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THE  
FEDERAL REPORTER.

VOLUME 36.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT AND DISTRICT COURTS  
OF THE  
UNITED STATES.

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OCTOBER, 1888—JANUARY, 1889.

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JUDGES  
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# CASES

## ARGUED AND DETERMINED

IN THE

### United States Circuit and District Courts.

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DENTON v. INTERNATIONAL CO. OF MEXICO.

(Circuit Court, S. D. California. July 30, 1888.)

**COURTS—FEDERAL CIRCUIT—JURISDICTION—CITIZENSHIP—CORPORATIONS.**

Under act Cong. March 3, 1887, providing that the United States circuit courts shall have original cognizance of a controversy between citizens of a state and foreign states, citizens or subjects, but that no civil suit shall be brought before such courts except in the district whereof the defendant is an inhabitant, a citizen of Mexico cannot sue a Connecticut corporation in the United States circuit court for the Southern district of California, although the corporation has an office and managing agent in that district.

At Law. On motion to quash service of summons, and on demurrer to defendant's preliminary answer in the nature of a plea in abatement.

Stephen M. White, George J. Denis, and Max Loewenthal, for plaintiff, cited *Harold v. Mining Co.*, 33 Fed. Rep. 529.

George Fuller, for defendant.

Defendant is an inhabitant of the state of Connecticut, and not of the state of California. *Railroad Co. v. Koontz*, 104 U. S. 5; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Railroad Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. Rep. 432; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. Rep. 364; *U. S. v. Telephone Co.*, 29 Fed. Rep. 17. Plaintiff is a citizen of a foreign state, and is not a citizen of a state, in the sense in which the words are used in the constitution and the judiciary acts. Such citizen of a state must be a citizen of the United States. *Scott v. Sandford*, 19 How. 393. A citizen of a state is not a citizen of the United States unless he has the qualifications of the latter by birth or naturalization. *U. S. v. Cruikshank*, 92 U. S. 542; *Railroad Co. v. Koontz*, 104 U. S. 12. And even a citizen of the United States, who is a citizen of the District of Columbia, (*Hepburn v. Ellzey*, 2 Cranch, 445; *Barney v. Baltimore City*, 6 Wall. 280,) or of a territory of the United States, (*New Orleans v. Winter*, 1 Wheat. 91,) is not a citizen of a state. That the words "citizens of different states," in the proviso relating to the district in which suit may be brought, at the end of section 1 of the act of March 3, 1887, do not comprehend "foreign citizens," (or citizens of "foreign states,") is apparent from the use of both terms in the previous

part of the section, which declares in what cases the circuit courts shall have jurisdiction.

Ross, J. This action was commenced in this court. It was brought to recover of defendant a large sum of money, in amount exceeding one million of dollars, for services alleged to have been rendered, and for maps and *data* alleged to have been furnished, by plaintiff to an alleged Mexican corporation, styled "Luis Huller & Co.," in connection with certain lands in the republic of Mexico, payment for which it is charged was assumed by the defendant. In the complaint it is averred that the plaintiff is a citizen of the republic of Mexico, and a resident of the county of San Diego, state of California; that the defendant is a corporation duly created by the laws of the state of Connecticut; that under and by virtue of its charter it has the power and capacity to buy, receive, hold, and sell lands in any state of the United States, and in any and all parts of the republic of Mexico; and to do any and all acts, and to make any and all contracts, relating or incident to the purchase, sale, or holding of such lands; that defendant has ever since its creation carried on business by virtue and under the authority of and in accordance with its charter; that its principal place of business is in the city of Hartford, state of Connecticut; and that it is "doing business in the state of California, and has an office and managing agent in said state of California, within the county of San Diego." The summons issued in the action was served by the marshal of the district, as appears from the returns indorsed thereon, upon one Charles Scofield, "managing agent of defendant in San Diego county." The defendant has appeared specially and only for the purpose of objecting to any jurisdiction of this court over it; and has, among other things, pleaded that it is a foreign corporation, and that at the time of the commencement of this action, and at the time of the attempted service of process upon it, it had no place of business or agent or officer in this state, or any person authorized to receive service of legal process for it, and that Charles Scofield at the time of service upon him was not, and never was, a managing or other agent or officer of defendant within this state.

Without reference to the question of the sufficiency of the plea as set up in the preliminary answer, I think it sufficiently appears from the complaint itself that this court has no jurisdiction of the defendant in the action. By the act of congress approved March 3, 1887, it is provided—

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or in which controversy the United States are plaintiffs or petitioners; or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; or a controversy between citizens of the same state claiming lands under grants of different states; or a controversy between citizens of a state and foreign states, citizens or sub-

jects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. \* \* \* But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. \* \* \* 24 U. S. St. 553.

So far as this section relates to the district in which a civil suit in a circuit or district court may be originally brought, its plain meaning, as held by Mr. Justice FIELD, in *Wilson v. Telegraph Co.*, 34 Fed. Rep. 561, is this:

"That such suit, where the jurisdiction is founded upon any of the causes mentioned in the section except the citizenship of the parties in different states, must be brought in the district of which the defendant is an inhabitant. But where such jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides."

The present is not a suit between citizens of different states, for the plaintiff is in the complaint alleged to be a citizen of the republic of Mexico, and the defendant to be a citizen of the state of Connecticut. It is therefore a suit between an alien and a citizen of a state, and, as has been seen, can only be brought in the district of which the defendant is an inhabitant. That district, according to the averments of the complaint, is not the Southern district of California, but the district of Connecticut. The fact alleged, that the defendant is carrying on its chartered business within the state of California, and has a managing agent within this judicial district, does not constitute it an inhabitant of this district. As both the charter of defendant and the laws of California permit this to be done, defendant may undoubtedly be sued in the courts of California. The extension of the operations of the corporation, however, beyond the limits of the state of its creation, does not constitute it an inhabitant of every district in which it may do business. It can have but one residence or habitat, and that is the place where its principal business is done. "A corporation," said the supreme court in *Railroad Co. v. Koontz*, 104 U. S. 12, "may for the purpose of suit be said to be born where by law it is created and organized, and to reside where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights, and having all the powers, its charter confers. It cannot migrate nor change its residence without the consent, expressed or implied, of its state; but it may transact business wherever its charter allows, unless prohibited by local laws." As the complaint itself shows that defendant at the time of the bringing of this action was not an inhabitant of this judicial district, the summons should be quashed, and the action dismissed; and it is so ordered.

## MONTGOMERY v. UNITED STATES.

(Circuit Court, D. Oregon. September 8, 1888.)

## 1. COURTS—FEDERAL COURTS—JURISDICTION—CLAIMS AGAINST UNITED STATES—PUBLIC LANDS.

The word "claim," as used in the act of 1887, (24 St. 505,) giving this court jurisdiction to hear and determine certain claims against the United States, includes a "claim" by a purchaser of timber land under the act of 1878 (20 St. 89) to have a patent issue for the same. The ruling in *Jones v. U. S.*, 35 Fed. Rep. 561, affirmed.

## 2. PUBLIC LANDS—SALE OF TIMBER LAND—WHEN COMPLETE.

A sale of timber land under the act of 1878, by the register and receiver of the local land-office, is completed on the payment of the purchase price, and the delivery of the certificate or receipt therefor; and it is not necessary that the same should be ratified or confirmed by the commissioner of the general land-office; but it is the duty of such commissioner, on receiving "the papers and testimony in the case" from the local land-office, if it appears *prima facie* therefrom that the law has been complied with, to cause a patent to issue thereon to the purchaser.

## 3. SPECIFIC PERFORMANCE—JURISDICTION—PUBLIC LANDS.

A court of equity has jurisdiction of a suit to compel the specific performance of a contract to convey land, without reference to the locality of the same; and this court has jurisdiction, under the act of 1887, of a suit against the United States to compel the issue of a patent to a purchaser of timber land under the act of 1878, although the same is situate in Washington territory.

(Syllabus by the Court.)

Suit to Compel the Issue of a Patent.

*W. Scott Beebe and James K. Kelly*, for plaintiff.

*Lewis L. McArthur*, for defendant.

DEADY, J. This suit is brought under the act of March 3, 1887, (24 St. 505,) entitled "An act to provide for the bringing of suits against the government of the United States," to compel the issue of a patent to the petitioner to the S. W.  $\frac{1}{4}$  of section 10, in township 9 N., of range 1 W. of the Wallamet meridian.

It is alleged in the petition that the petitioner resides in Multnomah county, Or., and it appears therefrom that the land in question is situated in Cowlitz county, Wash. T., and is of the value of \$5,000, and not more than \$10,000; that on October 28, 1882, said land was surveyed public land of the United States, and subject to entry and purchase under the act of June 3, 1878, (20 St. 89,) for the sale of timber lands in the Pacific states, including Washington Territory, "and was valuable chiefly for timber, but unfit for cultivation;" that on said October 28th the petitioner was a citizen of the United States, and, having complied with the requirements of said act, and the regulations governing the acquisition of lands thereunder, so as to enable him to pay for the same, and claim a patent therefor from the United States, did on said day, at the United States land-office at Vancouver, Wash. T., purchase said land from the defendant, and did then and there pay to the receiver of said land-office the purchase price therefor, to-wit, the sum of \$400, or \$2.50 an acre;

and that said receiver gave the petitioner "a certificate or receipt" for said money, as "being in full" for said land.

That the defendant keeps and retains said money; and its servants, whose duty it is to execute and deliver to the petitioner a patent for said land, although often requested, refuse so to do, and deny the right of the petitioner to have the same, or to any interest therein.

The prayer of the petition is that the court will decree that the defendant issue to the petitioner a patent for said land.

Due service was made of the petition, as provided in section 6 of the act of 1887, and the district attorney appears for the defendant, and demurs to the petition.

The causes of demurrer are the same as those that were argued and determined in *Jones v. U. S.*, 35 Fed. Rep. 561, decided in this court on July 16, 1888, in which it was held that an applicant for land under the timber act of 1878, "becomes the purchaser thereof when he makes the prescribed proof to the satisfaction of the register, and pays the prescribed price therefor;" and "when the certificate of purchase is issued to the applicant the land described therein becomes his property,—the bare legal title is all that remains in the vendor in trust for the vendee; and if it was the case of a private person, a court of equity would compel him to perform his part of the contract by executing and delivering to the vendee the proper conveyance thereof;" and that "the claim" against the United States for a patent arising on this contract of sale with the petitioner is in its nature "enforceable by a suit in equity in this court for a specific performance of the same; and this brings the petitioner within the act of 1887, which gives her the right to sue the United States on any claim arising on contract, by a suit in equity, as 'if the United States were suable,'—which must mean, as if the United States were a private person;" and, also, (1) that the land in question is without the territorial jurisdiction of the court; and (2) that this sale under the act of 1878 is not binding on the government until it is ratified or confirmed by the commissioner of the general land-office.

As to the second point, it is sufficient to say that the statute provides that on payment of the purchase money "the applicant may be permitted to enter the same. \* \* \* and on the transmission to the general land-office of the papers and the testimony in the case a patent shall issue thereon."

It may be admitted that, notwithstanding the peremptory language of the statute, "the papers and testimony in the case" must show a *prima facie* compliance with the law before the purchaser is entitled to the patent. And if there was any fraud in the proceeding before the local land-office, sufficient to vitiate the purchase, and overcome the *prima facie* case, the government can set it up as a defense to the suit for specific performance, where the rights of the parties may be examined and passed on judicially, as they ought to be.

As to the first point, the objection is founded on a misconception of the nature of the suit. This is not a local action to recover the possession of the land, but a transitory one to enforce the specific performance



of a contract concerning the same. In such a proceeding a court of equity operates by its decree *in personam*, on the defendants, and not *in rem*, on the subject-matter; and therefore it matters not whether the land which is the subject of the contract is within the territorial jurisdiction of the court or not. If the court gets jurisdiction of the parties it has jurisdiction to determine what, if any, contract exists between them, and enforce it against the party in default, and may compel obedience to its decree by proceedings in the nature of punishment for contempt. 3 Pom. Eq. Jur. § 1317; 2 Story, Eq. Jur. § 743.

But, assuming, as I do, that "the claim" of the plaintiff is within the purview of the act of 1887, this court has jurisdiction in this case without reference to the locality of the land, simply because congress by that act has conferred it. The petitioner is required to bring his suit, not in the district where the land is situated, but in that in which he resides. The United States is potentially existent or resident throughout the states and territories, and agrees by the terms of the act to submit to the jurisdiction of the court in which the suit is brought, on due notice thereof being given to its attorney and representative. And thus the court gets jurisdiction of the parties and the cause, and it is immaterial, either under the statute or the general principles of equity jurisdiction, where the land for which the patent is sought may lie.

The demurrer is overruled.

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SEDDON v. VIRGINIA, T. & C. S. & I. Co. *et al.* SEDDON, Trustee, v. SAME. W. C. SEDDON v. SAME. PACE v. SAME. DOOLEY v. SAME. MABEN v. SAME. LEAKE v. SAME.

(Circuit Court, W. D. Virginia. August 7, 1888.)

1. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES.

In a suit against a corporation and its directors jointly, to cancel subscriptions to the corporate stock, and to compel the defendants to refund the amounts already paid on the same, the directors are not merely nominal parties; and where one of them is a citizen of the District of Columbia, or a citizen of the same state as plaintiff, the suit is not removable under act Cong. March 3, 1887, § 2, providing that any suit in which the controversy is wholly between citizens of different states shall be removable to the United States circuit court.<sup>1</sup>

2. SAME—RECORD AND PETITION.

A record and petition for removal of a cause from the state to the federal courts, which fails to show the citizenship of the petitioners at the time the suit was commenced, does not entitle them to a removal.

On Motion to Remand.

Seven suits, in which Thomas Seddon, Thomas Seddon, trustee, James B. Pace, James H. Dooley, W. C. Seddon, J. G. Maben, and T.

<sup>1</sup>Concerning the removal of causes under the act of March 3, 1887, on the ground of diverse citizenship, see *Cooley v. McArthur*, 35 Fed. Rep. 372, and note; *Whelan v. Railroad Co.*, *Id.* 849.

C. Leake, Jr., were the respective plaintiffs, and the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation, and its directors, were defendants, the object of which was to cancel subscriptions to the stock of the corporation defendant, and compel it and its directors to refund the amounts already paid in the subscriptions. Act Cong. March 3, 1887, § 2, provides that any suit in which the controversy is wholly between citizens of different states, and which can be fully determined as between them, shall be removable to the United States circuit court for the proper district.

*White & Buchanan, Christian & Christian, and W. W. Gordon, for plaintiff.*

*R. A. Ayers, Atty. Gen., for defendants.*

PAUL, J. These seven suits were instituted in the circuit court of Washington county, Va. The defendants, the Virginia, Tennessee & Carolina Steel & Iron Company, Frederick W. Huidekoper, John H. Inman, William P. Clyde, George S. Scott, A. H. Bronson, Extine Norton, and Nathaniel Thayer, petitioned the state court to remove these cases into this court, which petition was denied, and the said defendants, under the provisions of section 2, act March 3, 1887, amending act March 3, 1875, (24 St. at Large, 552,) presented their petitions, with a copy of the record, to this court, and the causes were docketed here at the May term, 1888. They are now submitted on a motion to remand to the state court, on the ground that this court has no jurisdiction of said causes. The object of all these suits is the same. They are brought by subscribers to the capital stock of the Virginia, Tennessee & Carolina Steel & Iron Company, for the purpose of annulling their subscriptions, and to recover the amounts already paid on such subscriptions, on the ground that the subscriptions were induced by fraudulent representations made by the directors of said company, and contained in a prospectus issued by said directors. The claims are made against the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation under the laws of the state of New Jersey, and the directors of said company. The directors are the defendants Frederick W. Huidekoper, a citizen of the District of Columbia; John M. Bailey, a citizen of Virginia; George S. Scott, William P. Clyde, John H. Inman, A. H. Bronson, and Extine Norton, citizens of New York; and Nathaniel Thayer, a citizen of Massachusetts. The other defendants are citizens of the state of Virginia. It is conceded that they are merely nominal parties to the suits, and it is not necessary to consider their citizenship in discussing the question of the jurisdiction of this court. The citizenship of the plaintiffs in the several suits is as follows: Thomas Seddon, Thomas Seddon, trustee, James B. Pace, James H. Dooley, and T. C. Leake, Jr., Virginia; William C. Seddon, Maryland; and J. C. Maben, New York. The plaintiffs move that these causes be remanded to the state court—*First*. Because the petition for removal is insufficient, in that it fails to allege that the citizenship of the parties, as stated in the petition, existed at the commencement of the suits. The records, as brought into

this court, did not contain the bills filed in the several causes in the state court, the records being copied and brought here before the bills were filed. But by an agreement in writing, signed by counsel for the plaintiffs, and for the defendants, and filed at the hearing of this motion, the bill is made part of the record in each cause. The record, as thus made up, including the petition for removal, fails to show the citizenship of the petitioners at the time the suits were commenced. It is well settled that the citizenship of the parties, which gives jurisdiction to this court, must be shown to have existed at the time of commencing the suit, and at the time of filing the petition for removal. *Railroad Co. v. Swan*, 111 U. S. 379-381, 4 Sup. Ct. Rep. 510; *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. Rep. 873; *Akers v. Akers*, 117 U. S. 197, 6 Sup. Ct. Rep. 669. If no other ground existed than the failure of the record and petition to show the citizenship of the parties at the time the suits were instituted, and when the application for removal was made, the court is of opinion that for this reason the causes should be remanded. *Second.* Another ground for the motion to remand is that the defendant Frederick W. Huidekoper, who is one of the directors of the Virginia, Tennessee & Carolina Steel & Iron Company, and who is jointly sued with said company and the other directors of said company, is not a citizen of any state, but is a citizen of the District of Columbia, and that the suits are therefore not between citizens of different states, and are therefore not removable. "States of the Union are the political bodies referred to in the extension of the judicial power of the United States to controversies 'between the citizens of different states.' The territories of the United States are not such states, and the District of Columbia is not a state, and hence citizenship in neither will suffice to give jurisdiction." *Spear*, Fed. Jud. 144, 145; *Hepburn v. Ellzey*, 2 Cranch, 445; *Corporation of New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore City*, 6 Wall. 280.

Counsel for defendants contend that said Huidekoper, though one of the directors of the Virginia, Tennessee & Carolina Steel & Iron Company, is not a real, but only a nominal, party to these suits; that the only real defendant in the controversy is the Virginia, Tennessee & Carolina Steel & Iron Company; that all of the directors of said company are nominal parties; and, if not nominal, their liability is several and separable, and is not joined with that of the said company of which they are directors. The court cannot adopt this view. The bill in each suit seeks relief against the said Virginia, Tennessee & Carolina Steel & Iron Company, and all of the directors. The bill in each suit states:

"Your orator is advised that he has the right to have the said contract of subscription annulled and rescinded; to recover from the said company and the said directors the said sums paid by him on account of said stock, with interest on each payment from the time of its payment, and to have the estate of and debts due the said company in this state subjected to their payment."

The prayer of each bill is:

"That upon a hearing of the cause your honor will adjudge, order, and decree said contract of subscription to be null and void; that said company and

said directors pay to your orator the said sums paid by him on account of said stock, with interest on each payment from its date; that the said estate and debts of said company which have been attached in this cause be subjected to the payment of what is due your orator."

The charges in the bill and the prayer for relief make a single controversy. It is not a separable one, so as to enable some of the defendants to remove the cause into this court. The plaintiffs have sued the defendants jointly, as they had a right to do, and they must be treated as joint defendants, and real parties to the controversy. *Railroad Co. v. Mills*, 113 U. S. 256, 5 Sup. Ct. Rep. 456; *Pirie v. Tvedt*, 115 U. S. 41-43, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 278, 279, 6 Sup. Ct. Rep. 730; *Little v. Giles*, 118 U. S. 602, 7 Sup. Ct. Rep. 32; *Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. Rep. 1265. This ground for remanding, to-wit, that the defendant Frederick W. Huidekoper is a citizen of the District of Columbia, and not of any state, and that the controversy is single and not separable, applies alike to all of the suits, and is sufficient cause for remanding them all.

It further appears from the record that the defendant John M. Bailey is a citizen of the state of Virginia, and that the plaintiffs in five of the suits, viz., Thomas Seddon, Thomas Seddon, trustee, James B. Pace, James H. Dooley, and T. C. Leake, Jr., are citizens of the same state. J. C. Maben, the plaintiff in another suit, is a citizen of the state of New York, the same state of which the defendants George S. Scott, William P. Clyde, John H. Inman, A. H. Bronson, and Extine Norton are citizens. In all of these suits, then, it is clear that the requisite citizenship to give this court jurisdiction does not exist. The opposing parties in the suits have not each a different state citizenship.

Other reasons are assigned by counsel for remanding these causes, but it is unnecessary to consider them. The foregoing are sufficient. Orders will be entered in all the causes, remanding them to the state court.

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## KANSAS CITY & T. RY. CO. v. INTERSTATE LUMBER CO.

(Circuit Court, W. D. Missouri, W. D. August 27, 1888.)

### 1. REMOVAL OF CAUSES—MOTION TO REMAND—TIME OF HEARING.

Under the removal acts of 1875 and 1887, § 3, requiring the party removing the cause to give bond for entering in the United States circuit court, on the first day of its next session, a copy of the record, and for appearing and entering bail, etc., and providing that, such copy being entered, the cause shall proceed as if it had been commenced there, the United States circuit court has no power to remand a cause so removed, for want of jurisdiction prior to the return-day, that being the next regular term after the removal.

### 2. SAME—PROCEDURE AFTER REMOVAL—EMINENT DOMAIN—APPOINTMENT OF COMMISSIONERS.

Under the Missouri statute for the condemnation of land by railway companies, providing that a summons shall be issued to the owner, giving him 10

days' notice of the time when the petition will be heard, where the cause is removed to the United States circuit court on the return-day of the summons, the appointment of commissioners by the latter court to assess damages is a proceeding in the cause, and will not be made prior to the next regular term after the removal.

At Law.

Condemnation proceedings by the Kansas City & Topeka Railway Company against the Interstate Lumber Company. Motion of petitioner to remand cause to state court, or to appoint commissioners to assess damages.

*Crittenden, McDougal & Stiles*, for petitioner.

*Kagy & Bremerman and Jefferson Brumback*, for defendant.

PHILIPS, J. The petitioner instituted this proceeding in one of the circuit courts of Jackson county, Mo., for the condemnation to its use of certain land belonging to the defendant. The petitioner is a railroad corporation, claiming the right of condemnation under grant of power therefor under the statutes of this state. Both parties are non-residents. On service of summons on defendant, it appeared before the state court, and filed its petition for the removal of the cause to this court. The removal was accordingly made. The record from the state court is properly returnable to the next session of the United States circuit court, which would be the third Monday of October next; but the petitioner appears here and presents the record, and, after notice to the defendant, moves the court to remand the cause for the reason that this court has no jurisdiction over the subject-matter, with the further suggestion that, if this court should hold that the removal was well taken, the court then proceed to appoint commissioners, pursuant to the statute, to assess the damages, without waiting therefor until the next session of this court. The motion to remand presents for determination the question of practice whether or not this court can entertain such motion prior to the term of court in which the defendant is required to file the copy of the record. By the third section of the removal act of 1875, as well as by that of 1887, the party removing the cause is required to give bond "for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit for their appearing and entering bail, etc.; and, the said copy being entered as aforesaid in said circuit court, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." There can be no question but that in contemplation of this statute the cause would not be for hearing until the next regular term of the United States court occurring after such removal. It has been held, however, that this statute does not prevent the other party from bringing up and filing in the United States court such copy of the record, and this he may do at any day before the return-day; but the cause itself could not be proceeded in prior to the term at which, by the terms of the bond, the removing party is required to present the record, and enter his appearance. It is also well settled that from the time of entering the motion, and tendering

the required bond for removal, the jurisdiction of the state court over the subject-matter of the suit ceases, and the jurisdiction of the United States circuit court attaches *eo instanti*; but the exercise of that jurisdiction begins when the copy of the record is entered in court. *Railroad Co. v. Kootz*, 104 U. S. 5-14. The case is supposed to be docketed on filing the transcript. *Spear*, Fed. Jud. 520. This would be the docket of the next session for the purpose of the exercise of jurisdiction in proceeding to the hearing, trial, and determination of the cause. As jurisdiction over the case itself is not to be left in absolute suspense between its cessation in the state court and the next session of the United States circuit court, the very necessities of justice, and the preservation of the rights of the plaintiff, would demand that the latter court should exert its jurisdictional power, under certain contingencies, *ad interim*. This, it has been held, it may do on presentation of the record and notice to the adverse party, in the instance of issuing the writ of injunction, or some restraining order to preserve the *status* of the case, or to appoint a receiver, and to issue the writ of attachment in aid of the suit. *Dill. Rem. Causes*, 71; *Mining Co. v. Bennett*, 4 Sawy. 289; *Railroad Co. v. Railroad Co.*, 5 Fed. Rep. 160; *In re Railway Co.*, 2 McCrary, 216, 4 Fed. Rep. 10. So it was held, orally, by Judge DILLON, when judge of this circuit, that between the time of the order of removal in the state court, and the filing of the record in the United States court, depositions might be taken *de bene esse*. These are in the nature of provisional remedies and orders, designed to preserve the essential rights of the parties, in preventing a failure of justice. In other words, they are agencies to preserve the *statu quo* of the parties prior to the act of removal. It seems to me that it would be a forced construction of these rulings to extend them to the instance of remanding the cause prior to the return-day. In order to remand this cause, the court must review the petition, and consider the whole question of jurisdiction, the subject-matter of the controversy, and the character of the parties as disclosed by the petition. If the cause is remanded, it is a final determination of the case, a final judgment, so far as this court is concerned. As the law now stands, it is a judgment not reviewable on appeal or writ of error. It is final. It certainly was not within the contemplation of the framer of the act that the party taking the removal could be thus turned out of the United States court prior to the return-day of the case. It is true, the removal act, section 5, act 1875, which is not repealed by the act of 1887, provides that, if it shall appear to the circuit court, at any time after such suit is brought or removed thereto, that such suit does not really involve the jurisdictional matter, it may be remanded. But it is to be observed that this can be done only "after such suit has been brought or removed thereto." As already shown, this was not contemplated until the time had elapsed when the party so removing it had filed the record. And while the adverse party may present the record, "the suit will stand and be proceeded in the same as if the papers had been filed by the applicant for removal." *McBratney v. Usher*, 1 Dill. 371. We have not overlooked, in reaching this conclusion, the suggestion of the great inconvenience and injustice

to the petitioner in a condemnation proceeding in thus delaying action until the succeeding term of the United States court. With the expediency and imperfections of the law the court has nothing to do, except in so far as such matters may aid in a proper interpretation of the statute. Hard cases are the quicksands of the courts, and the constant temptation against which courts ought ever to guard is to make law to meet hard cases, instead of declaring the law as they find it.

2. The next question, in its order, is: Can this court now proceed to the appointment of commissioners, as provided by the state statute, for the assessment of damages? The statute directs, in substance, that where lands are sought to be appropriated by any railroad for public use, and the parties cannot agree upon the proper compensation, such corporation may apply to the circuit court of the county where the land lies, or the judge thereof in vacation, by petition setting forth certain specified facts, praying the appointment of three commissioners or a jury to assess the damages. Upon filing the petition, a summons shall be issued, giving such owner at least 10 days' notice of the time when the petition will be heard. Provision is also made for notice by publication to unknown and non-resident parties. The court, or judge in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three commissioners, freeholders and residents of the county where the land is situated, to assess the damages, who, after viewing the property, shall forthwith return under oath such assessment of damages to the clerk of the court. The clerk shall file such report, and record the same, and thereupon such company shall pay the clerk the amount of the assessment for the party in whose favor it is made; and, on making such payment, it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid, etc. It is then provided that upon the filing of such report the clerk of the court shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions filed by either party in the clerk's office within 10 days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisal upon good cause shown. Such new appraisal, at the request of either party, shall be by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; such proceedings, however, not to affect the right of the company to enter upon the land, it having paid the original assessment, but only the amount of compensation to be allowed. What has been said respecting remanding the cause is quite applicable to this motion. Judge Dillon, in his work on Removal of Causes, (page 71,) says:

"The jurisdiction of the circuit court does not properly attach until the record of the state court is entered therein. If it be entered before the time, it has been made a question whether it will then attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction, or appoint a receiver, (which should be done, however,

only upon notice,) in order to protect the right of the parties, or to preserve the property in litigation."

So BILLINGS, J., in *Railroad Co. v. Railroad Co.*, 5 Fed. Rep. 160, on refusing to dissolve an injunction before the return-day of the record, very aptly expressed the limitation of the rule as to what the United States circuit court might do *ad interim*:

"What the court should do in this, as in all cases where the record is here before the return-day, is by all proper orders to preserve the property in dispute, and the rights of all the litigants."

But it must be conceded that to entertain this motion, and proceed now to the appointment of commissioners, is to proceed with the cause. It is to assume that the cause is properly here, and to take a step therein in the nature of adjudication. As shown by the preceding discussion herein, the court may be called upon to determine, in the first instance, whether or not it has acquired jurisdiction, either over the subject-matter, or from the character of the parties. Unless it has so acquired jurisdiction, it could not proceed to appoint the commissioners, as its act therein would be *coram non judice*. In the next place, the court must determine, from an inspection of the petition, whether or not the jurisdictional facts are stated entitling the petitioner to institute the condemnation proceeding. If it be said in answer to this that the state court has already determined the sufficiency of the petition in issuing the summons to the defendant, it is not maintainable, because the statute directs that upon filing the petition summons shall be issued, giving the owner 10 days' notice "of the time when said petition will be heard;" showing that the petition is not to be heard until after such summons. And as the cause was removed from the state court on the return-day of the summons, the petition remains to be heard. The succeeding section of the statute provides that the next step to be taken is that the court, or judge in vacation, shall be satisfied that due notice of the pendency of the petition has been given. These are facts to be ascertained by the court in the progress of the cause; and whatever construction may be placed upon the term "said petition will be heard," whether it pertain, as contended by counsel for defendant, to the determination in advance of the question whether or not the use be a public one to which the property is to be applied, or whether it pertains solely, as contended by counsel for the petitioner, to the giving the property owner the right to be heard in the matter of appointing proper commissioners, it still remains an action taken by the court in the progress of the condemnation proceedings, and as such it cannot be regarded as in the nature of a mere provisional order designed to maintain the *statu quo* of the parties, "or to preserve the property in litigation." It was for this reason, in the main, that Judge NELSON, in *Re Railroad Co.*, 2 McCrary, 216, 4 Fed. Rep. 10, refused, before the return-day, to appoint such commissioners. As already suggested, before the appointment of such commissioners could be made on this record, I should have to determine the question as to whether this cause was properly removed to this court; and as I am inclined to the opinion that the same was prematurely removed, and as I



have just held that I cannot remand it until the next session of this court, it must follow that I should decline to appoint commissioners as requested. The motions are denied.

### McCORMACK v. JAMES.

(District Court, W. D. Virginia. May 27, 1886.)

#### 1. EQUITY—PRACTICE—MASTER'S REPORT—STATEMENT OF FACTS.

Under U. S. equity rule No. 76, providing that masters' reports shall recite no part of any state of facts, etc., used before them, but shall refer to and specify such state of facts, so as to inform the court what state of facts was used, a commissioner's report need not state what facts he considers proved by the evidence.

#### 2. SAME—SCOPE OF REFERENCE.

A commissioner may allow charges for improvements on real estate, although that matter was not embraced in the decree of reference, where the question is raised by the pleadings, and the parties examined witnesses as to the value of such improvements, and agreed to submit the same to arbitration, and the master adopted the award.

#### 3. MORTGAGES—DEEDS OF TRUST—RECORDING—BONA FIDE PURCHASER.

Under Code Va. 1860, c. 118, § 5, providing that every deed of trust of real estate shall be void as to creditors and subsequent purchasers for a valuable consideration without notice, until it is admitted to record, a recorded deed of trust of real estate is notice to a subsequent purchaser.

#### 4. SAME—ACKNOWLEDGMENT—CERTIFICATE.

A certificate of acknowledgment to a deed of trust certifying that H. J., "whose name appears signed to the within deed, came this day before me, R. O. W., acting justice for said county, and acknowledged the same to be his act and deed, and desired me to certify the same to the clerk of the county court of said county, that it may be duly recorded," is a substantial compliance with Code Va. 1860, c. 121, § 3, requiring such certificate to be to the following effect: "I, —, a justice of the peace in the county aforesaid, in the state of —, do certify that —, whose name is signed to the writing above, (or hereto annexed,) bearing date on the — day of —, has acknowledged the same before me, in my county aforesaid,"—and is sufficient.

#### 5. SAME—RIGHTS OF BENEFICIARY—ESTOPPEL—IN PAIS.

A beneficiary under a recorded deed of trust is not estopped from asserting his lien as against a subsequent purchaser of the land by having merely been cognizant of and participated in the negotiations culminating in a sale to such purchaser.<sup>1</sup>

In Equity. On exceptions to commissioner's report.

*Campbell & Trigg, Daniel Trigg, and Seldon Longley, for plaintiff.*

*White & Buchanan, for defendant.*

PAUL, J. On the 25th day of April, 1861, Hansford James, of Smyth county, Va., executed to James Ward a deed of trust conveying to said Ward a tract of land lying in said county, to secure certain creditors

<sup>1</sup>On the subject of estoppel by conduct and declarations, see *McDowell v. Steel-Works*, (Ill.) 16 N. E. Rep. 854, and note; *Guest v. Opera-House Co.*, (Iowa,) 38 N. W. Rep. 158, and note; *Towne v. Sparks*, (Neb.) 36 N. W. Rep. 375; *Matthews v. Warner*, 33 Fed. Rep. 369; *Marrow v. Brinkley*, (Va.) 6 S. E. Rep. 605, and note.

therein named, a preference being given to David E. James, to whom he owed one bond of \$2,226, and some other smaller amounts. This deed was duly admitted to record in the clerk's office of the county court of Smyth county on the day of its execution, April 25, 1861. In March, 1862, said David E. James assigned his interest in said trust deed to Henry Horne; and in May, 1863, the said Hansford James, the grantor in the deed of trust, sold the said tract of 280 acres of land to the plaintiff, Micajah McCormack, at the price of \$7,500, in Confederate currency, of which sum said McCormack paid cash \$6,500, and executed his bond for \$1,000, payable two years after date, the date being May 9, 1863. Said McCormack was put in possession of said land in the fall of 1863, and remained in possession thereof until June 24, 1870. On the 30th day of May, 1868, the said Hansford James filed his petition in bankruptcy, and was adjudicated a bankrupt thereon. In his schedules in bankruptcy said Hansford James surrendered the said tract of 280 acres of land on which the deed of trust to Ward was given, and which he had sold to Micajah McCormack in 1863; and in November, 1868, said land was sold by G. J. Holbrook, the assignee in bankruptcy of said Hansford James, and at said sale David E. James, the preferred creditor in the deed of trust to Ward, became the purchaser at the price of \$1,500. In November, 1868, Micajah McCormack filed his bill before Hon. JOHN C. UNDERWOOD, United States district judge for the district of Virginia, praying for an injunction against the assignee of Hansford James, bankrupt, and said David E. James, from further proceedings in said sale to David E. James, and that a title be decreed to said McCormack for said land. On the 9th of December, 1868, a restraining order was awarded, as prayed for in the bill. To this bill Hansford James, David E. James, and G. J. Holbrook, assignee in bankruptcy of Hansford James, filed their answers; but on the 24th of November, 1869, the injunction granted December 9, 1868, was dissolved. On the 24th of June, 1870, an order was entered declaring David E. James entitled to the possession of said land, and ordering the marshal to put him in possession thereof. By an order entered April 3, 1872, at Richmond, the cause was removed into the court of the Western district, at Abingdon. On a motion made November 21, 1872, to reinstate the injunction, and for a rehearing, the bill was dismissed, with costs to the defendants. November 28, 1874, McCormack filed a bill of review, to which David E. James filed his answer, and on the 12th day of June, 1875, the decree of November 21, 1872, dismissing McCormack's bill, was reversed and annulled, and the injunction dissolved by order of November 24, 1869, was reinstated; the sale made by Holbrook, assignee of Hansford James, bankrupt, to David E. James was set aside, vacated, and annulled, and a writ of possession awarded McCormack for the land. The order says further:

"It appearing to the court that there is a lien asserted against said land by David E. James, which he claims is prior in date to plaintiff's purchase, and that the lien is still subsisting and valid; and it further appearing that there is still a balance of purchase money due from the plaintiff, and that he claims to be entitled to rents and profits for the use of said lands during the time

that he has been dispossessed thereof,—it is ordered that he so amend his bill as to bring these matters, and any others he may be advised, before this court."

In pursuance of this order, McCormack filed his amended and supplemental bill, October 1, 1875, to which the defendants David E. James and Hansford James filed their answers October 21, 1875. In the mean time, on the 19th of August, 1875, said David E. James filed his petition, praying that the said Micajah McCormack be compelled to pay the debt of \$2,225, secured in said deed of trust, due said James, and that said McCormack, W. O. Austin, deputy-marshal, their agents, etc., be restrained from executing the writ of possession awarded McCormack by the decree of June 12, 1875. On this petition a restraining order was granted as prayed for. To this petition McCormack filed his demurrer and answer. On the 3d day of November, 1875, an order was entered dissolving the restraining order granted August 19, 1875, and allowing McCormack his costs against James. From this order an appeal was taken to the circuit court. On the 28th day of March, 1876, the appeal was docketed in the circuit court at Lynchburg, and an order issued restraining McCormack from all further proceedings in the district court, until the adjudication of the appeal in the circuit court. On the ——— day of March, 1877, the appeal was heard at Lynchburg, by Judge BOND, the circuit judge, and the decrees of June 12 and November 3, 1875, were affirmed, and the appeal dismissed. From this decree an appeal was taken by David E. James to the supreme court of the United States. In the supreme court the cause was dismissed under the sixteenth rule of that court. Nothing more was done in the case until June 5, 1883, when a decree was entered in accordance with the decree of 1874, and the prayer of the amended and supplemental bill filed by McCormack, October 1, 1875, referring to M. H. Honaker, a special commissioner, to take an account, and report "what liability, if any, attaches to the alleged deed of trust exhibited by the defendant David E. James, with his answer, purporting to convey to James Ward, for the purposes therein mentioned, the land therein mentioned, by said Hansford James, which paper bears date April 25, 1861. What would be a reasonable rent for said land from the 24th of June, 1870, to the 5th day of July, 1875?" The question of rents and profits was, by agreement in writing, signed by the plaintiff and defendant, submitted to the arbitration of James T. Porter and R. C. Williams, as was also the question as to the value of permanent improvements put upon the lands by the defendant, David E. James, during his occupation under his purchase from Holbrook, assignee in bankruptcy of Hansford James. Said arbitrators made their award, which was adopted by the special commissioner, and made part of his report.

The commissioner reports that the debt secured by the deed of trust is a liability attaching to the plaintiff by reason of his purchase of the land conveyed in the trust deed. The substance of the report is that the debt of \$2,225 is a lien on the land, and this is the main point of controversy in this cause.

To this report the plaintiff, McCormack, files exceptions, marked 1, 2, 3, 4, and 5. The defendant files exceptions numbered 1 and 2. The second exception by the defendant, which is to the amount of rent allowed McCormack by the commissioner, is withdrawn in the written agreement filed by the defendant's counsel. The remaining exception is for the failure of the commissioner to report certain judgments claimed by the defendant to be liens on the land conveyed in trust. These judgments were excluded, as the commissioner states, for want of sufficient proof. The court is of opinion that the report is correct in this respect, and the exception must be overruled.

The first exception filed by the plaintiff is for failure of the commissioner to report what facts were, according to his view of the evidence, proved. The report is in conformity with the requirements of equity rule No. 76, and this exception must be overruled. For the same reason plaintiff's exception No. 3 must be overruled.

Plaintiff's fourth exception is that the commissioner erred in allowing the defendant, David E. James, charges for permanent improvements put upon the property while held by him under his purchase from G. J. Holbrook, assignee of Hansford James, bankrupt. While it is true, as alleged in the exception, that this matter was not embraced in the decree of reference, yet the question is raised in the pleadings. The parties, plaintiff and defendant, examined witnesses as to the value of the improvements, and the plaintiff and defendant agreed to submit the same to arbitration. They had the power to do this. It was a matter in controversy, and the amount ascertained by the award was properly allowed by the commissioner, and this exception must be overruled.

Plaintiff's fifth exception says: "The evidence shows that the trust debt was paid by Hansford James, and the commissioner should therefore have reported that there was no existing liability by reason of the deed of trust." The evidence, in the opinion of the court, does not show the debt to have been paid; and, granting that the testimony on this question was conflicting, it was the province of the commissioner to determine its weight and credibility. The exception will be overruled.

This disposes of all the exceptions filed by the plaintiff and the defendant, except the second exception filed by the plaintiff. This exception states two grounds which, it is asserted, should defeat the claim of the defendant, David E. James, under the deed of trust of April 25, 1861. The first is "that McCormack is an innocent purchaser for valuable consideration without notice of the deed of trust." The second is "that the defendant, David E. James, participated in the negotiations which culminated in the sale to and the payment by McCormack of almost the entire purchase money, and that David E. James is estopped, by his conduct, to assert his lien by deed of trust."

As to the first ground of exception, there is no principle of law that would seem to be more firmly established by an unbroken line of decisions than that a subsequent purchaser for valuable consideration without notice, in order to be protected, must be a complete purchaser; that is, a purchaser of the legal title, who, before notice of an unrecorded incum-

brance, has both paid the whole of the purchase money and taken a conveyance. This, it must be remembered, is necessary as to an unrecorded conveyance. The following are a few of the many decisions sustaining this doctrine: *Briscoe v. Ashby*, 24 Grat. 476, 477; *Shirras v. Caig*, 7 Cranch, 34-48; *Vattier v. Hinde*, 7 Pet. 274; *Boone v. Chiles*, 10 Pet. 211; *Society v. Stone*, 3 Leigh, 218-236; *Doswell v. Buchanan's Ex'rs*, Id. 381-384. See, also, 2 Rob. Pr. (Old Ed.) 29, 30, 307; 2 Minor, Inst. 1028-1031; *Bank v. Manoni*, 76 Va. 802. The only modification of this doctrine to be found in the decisions of the supreme court of appeals of Virginia is in *Preston's Adm'r v. Nash*, 75 Va. 949. In that case the court held that a subsequent purchaser without notice of an unrecorded deed of trust was one who had paid the whole of the purchase money, and was entitled to a conveyance. In the case before the court the deed of trust securing James was recorded before the purchase by McCormack, and the purchaser had not paid the whole of the purchase money, so as to entitle him to a conveyance. The facts in the case of *Preston's Adm'r v. Nash* are so widely different from those in the case under consideration as not to require discussion. In fact, all of the decisions on this subject of an innocent purchaser for valuable consideration without notice deal with the question of priority arising out of unrecorded deeds, creating liens on the purchased property. None of them involve the decision of the validity of a deed properly executed and recorded, as in this case, prior to the purchase.

In some of the United States, recordation of deeds or other writings required to be registered in accordance with the registry acts is held to charge a subsequent purchaser with notice. It is difficult to see how a different view can be held as to a deed of trust properly recorded under the registry acts of Virginia. Chapter 118, § 5, Code Va. 1860, provides that every deed of trust or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be." The very object of the legislature in enacting this provision was to give the purchaser or other person dealing with the property notice of any incumbrance thereon. For the convenience of persons desiring to investigate the condition of the property, the clerk is required to keep an index of the record-book, as well in the name of the grantor as of the grantee. In order to give further notoriety to such transactions, the clerk is required to post, in the morning of the first day of each term of his court, at the front door of the court-house, a list of all writings admitted to record under chapter 121, Code 1860, during or since the preceding term, and a duplicate of such list is to be presented to the court, and entered of record in the minutes. Code Va. 1860, c. 121, §§ 8, 10. So complete are the requirements for the registration of all matters touching the titles to land, so easy of access is the necessary information, and so general among all classes of people is the knowledge where and how it can be attained, that, in the language of a distinguished law writer, "for one to be deceived ar-

gues in general a negligence so gross as to exclude sympathy for the sufferer." 2 Minor, Inst. 988. But, if we should concede that the deed of trust to Ward was not constructive notice to McCormack, the purchaser, I think the weight of the testimony shows that he knew of the existence of this lien at the time of his purchase. In no view of the case can the court regard him as an innocent purchaser without notice, and thus declare invalid the deed of trust, executed, acknowledged, and recorded in conformity with all the requirements of law necessary to insure the payment of the debt which the trust was given to secure. To do so would be to set a precedent in this court that would sanction the grossest negligence in a purchaser of lands, set at naught the solemn records of our registry acts, by testimony resting on the uncertain memory of witnesses given 25 years after the record has been made, and to render uncertain and insecure the highest assurances that debtors can give for the security of their creditors.

As to the second branch of the second exception, that "David E. James was cognizant of and participated in the negotiations which culminated in the sale, and is therefore estopped by his conduct from asserting his lien by deed of trust," the charges thus made rest upon the unsupported testimony of McCormack, plaintiff. The answer of David E. James, which is responsive to the allegations in the amended and supplemental bill, denies that he participated in the negotiations for the sale, and asserts that McCormack had notice of the lien. The answer of Hansford James, in response to allegations in the amended bill, says McCormack had notice of the lien of David E. James. The testimony of the other witnesses is too indefinite in time and circumstances, or the time fixed as to conversations with McCormack on the subject of the lien is too remote from the date of sale, to be entitled to much weight. Fraud, actual or constructive, is the essential and central element (2 Pom. Eq. Jur. § 821) in an equitable estoppel. "Now, the principle of estoppel invoked by the appellants to preclude the appellees from setting up in this case a title in themselves as heirs of Clark, discharged of the trust, rests upon the ground of fraud." Judge JOYNES in *Bargamin v. Clarke*, 20 Grat. 552. Kerr, Fraud & M. 130; 1 Story, Eq. Jur. § 391. "He who alleges fraud must clearly and distinctly prove the fraud he alleges." Kerr, Fraud & M. 382, 383. If the case here stood alone upon the testimony of the plaintiff, McCormack, and the answer of the defendant, James, the answer must prevail, and the charge of fraud is unsustained. Id. 398. The language employed by the defendant, David E. James, during the negotiations between McCormack and Hansford James, were we to admit that he used it, could not, we think, amount to an estoppel, had the equity been a latent, instead of a recorded, lien; for at that time David E. James had no interest whatever in the deed of trust, he having assigned his interest therein to Henry Horne more than 12 months before. The language attributed to him by McCormack, which is: "He asked me what was the reason I did not buy Hansford's land. Said that I must buy it; it would enable him to buy the Mitchell Scott land, and pay every dollar he owed in the world,"—shows

an anxiety on his part to see his relative and partner in business, Hansford James, get out of debt; and this seems to have been one of the objects of Hansford James in selling, for we find him, after getting part of the purchase money from McCormack, trying to pay off the deed of trust debt to Henry Horne, who then held it, but who refused to receive Confederate money. David E. James had no interest in the debt at that time, nor did he have any until four years thereafter, when he repurchased it. He could have had no motive in concealing the existence of the deed of trust, or for fraudulently influencing McCormack to purchase the land.

It is to be noted that the cases of estoppel referred to by the counsel for the plaintiff, and cited by the text writers, are instances of latent, concealed, or unrecorded incumbrances. See 1 Story, Eq. Jur. §§ 398, 399. No case has been cited in argument, and the court has found none in the investigation of this question, where the beneficiary in a recorded deed of trust or mortgage has been estopped from asserting his lien on the ground of concealment, fraud, or misrepresentation to a purchaser of the land. It seems that a registered lien has been regarded by the courts and text writers as constructive notice to the purchaser of the land.

What has been said heretofore with regard to a registered deed of trust being constructive notice to a purchaser for value is equally applicable to this branch of the plaintiff's exception No. 2, and need not be repeated. There were a few other points called to the attention of the court in the argument, but as they are not raised in the pleadings, it is not necessary that they be noticed or acted upon by the court.

There was, however, one question presented to the court, while not raised in the pleadings, which is apparent upon the record, and the court will dispose of it. It is as to the validity of the certificate of the justice taking the acknowledgment of Hansford James to the deed of trust to Ward, dated April 25, 1861. The certificate is as follows:

*"Virginia, to-wit: Smyth County, to-wit: This is to certify that Hansford James, whose name appears signed to the within deed, came this day before me, Robert C. Williams, acting justice for said county, and acknowledged the same to be his act and deed, and desired me to certify the same to the clerk of the county court of said county, that it may be duly recorded. Witness my hand and seal this 25th day of April, 1861.*

*"R. C. WILLIAMS, J. P."*

The provision of the statute of Virginia, as to the certificate of acknowledgment to be taken by a justice, is as follows:

*"Such court or clerk shall also admit every such writing to record, as to any person whose name is signed thereto, upon a certificate of his acknowledgment before a justice or notary public within the United States, written on or annexed to the same to the following effect, to-wit: County of ———, to-wit: I, ———, a justice of the peace for the county aforesaid, in the state of ———, do certify that ———, whose name is signed to the writing above (or hereto annexed) bearing date on the ——— day of ———, has acknowledged the same before me in my county aforesaid.*

*"Given under my hand this ——— day of ———."*

See Code 1860, c. 121, § 3.

It is not necessary that the language of the certificate be identical with that of the form given by the statute. It is only necessary that it conforms to it in effect. The certificate under consideration conforms to the form in the statute in all the necessary elements, and this is all that is required. "It is a substantial compliance in everything material." See *Tod v. Baylor*, 4 Leigh, 513; *Siter v. McClanachan*, 2 Grat. 294. None of the exceptions to the commissioner's report being sustained, the report will be confirmed.

NOTE. In conformity with this opinion, a decree was rendered May 27, 1886, in favor of David E. James for \$4,981.70, the amount ascertained to be due him by Commissioner Honaker's report, with interest on \$2,225, part thereof, from October 26, 1885; and awarding costs to defendant; and further directing a sale of the lands in the bill and proceedings mentioned, unless McCormack should, within 60 days thereafter, satisfy the decree. From this decree McCormack appealed to the circuit court, Bonn, J. This appeal being heard, the decree of the district court was affirmed, and a decree accordingly was rendered July 15, 1887; from which last decree there has been no appeal.

BUFORD v. COOK *et al.*

(Circuit Court, W. D. Iowa. August 31, 1888.)

1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTE—EVIDENCE—SUFFICIENCY.

In a proceeding by creditors' bill to reach certain land which had been conveyed to the debtor's mother-in-law, the latter claimed that she was to be allowed a certain sum per year for services in the debtor's family, and that she owned and had paid for the land in suit, but knew nothing about how or when the purchase had been made, or a building thereon had been erected. The proceeds of the only property she had, had been invested in other lands, and her husband, during the last years of his life, having been disabled, had contributed nothing to their support. The debtor had in fact furnished and paid the money. *Held*, that complainant was entitled to a decree subjecting such property to the satisfaction of his judgments.<sup>1</sup>

2. SAME.

In a proceeding by creditors' bill to set aside certain mortgages as fraudulent, it appeared that the mortgagee, who was the debtor's banker, had begun business with a capital of \$10,000, and in six years had taken mortgages for advances to the debtor to the amount of \$23,000. The debtor had previously been in embarrassed circumstances, and was carrying on a large agricultural implement business, with warehouses and agents in different places, in an extravagant and careless manner. As to a portion of the indebtedness, its genuineness was testified to by the mortgagee and debtor; and the former offered to produce the account, but it was not called for. As to the remainder, a full itemized account was presented, and no item was shown to be wrong. *Held* that, although some of the debtor's property might not have been accounted for by the mortgagee, and certain chattel mortgages taken as additional security might not be sustainable, the transactions could not be said to be fraudulent.<sup>1</sup>

In Equity.

Creditors' bill by James M. Buford, assignee, against John B. Cook, Viola E. Cook, Susan Smith, and W. L. Culbertson, to set aside fraudulent conveyances.

<sup>1</sup>See, as to what is sufficient evidence of fraudulent intent to cause a conveyance by a debtor to be set aside, *Neal v. Foster*, *post*, 29, and note.



*Cole, McVey & Clark*, for complainant.  
*Geo. W. Payne*, for defendants.

BREWER, J. The facts in this case are these: Plaintiff holds two judgments against the defendant John B. Cook, amounting together to about \$9,000, upon which judgments executions have been issued and returned unsatisfied, and this bill was filed as a creditors' bill to reach certain real estate, part of it standing in the name of Viola E. Cook, the wife of John D. Cook, and a single lot in the name of Susan Smith, the mother of Mrs. Cook. One of these judgments was rendered against both John D. and Viola E. Cook. So far, then, as Mrs. Cook's interest is concerned, it can be taken under that judgment as well as her husband's. All the real estate standing in the name of Mrs. Cook is subject to the lien of several mortgages given to the defendant W. L. Culbertson, and the bill attacks these mortgages as fraudulent and void.

The first question, and that easy of solution, is whether the real estate standing in the name of Mrs. Smith is hers, or equitably the property of John B. Cook. Mrs. Smith and her second husband lived with Mr. and Mrs. Cook from 1873 to 1884, at which time Mr. Smith died. At the time she commenced living with Mr. Cook she had no property but a house and lot in Ohio, left her by her first husband, and the proceeds of that, when sold, were invested in lot 7 of block 3, in Carroll, Iowa. Afterwards lot 1 in block 9 was purchased in her name, and a building erected on it, and this is the property about which the contention arises. During the last years of his life Mr. Smith was practically disabled from work, and contributed substantially nothing to the support of himself and wife. The money for the purchase of the lot and the erection of the building was, in fact, furnished and paid by Mr. Cook; and while Mrs. Smith claims that she was to be allowed \$300 a year for her services, that she owned this property and paid for it, yet it very clearly appears that this was all a mere pretense, and that the property was really all the time Mr. Cook's. She personally had nothing to do with the transaction of the purchase or the building, and could not tell how or when they were had. The complainant is entitled to a decree subjecting her interest in this property to the satisfaction of the judgments. This, however, is a minor matter.

The principal question is as to the validity of the Culbertson mortgages. Between 1873 and January, 1882, Cook executed five mortgages to Culbertson, aggregating \$11,500. In January, 1882, and January, 1883, he executed three more mortgages, amounting to \$9,800, and secured these by different tracts of real estate. In January, 1882, he executed a chattel mortgage for \$12,500, and in January, 1883, another chattel mortgage for \$12,000. These last two mortgages were merely given as additional security. As the right to retain possession of the mortgaged property and to sell and dispose of them was retained by the mortgagor under these last two mortgages, and as the property therein was, in fact, sold and disposed of by the mortgagor, they drop out of consideration, except so far as they throw light upon the question of

good faith. The first question is whether these real-estate mortgages were to secure *bona fide* indebtedness. In reference to those executed before January, 1882, both Culbertson and Cook testify as to the genuineness of the debts. Mr. Culbertson was a banker, with whom Mr. Cook did business; and, while it does not appear from their testimony that either of these five mortgages represented a distinct loan made at the time, it does appear from such testimony that the full amount thereof was from time to time advanced from the banker to his customer.

The account of the dealings between Cook and Culbertson during these years is not presented, though Mr. Culbertson offered to produce such account, if desired; but it was not called for. With reference to the transactions between Mr. Culbertson's bank and Mr. Cook from January 1, 1882, onward, an itemized account is presented, and testified to by Mr. Culbertson as correct. The correctness of this account is not challenged by any direct testimony, though, if not correct, means of attack were plainly disclosed by the account itself. It embraces a large number of items, both of debt and credit, with such distinctness as would enable the complainant easily to prove their falsity, if they were false. The various creditors of Cook in whose favor drafts were given by Culbertson could easily have been interrogated, and the truth or falsity of those items shown thereby. In the absence of such testimony, and with the positive testimony of Culbertson as to the correctness of the account, its truth must be considered as proved. As the prior account was not called for when proffered, I think the same conclusion as to its genuineness follows. I know there are some things which make against this conclusion, and the learned counsel for complainant has presented these various matters with a great deal of ingenuity and force. Obviously they throw a good deal of suspicion around the transactions of the banker and his customer. I think the careless and extravagant way in which Cook was carrying on his business sufficiently explains most of the suspicious circumstances. He was carrying on the agricultural implement business, partly as an independent trader and partly doing a commission business. He had warehouses and agencies in six or eight different places, having many agents, and going to large expense in the matter of warehouses, freights, employes, and other expenses. He put his real estate in the name of his wife by reason of some prior pecuniary embarrassments of his own. On several of these lots that stand in his wife's name he put warehouses, and seems to have been frequently trading machines for real estate or mortgages. His banking business was done principally with Culbertson, and it is not strange that in giving his testimony as to the various transactions, without his books or accounts before him, some inaccuracies have crept in; but of the general fact that he was doing a large business, and having his banking transactions with Culbertson, there can be no doubt. Something more, then, than mere suspicion should appear to invalidate the securities given for the balances shown by the banker's books. It seems strange that a banker starting in 1876 with a limited capital—\$10,000, as Mr. Culbertson testifies—should have made such large advances to one customer—some

\$23,000—in six years; and yet, when we consider the business done by Mr. Cook at so many different places, and the expenses attending the work at each place, it is obvious that he must have somewhere obtained funds therefor. I do not think it strange that at the commencement of the years 1882 and 1883, in view of the expected advances, Mr. Culbertson should ask chattel mortgage security as further collateral. I think he may well have anticipated the difficulties and embarrassments which subsequently befell Mr. Cook; and insisting on all the security he could obtain is not to be charged against him as evidence of fraud. It may be that these chattel mortgages, under the rules laid down by the supreme court of Iowa, could not have been sustained if challenged; but that does not show that Mr. Culbertson was trying to defraud, but simply that he mistook as to the validity of the extra security which he was obtaining. It is also true that just before the September term, 1883, of the courts in which suits were pending against Cook brought by some of the creditors, Mr. Culbertson received sundry conveyances as security. It does not seem to me, from the testimony, that all the security which Mr. Culbertson has can be considered excessive for the indebtedness which he shows; and the mere fact that a banker presses for and obtains security, unless grossly excessive, is not to be charged against him as fraudulent. I do not believe that anything will be gained by noticing in detail the various transactions commented upon by counsel in his brief.

It may be that Mr. Culbertson has not given full credit for the proceeds of all the property received from Mr. Cook, and converted by him since these troubles commenced; and perhaps there should be a credit of \$2,000 more, as claimed. But, after all, that which impresses me the most is the fact that an itemized account of the transactions after January, 1882, was presented, and not a single item is shown to be wrong. The burden of proof, of course, is on the complainant. Before wrong and fraud can be adjudged against the defendants, there must be something more than a mere suspicion,—there must be proof; and I have read and reread the testimony without being able to come to any other conclusion than that the transactions and the indebtedness between Cook and Culbertson were substantially as stated, and that no excessive or unreasonable security was exacted or received by Culbertson. Under these circumstances, I do not think the complainant is entitled to any relief as against these mortgages. Defendant Culbertson is therefore entitled to a decree in his favor dismissing the bill. The complainant can take a decree against Mrs. Smith's interest in the lot hereinbefore referred to.

WOOD *et al.* v. ASPEN MINING & SMELTING CO. *et al.*

(Circuit Court, D. Colorado. August 18, 1888.)

## MINES AND MINING—LOCATION AND ACQUISITION—CITIZENSHIP—EVIDENCE.

William J. Wood, the locator of the mine in question, was born in Canada, where he lived until 1870, when he moved to Kansas, leaving his wife and five or six children in Canada. It appeared that an entry of public lands had been made in Kansas, by a William Wood, who made oath at that time that he was a citizen, the head of a family consisting of a wife and seven children, and that he and his family had resided on the land from September, 1870, to April, 1871. A witness testified that he saw naturalization papers issued in Kansas, in such locator's possession, but no record of such papers could be found in that state. *Held* that, the locator's title to the mine being of recent origin, the evidence of his citizenship was insufficient to support the same.

In Equity. Suit to cancel a conveyance.

Suit by James A. Wood and others, heirs at law of William J. Wood, against the Aspen Mining & Smelting Company, Jerome B. Wheeler, and others, defendants, to set aside a conveyance made by complainants of their interest in a mine located by said William J. Wood.

T. A. Green, for complainants.

G. J. Boal, for Wheeler.

T. J. Edsall, for Aspen Mining & Smelting Company.

HALLETT, J. In the month of April, 1880, William J. Wood, with two other persons, located the Emma mine, in Pitkin county, and soon afterwards died intestate. This bill is filed by complainants, as the heirs at law of Wood, to set aside certain conveyances made by them of their interests in said mine inherited from William J. Wood, and to establish their title thereto. It is alleged in the bill that William J. Wood was at the time of locating the mine a citizen of the United States, and thus qualified to acquire title to public mineral lands under section 2319 of the Revised Statutes. This allegation is denied in the answers, and has become the subject of proof. It is conceded that Wood was born in Canada, and lived there until the year 1870, when he came to the state of Kansas, leaving a wife and five or six children residing in Canada. In proof of Wood's citizenship a record of an entry of land made by one William Wood in Greenwood county, Kan., is offered. In that entry William Wood made oath that he was a citizen of the United States, which oath it is claimed establishes the fact. The proof offered in support of the entry shows that William Wood was the head of a family consisting of a wife and seven children, and that he had resided with his family on the land from September 20, 1870, to the date of entry, April 8, 1871. Inasmuch as William J. Wood had then only six children, and his wife and family were in Canada, it would seem that he was not the same person who entered the land in Kansas. If he did make such entry, he gave false testimony as to the number and residence of his family, which is not to be presumed. He also gave false testimony as to his citizenship. He had then been in the country only one year, and

could not have gained citizenship under five years. There is also on file the affidavit of one John P. Kinneavy, to the effect that in the year 1873, in Denver, he saw in Wood's possession certain "naturalization papers or declarations" which were issued in the town of Iola or Emporia, state of Kansas, in 1871 or 1872. Full search has been made in the records of Greenwood county and elsewhere in the state of Kansas, and no record of Wood's declaration of intention to become a citizen, or of his naturalization, can be found. In the absence of such record, it is clear that no such vague or uncertain statement as that made by Kinneavy can be received. And in a case of this kind, where the fact is of recent occurrence, and there is nothing like concurrent acquiescence in its existence on the part of those interested in the property, it is clear enough that no such evidence as that here offered can be recognized. In such a case the fact of naturalization or of the declaration of intention to become a citizen must be proved by the record of some court of competent jurisdiction. *Green v. Salas*, 31 Fed. Rep. 107; *Dryden v. Swinburne*, 20 W. Va. 90. In some cases, where it is sought to overturn a title long recognized as valid, there may be a presumption of citizenship in the absence of proof by the record. Such cases are referred to in *Dryden v. Swinburne*, *supra*. But no rule of that kind can be applied in a case where complainant's right has been contested from the very hour that it accrued.

Other questions presented in the record have not been considered. On the ground that the citizenship of William J. Wood, or a declaration by him of his intention to become a citizen, is not sufficiently shown, the motion for a receiver is denied.

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### BOARDMAN v. BLIZZARD *et al.*

(Circuit Court, S. D. Iowa, C. D. August 30, 1888.)

#### PAYMENT—WHAT AMOUNTS TO—MONEY IN HANDS OF AGENT.

Defendant applied to C. to procure him a loan to be used in paying a mortgage held by plaintiff. The loan was secured and embezzled by C., but defendant did not know when he received the money, and never expressly directed him to apply it to the mortgage. C. was plaintiff's agent to collect the interest and principal of the mortgage. *Held*, that defendant had made no application of the money, and that its receipt by C. was not a payment of the mortgage.

In Equity. Bill to foreclose mortgage on realty. On final hearing.

This is a bill to foreclose a mortgage on real estate, brought by William Boardman against Harrison Blizzard, owner of the real estate, and Warren Gifford, a junior incumbrancer.

*Kauffman & Guernsey*, for complainant.

*H. McNeil* and *D. H. Ettien*, for defendants.

**SHIRAS, J.** On the 25th day of July, 1879, the defendant Harrison Blizzard, through Hugh R. Creighton, of Des Moines, Iowa, negotiated a

loan of \$700 from the complainant, payable November 1, 1884, securing the same by a mortgage on certain realty situated in Warren county, Iowa. The present bill was brought for the purpose of foreclosing this mortgage, it being averred that the principal debt is due and unpaid. The defendant Blizzard avers payment, and shows that for the purpose of raising the money that would be needed for the payment of said mortgage he, on or about the 26th day of August, 1884, made an application through the Union Loan Association of Des Moines, Iowa, under which name Hugh R. Creighton mainly carried on business, for a loan of \$700, to be secured by a mortgage upon the realty described in the mortgage to the complainant; that through Sanford & Kelley, loan brokers at New Bedford, Mass., the desired loan was placed with Warren Gifford, who advanced the needed sum, and which was on or about September 26, 1884, forwarded by said Sanford & Kelley to Hugh R. Creighton, at Des Moines, Iowa. A mortgage to secure the amount thus loaned was delivered to said Gifford, he accepting same in the belief that his mortgage would be the first lien on the land, through the payment of the mortgage to complainant. Instead of applying the money thus received to the purpose for which it was borrowed, to-wit, the payment of the debt due complainant, Creighton embezzled the same, and the real question to be determined is upon whom the loss must fall.

The rascality of Creighton has created such a state of facts that it is impossible to avoid a serious loss to one of two really innocent parties, to neither of whom can the slightest bad faith, or even ordinary negligence, be attributed. No matter, therefore, how the cause may be decided, the party adjudged to bear the loss will doubtless feel aggrieved; for no amount of logical reasoning will overcome the natural feeling that it is an outrage that one should be compelled to submit to heavy pecuniary loss when the party is not conscious of any failure of duty or of care on his part. It is not questioned that the complainant loaned the sum for which the defendant Blizzard executed the mortgage in the bill of complaint described, and that the latter received the same. Unless, therefore, this sum has been repaid, the complainant has a just claim to recover the amount thereof. The case, therefore, turns upon the plea of payment interposed by the defendant. It is admitted in the stipulation of facts signed by the parties hereto that the money procured from Gifford never reached the complainant, nor was the same used by Creighton in the interest of or for the benefit of complainant, but the same was converted by Creighton to his own use. To make the complainant responsible therefor it must be made to appear that when Creighton converted the money he was holding the same as agent for complainant. There is evidence in the case tending to show that Creighton collected the annual interest accruing on this loan, and on others held by complainant; and it may be assumed that the evidence would justify the finding that Creighton acted for the complainant in the collection of the principal and interest of the loans that had been negotiated through Creighton. It is equally, or even more, certain, that Creighton had also acted as agent for the defendant Blizzard. The money actually embez-

zled by Creighton was that procured from Gifford, and which came into the hands of Creighton in September, 1884. The procuring of this loan was the act of the defendant Blizzard, with which the complainant was not in any sense connected. It does not appear that Blizzard was moved in procuring the same by any act, demand, or notice from either complainant or Creighton. The debt to complainant did not mature until November 1, 1884, and the initiatory steps in the procurement of the loan from Gifford were taken in August previous, and the money was actually received by Creighton in September. When the money came into his hands he received it in his capacity of agent for Blizzard. There is nothing in the evidence to show that Blizzard expected to pay off the loan to complainant before its maturity. All that can be inferred from the evidence is that he had taken the steps resulting in the procurement of the second loan for the purpose of being prepared to meet the debt due to complainant when the same came due. The money in the hands of Creighton remained the money of Blizzard, unless it was appropriated to the payment of the debt of complainant, and there is nothing shown in the evidence upon which such appropriation can be predicated. The testimony of the defendant Blizzard was taken in the case, but he was not interrogated in regard to the second loan, and does not refer to it, nor to the use to be made of the money so obtained. In the written stipulation of facts submitted it is stated "that on or about the 26th day of August, 1884, the defendants Harrison Blizzard and Martha E. Blizzard, for the purpose of raising money to pay off and satisfy the mortgage attempted to be foreclosed in this action, made an application for a loan of money through the Union Loan Association of Des Moines, Iowa, for the purpose of borrowing the sum of \$700," etc. There is nothing in the evidence to show that Blizzard directed or expected Creighton to hold the money after its reception, and it is not shown that he ever directed him to apply it to the payment of the debt due complainant. The statement is that Blizzard, for the purpose of procuring the money to pay the debt due complainant, applied for a new loan; but it is not shown that he ever directly authorized Creighton to make the application to the payment of complainant's debt. It further appears that Blizzard did not know until after April, 1885, that the money had been procured on the second bond and mortgage executed. Two letters written Blizzard by Creighton—one in December, 1884, and one April 25, 1885—are in evidence, in which Creighton wrote him that, owing to the scarcity of money, he had been unable to negotiate the second loan, but that he hoped to be able to do so by May 1st. It does not, therefore, appear, as already said, that Blizzard had expressly directed Creighton to apply the money when received upon the second loan to the payment of the loan due complainant, and he was not induced to believe that such appropriation had in fact been made, because he was led to believe that the money had not been received by Creighton. In the stipulation of facts it is agreed that Creighton never used the proceeds of the second loan for the purpose of paying off and satisfying the mortgage debt due complainant, but converted the money to his own use; and it is not

shown but what this conversion took place before the maturity of the debt due complainant. The strong probabilities are that Creighton embezzled the money as soon as it came into his possession. Under such circumstances, upon what ground can it be fairly claimed that, when the embezzlement took place, the money had become that of complainant? In the absence of evidence showing that the money received from Gifford had been appropriated in Creighton's hands to the payment of complainant's claim, it must be held that the plea of payment has not been made out, and that complainant is entitled to a decree against the defendant Blizzard for the sum due, and for the foreclosure of the mortgage.

Warren Gifford, the holder of the second mortgage, is also made a party defendant to the bill, and answers the same, setting up the execution of the mortgage to himself as security for the money by him advanced, and averring the delivery of the money to Creighton as a payment of the mortgage to complainant. There is nothing in the evidence which places Gifford in any other position than that occupied by Blizzard. It is not claimed that complainant has by act or word estopped himself from showing the exact facts of the case, and the defense relied on by Gifford is the same as that pleaded by Blizzard, to-wit, payment of the debt due complainant. The evidence failing to support this defense, the complainant is entitled to a decree of foreclosure, as prayed for, against all the defendants.

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NEAL v. FOSTER *et al.*

(Circuit Court, D. Oregon. August 20, 1888.)

**1. JUDGMENT—RES ADJUDICATA.**

The determination of a point or question in any legal proceeding binds the parties thereto and their privies in any subsequent litigation that may arise between them, although the cause of action in the two proceedings is not otherwise identical.

**2. EVIDENCE—DECLARATIONS—VENDOR AND VENDEE.**

The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee on the question of the character and purpose of such sale.

**3. TAXATION—TAXABLE PROPERTY—TAXABLE CREDITS.**

A person cannot lawfully nor truthfully omit a note from his statement of his taxable credits on the ground that there is an understanding between him and the maker thereof that he will not deduct the amount of the same from the value of his property listed for taxation.

**4. COURTS—FEDERAL COURTS—JURISDICTION—MOTIVE OF SUITOR.**

The motive with which a person purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout in the national courts; and so it does not affect the jurisdiction of said courts if the purchase is made with the expressed intention of suing therein.

**5. JUDGMENT—LIEN—FRAUDULENT CONVEYANCE—RIGHTS OF CREDITORS.**

A conveyance of real property, though void as to creditors asserting their right against it, passes all the estate of the grantor in the premises to the grantee; and therefore the lien of a subsequent judgment against the grantor, which only attaches to property then belonging to him, does not affect the property so conveyed; and the creditor first seeking to set aside such conveyance obtains a prior right to satisfaction thereout, from the commencement of his suit for that purpose.



# 6. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—CONSIDERATION.

The grantee in a conveyance of real property by an insolvent debtor having paid at least three-fourths of its cash value therefor, by the redemption of certain wheat-warehouse receipts of the grantor, concerning which he was then liable to a criminal prosecution, and the discharge of certain obligations on which he was surety, *held*, that the circumstances do not warrant the conclusion that the conveyance was made or taken with intent to hinder, delay, or defraud creditors.<sup>1</sup>

# 7. SAME.

A conveyance by an insolvent debtor of a block of brick buildings for the alleged consideration of the surrender of six notes of the grantor for the principal sum of \$18,000, payable to the grantee, which notes are in fact without consideration. *Held*, that the conveyance was voluntary, and therefore fraudulent as against the creditors of the grantor.<sup>1</sup>

(*Syllabus by the Court.*)

Suit to Enforce Judgments.

*C. E. S. Wood and George H. Williams*, for plaintiff.

*Earl C. Bronaugh and L. Flinn*, for defendants Crawford and Pearce.

*J. K. Weatherford and Charles E. Wolverton*, for defendants Goltra, Walden, Liles, and Baltimore.

DEADY, J. This suit is brought by the plaintiff, a citizen of Illinois, against James A. Foster, John A. Crawford, William Crawford, and Ashby Pearce, citizens of Oregon. The plaintiff sues as the assignee and owner of two certain judgments against the defendant Foster, and to set aside, as fraudulent, three certain conveyances executed by Foster to John A. Crawford, William Crawford, and Ashby Pearce, respectively. William H. Goltra, E. Walden, John R. Baltimore, and J. S. Liles, citizens of Oregon, and judgment creditors of Foster, are also made parties defendant.

It is alleged in the bill that on and prior to February 6, 1884, Foster was indebted to Sibson, Church & Co. in the sum of \$13,034.96, which claim was on July 15, 1885, assigned to Sibson, Quackenbush & Co., who on March 8, 1886, obtained judgment thereon for \$14,066.72, in the circuit court of Linn county, Or., which judgment was then docketed therein, and on March 15th an execution issued thereon and was returned unsatisfied; that on June 11, 1886, Sibson, Quackenbush & Co. sold and assigned said judgment to the plaintiff, who now owns the same.

That on March 8, 1886, Noon & Co. obtained a judgment in said circuit court against Foster, on a promissory note and account for goods, in the sum of \$1,920.35, which judgment was then docketed therein, and on March 15th an execution issued thereon and was returned unsatisfied; and that on June 19th Noon & Co. sold and assigned said judgment to the plaintiff, who now owns the same.

That when said debts were contracted, on which said judgments were obtained, Foster was the acknowledged owner of the following real prop-

<sup>1</sup>As to what constitutes a fraudulent conveyance, and what is sufficient proof of fraud to cause a conveyance to be set aside, see *Stoddard v. Rowe*, (Iowa,) 39 N. W. Rep. 84, and note; *Satterfield v. Malone*, 35 Fed. Rep. 445, and note; *Bernard v. Myroleum Co.*, (Mass.) 17 N. E. Rep. 887, and note.

erty, situate in Albany, in said county and state: (1) The Magnolia flour-mill and lot, including the race connecting the mill with the Santiam water-ditch; (2) block 55, except two lots; (3) lot 1 in block 11; (4) one-half interest in the Albany water-works; (5) a parcel of land 74 feet by 100, with brick buildings thereon; and (6) part of lot 7 in block 4 with a brick store thereon; that on February 6, 1884, Foster conveyed all of said property except the fifth and sixth items to the defendant John A. Crawford, and on the same day conveyed the fifth item to the defendant William Crawford, and on February 7th conveyed the sixth item to the defendant Ashby Pearce; that each of said conveyances was voluntary and without consideration, and was made by the grantor, and accepted by the grantee, therein, with intent to hinder, delay, and defraud the creditors of Foster, and particularly the assignors of the plaintiff, Sibson, Quackenbush & Co., and Noon & Co.; that Foster is insolvent; that the property so conveyed was then worth \$110,000, and was all the property Foster had, and he is still in the possession and enjoyment of the same.

That subsequent to said conveyances the other defendants herein obtained judgments in said circuit court against Foster, as follows: Baltimore, March 10, 1884, for \$1,652.92; Goltra, February 23, 1886, for \$1,636.90; Liles, March 12, 1886, for \$1,049.75; and Walden, February 23, 1886, for \$568.50.

The prayer of the bill is that the conveyances be set aside as fraudulent, and the property be sold to pay the claims of the plaintiff, and the defendants Baltimore, Goltra, Liles, and Walden, according to their respective priorities.

The defendants Foster and the Crawfords, by their joint answer, admit the judgments against Foster, as stated in the bill, but deny that the plaintiff is the owner of any of them, and allege that the assignments thereof to him by Sibson, Quackenbush & Co. and Noon & Co. were made without consideration, and for the sole purpose of giving this court jurisdiction. They admit the execution of the conveyances to the Crawfords and Pearce, as stated in the bill, but deny that they are voluntary, or were made or accepted with intent to hinder, delay, or defraud creditors, and allege that at the date thereof Foster was short about 20,000 bushels of wheat, for which he had given receipts; and that Foster conveyed the items one, two, three, four, and five of said property, and certain book-accounts and grain-sacks, to the Crawfords, in consideration of John A. Crawford's taking up those receipts, and \$64,000 to be paid him by the surrender of certain notes and an account due from Foster to said John A., and certain other notes due from Foster to William Crawford, and the payment by John A. of certain notes of Foster's, on which he was surety; and that the conveyance to Pearce was made subject to Mrs. Foster's right of dower, in consideration of the payment by him of \$4,000 as security for Foster.

They admit that on, prior, and since February 6, 1884, Foster was and is insolvent, and aver that the property conveyed is not worth more than \$56,000.

The defendants Baltimore, Liles, Walden, and Goltra answer the bill jointly, admitting the allegations thereof, and that they are severally the owners of the certain judgments obtained by them in 1886, in the circuit court of Linn county, Or., against Foster, as alleged in the bill; and also allege that Goltra is the owner of a certain other judgment obtained by him in said circuit court, on February 23, 1886, against said Foster, on twelve promissory notes and one account theretofore assigned to him, for the sum of \$16,119.70, which judgments they allege are each a lien on the property of Foster in said county; and that the property conveyed to the Crawfords and Pearce was so conveyed with intent to hinder, delay, and defraud the creditors of Foster, including the defendants.

Afterwards the defendants Foster and the two Crawfords filed a cross-bill, alleging therein that on February 10, 1886, Goltra commenced a suit in the circuit court aforesaid against the plaintiffs in the cross-bill to enforce the judgment for \$16,119.70 theretofore obtained against Foster, as stated in his answer herein, against the property in question, on the ground that the conveyances thereof by Foster to the Crawfords and Pearce were invalid, because made with intent to hinder, delay, and defraud the creditors of the grantor, including Goltra and his assignors; that the defendants in said suit answered the complaint therein, denying the allegations of fraud, and alleging that said conveyances were made in good faith, and for an adequate consideration, to which answer there was a reply by Goltra; that the cause was heard on the issue thus made, when the court, on July 9, 1886, found in favor of the defendants, and dismissed the suit; that Goltra took an appeal to the supreme court of the state, where, on April 11, 1887, said appeal was dismissed, whereby the judgment of said circuit court remains in full force and effect, and Goltra is thereby estopped to say that said conveyances are invalid, for the reason assigned.

A demurrer to this cross-bill was overruled, and the same taken for confessed. 34 Fed. Rep. 496. And it is now admitted by counsel that Goltra is estopped to say in this suit, in support of said judgment, that these conveyances are invalid, because made in fraud of creditors.

But counsel maintain that the judgment of Goltra, obtained on February 23d, for \$1,637.20, is not within the operation of said estoppel, because the judgment was not included in the suit out of which the estoppel arises. It is true that the decree in the former case between the parties to the cross-bill was given in a suit in which the right to enforce this particular judgment against this property was not involved. But the question on which such right depends was so involved. A question contested and determined in one case is determined, so far as the parties to the same are concerned, for all time and all purposes. It cannot be ground over again in another action.

The question of the validity of Foster's conveyances to the Crawfords and Pearce, for the cause alleged, namely, that they were executed with intent to hinder, delay, and defraud creditors, was the principal and only contested question in the suit of Goltra against Foster and the Crawfords;

and the decision therein that they were not so executed estops the parties and their privies to allege or maintain aught to the contrary, in this or any other litigation between them. *Outram v. Morewood*, 3 East, 346; *Cromwell v. County of Sac*, 94 U. S. 351; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. Rep. 1004; *Bigelow, Estop.* 84; *U. S. v. Schneider*, 35 Fed. Rep. 107.

This disposes of the case made in the cross-bill. Goltra is estopped to allege or contend that the conveyances in question are fraudulent. That identical point was found against him in the former suit, and therefore, as against Foster or his grantees, he cannot make or state a case that will entitle him to subject the property to the satisfaction of either of his judgments against the former.

In the progress of the case it was referred by the circuit judge to a master, to take the testimony, and report the same with his conclusions of fact and law thereon. The report finds (1) that at the commencement of this suit the several judgments mentioned in the pleadings were owned by the plaintiffs therein, except those of Noon & Co. and Sibson, Quackenbush & Co., which had been theretofore duly assigned to the plaintiff, who was the owner thereof; (2) that the conveyances to Pearce and John A. Crawford were made in good faith, and for "full value," while that to William Crawford was made without consideration, and is void as against the plaintiff and other creditors of said Foster; (3) that on February 6, 1884, the date of said conveyances, and since, Foster was insolvent, and has no property out of which any of such judgments can be made; (4) that the real property conveyed to John A. Crawford was at the date of the conveyance thereof worth \$36,000, in addition to which he then received from Foster accounts and grain-sacks worth \$6,000, in all \$42,000, and that Foster then owed said Crawford on notes and accounts \$27,733.50, while the latter was liable to pay for the former, as surety, about \$16,000, all of which debts and liabilities he released and paid, and also made good to sundry persons a deficiency in wheat in the mill warehouse of near 20,000 bushels, which cost him near \$10,000 more, in all \$53,733.50; (5) that at the date of the conveyance to Pearce he was an accommodation indorser for Foster on a note for \$5,000, that he afterwards paid; that the real property conveyed to him was worth \$3,500, in addition to which he received \$700 worth of mill products; that the property conveyed to William Crawford was then worth \$18,000, upon which he has since expended in permanent improvements the sum of \$2,000.

Both parties excepted to the master's report,—the plaintiff, to the finding in relation to the conveyances to John A. Crawford and Pearce; and the defendant William Crawford, to the finding concerning the conveyance to himself.

On the argument, it was tacitly conceded that the conveyance to Pearce was made for a full consideration, as found by the master, and with no other purpose than to prefer him to other creditors, as the grantor lawfully might, and of this there can be no doubt on the testimony.

At and before February 6, 1884, Foster was in a financial strait. By v.36F.no.1—3

reason of a decline in flour during the winter, he had lost or failed to realize one dollar a barrel on about 30,000 barrels shipped to Liverpool. He was also short about 20,000 bushels of wheat, for which he had given receipts, on any one of which he was liable at any moment to a criminal prosecution. There is no room to doubt that John A. Crawford was then liable as surety on Foster's paper for \$15,900, namely, to the Bank of British Columbia, \$5,000; to John Conner and the Bank of Albany, \$6,000; and to Frank Parton, \$4,900,—and that he afterwards paid the same, as part of the consideration for the transfer to him.

Neither is there any room to doubt that Crawford settled with the farmers and others holding Foster's wheat receipts for 19,541 bushels of wheat that the latter had used. But the amount disbursed for this purpose is not certain. The evidence on the point is not clear or satisfactory. Wheat, at the time of the transfer, was 90 cents per bushel. But it was rapidly declining, and soon fell to near 50 cents. It is altogether probable that from \$10,000 to \$15,000 was paid out for Foster on this score,—say \$12,500. This, added to the amount paid by Crawford, as surety or indorser, makes \$28,810 paid on the property in cash. In addition, Crawford claims to have turned in an open account of \$5,803 against Foster, as a part of the consideration for the purchase. Under the circumstances, the claim is a probable one. Crawford seems to have been carrying Foster in every direction; and, on the proof, it cannot be rejected. This, with the cash, makes a consideration of \$34,113 paid for the property, real and personal,—more than it would have probably sold for at sheriff's sale, and more than three-fourths of the value that the master places upon it, which, in my judgment, is its full market value.

If the purchase was made in good faith, that is, for the purpose of providing for the payment of the debts due the purchaser, or the obligations on which he was surety for the grantor, and not merely to hinder, delay, and defraud creditors, the conveyance is not within the statute of frauds, and is valid. The amount and character of the consideration is not material, except as it may affect the question of good faith. *Bump, Fraud. Conv. 207.* Neither the amount nor character of this consideration tends to prove that the purchase was not made in good faith.

The only specific circumstance urged against the good faith of this transfer is the fact that Foster remained in possession of the mill and dwelling-house, and his declarations while there. The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee on the question of the character and purpose of such sale and possession. *Bump, Fraud. Conv. 589; U. S. v. Griswold, 7 Sawy. 316, 8 Fed. Rep. 496.* But such acts and declarations are not conclusive, and must be considered in the light of all the circumstances. Mr. Foster was an old man, who had done business in Albany as merchant and miller for over 30 years. When he failed and transferred his property to his life-long friend and principal creditor, John A. Crawford, it was not unreasonable, nor out of the ordinary course of business, for the latter, who was over 70 years of age, and had been out of the mill-

ing business for many years, and was otherwise much engaged, to retain Foster as superintendent of the mill, both for his own interest, as well as a kindly consideration for Foster, who was then thrown on the world without any visible means of support, at a compensation of \$75 per month, and the use of the dwelling-house in which he lived. But Foster's declarations to his other creditors, all of whom are represented in the several judgments mentioned in the pleadings, do indicate that he expected to get the mill back again, either as owner or lessee of Crawford, in which case, if times "livened up," he would be able to pay all his debts from the profits of the mill. But I am satisfied he either went beyond the fact, or his hearers, smarting under the loss of their claims, have remembered and repeated his statements for more than they were worth. As is said by counsel in the brief for plaintiff, "each of these witnesses was not only a friend of many years' standing with Foster, but also a creditor. Some of them had sold him wheat only a few days before the transfer; and in the presence of men whom he had so wronged, \* \* \* and who, nevertheless, still displayed some old-time loyalty and friendship towards him, it is quite natural he should seek to placate them, and restore himself in their esteem by an explanation that would not leave them hopeless."

Under these circumstances Foster might have made statements and held out hopes that implied, in the willing minds of his anxious hearers, that, after all, the transfer was only a contrivance to tide over a financial difficulty, and in the mean time Crawford was only holding the property in trust for him.

One form of declaration attributed to him is, "that if he could make arrangements with his creditors he could lease the mill, and pay them off, if times 'livened up,' out of the profit of it." And this declaration is perfectly compatible with a *bona fide* sale. Neither would it be difficult or extraordinary for those who would have it so, to remember and relate how Foster said "he was going to get the mill back again as soon as he could arrange with his creditors," with the implication, of course, that such was the purpose of conveying it to Crawford.

However this may be, there is nothing in Foster's possession or presence at the mill or employment by Crawford inconsistent with good faith on the part of the purchaser. And so far as any of his declarations import the contrary, assuming that he has been correctly reported, they are easily accounted for, and are also contradicted by the admitted and controlling circumstances of the case.

The evidence as to whether Crawford also turned in Foster's three notes in part payment of this property is conflicting, but I think the weight of it is that he did.

Crawford and Foster both swear that in 1876 the mill firm of James H. Foster & Co.—the company being the brother, John Foster—dissolved, and James H. took the business, and agreed to pay the debts. At that time Crawford held three notes of J. H. Foster & Co., dated early in July, 1875, for an aggregate sum of \$12,593, with interest. The notes are produced, and their existence is satisfactorily established. On April

28, 1876, on a settlement with Crawford, Foster gave his two individual notes for the three company notes and interest, payable one day after date, with interest at 10 per centum per annum,—the one for \$8,605, and the other for \$5,325, or \$13,930 in the aggregate; and on September 12, 1878, Foster gave Crawford another note for \$3,000, payable one year after date, with like interest, for money then loaned him. On the first of these notes there is indorsed a payment of \$1,721 of interest, dated April 27, 1878, and on the second a like payment at the same date of \$1,065. On the third note there is an indorsement of \$350, dated June 19, 1882, which was afterwards canceled. No other payments appear to have been made on either of these notes prior to February 6, 1884, when it is claimed they were returned to Foster in part payment of this property. The notes are produced, and I think there is no doubt that they are genuine. There appears to have been a sufficient reason for their making. The old notes were partnership ones that James H. Foster had promised his brother to take up, which he did by giving his own in their place.

The contention of the plaintiff is that, admitting their genuineness, they were paid some time, but he cannot say when, before the transfer of the property, when they were fraudulently revived for the purpose of being made a part of the consideration of such transfer.

Both Foster and Crawford swear positively that the notes were due and unpaid, according to their face, at the time of the transfer, and that they constituted a part of the consideration therefor; and there is no direct evidence to the contrary. But there are some circumstances in the case which contradict them with more or less force.

It is very unusual that notes of this amount—\$16,930—are allowed by business men to go unpaid and unsecured for a period of 12 years, and that without the payment of interest for the last two-thirds of that time. Still, the matter is not so improbable as to prevent belief, when supported by the direct evidence of the parties.

On September 24, 1881, Crawford stated under oath, in writing, to the assessor of Linn county, that the notes then owned by him, and liable to taxation in the state, only amounted to \$5,500. On June 7, 1883, he made an affidavit to procure a decrease of his assessment for 1882, in which he stated that the gross amount of his "money, notes, and accounts" subject to taxation was only \$13,500.

Crawford's explanation of the apparent omission in both these statements of these three Foster notes is, there was an agreement between himself and Foster that on account of the interest on these notes being 10 per centum, instead of 12, the maximum allowed by law, the latter would pay the taxes thereon; that is, he would not deduct the amount from the value of his property assessed for taxation.

The explanation is open to the criticism that it is easily made and hard to contradict. But counsel says, if it is not true, the record of the assessments for the county will show it, at least negatively; and, as the plaintiff has not produced this evidence, as it was in his power to do, the presumption is that it would so far corroborate the testimony of the

defendants. At first blush this seems plausible; but if the fact is, as the plaintiff claims, these notes were paid, the record of the assessments would equally show that Foster did not deduct this indebtedness from his assessment; not for the reason given, but because it did not exist, at least from the time of such payment.

It may be admitted that a debtor and creditor may honestly make an agreement by which the former agrees not to deduct his indebtedness to the latter from the value of his property assessed for taxation, in consideration of which the creditor may honestly conclude that such indebtedness need not be returned by him for taxation as a credit liable thereto. Most persons are disposed to construe the law so as to keep out of the assessor's books as much as possible. But the law is otherwise, except in the case of a note secured by mortgage, since 1882; and the creditor, when called on to swear to the amount of credits belonging to him and subject to taxation in his hands, cannot lawfully or truthfully omit such credit from his return. But Crawford may have believed that the Foster notes held by him under the agreement stated were not liable to taxation *eo nomine*, because a tax on the value of the same was being paid by the debtor, as a condition of the credit. And therefore, while the failure of Crawford to return these notes for taxation is some evidence that they did not then exist as a legal obligation against Foster,—a living credit subject to taxation,—it is neither conclusive nor cogent on that point.

The defendant Goltra also testifies that in June, 1883, in talking with Crawford about Foster's financial condition, he said: "People think that Foster owes you considerable, or you have an interest in the mill;" when Crawford said: "He neither owes me, nor have I any interest in the mill." It is admitted he had no interest in the mill, and Crawford denies that he said Foster owed him nothing; and, all things considered, the denial at least neutralizes the assertion.

On this point my conclusion is that the weight of the evidence is that the three Foster notes in question were existing obligations between the parties at the date of the transfer; and that, whether this be so or not, the purchase was made in good faith, and for a valuable, and even adequate, consideration.

As to the purchase of the brick block by William Crawford, it is practically admitted that on July 20, 1867, William Crawford sold the mill in question to James H. and John Foster for \$16,000,—\$6,000 paid in cash, and \$10,000 by the five joint notes of the purchasers for \$2,000 each, payable in one, two, three, four, and five years, respectively, with interest at 10 per centum per annum, secured by a mortgage on the premises. The notes are in evidence, and each of them bears indorsements of payments of interest thereon, as follows: July 20, 1869, \$400; July 20, 1875, \$1,200; and April 15, 1881, \$478.75.

All the business of William Crawford with Foster appears to have been transacted by John A. Crawford as his agent.

Crawford and Foster testify that about July 20, 1883, these five notes were unpaid, except as shown by the indorsements thereon, when they were by consent of parties exchanged for six notes signed by James H.



Foster as J. H. Foster & Co.,—five of them being for \$2,000 each, payable in one, two, three, four, and five years from date, with interest at 8 per centum per annum, and the sixth one for \$6,000; the amount of the overdue interest on the first five notes, payable in one year from date, without interest. These notes are also in evidence, and it appears from the testimony of Crawford that the exchange was made later than July 20th, and the notes were antedated, so as to make the old ones expire with the even year. They also testify that at the date of the transfer the second series of notes were due and altogether unpaid, and were given up to Foster in consideration of the conveyance to William Crawford of the brick block in question. William Crawford also testifies to the same effect, so far as he knows. He says the first series of notes was unpaid when his brother John got them from him for the purpose of making the exchange, and that the second series was unpaid when, at his brother's suggestion, he gave them to him for the purpose of purchasing the property then conveyed to him by Foster.

This is an improbable statement in all its essential features, though it may be true. Men do not usually allow debts of this character to run on for years without payment of the principal and comparatively little interest. The principal reason for changing the notes, that the legal rate of interest had in the mean time (October 25, 1880) been reduced to 8 per centum, is not satisfactory or convincing. Notwithstanding the change in the law, parties might still contract for 10 per centum, and contracts made before the change were not affected by it. Hill's Code 1887, §§ 3587, 3592. The exchange was not made until nearly three years after the change in the law, which did not affect the notes in any way, and could not reasonably have been the cause of the exchange. But if the creditor thought 8 per centum was as much as the debtor ought to pay under the circumstances, there was nothing to prevent reducing it either by new notes or a memorandum on the old ones, without any reference to the change in the law, or what the law might allow him to take.

On September 17, 1881, William Crawford made oath before the assessor of Linn county, in writing, that the notes owned by him and liable to taxation in the state amounted in value to only \$5,000. John A. Crawford makes the same explanation of this matter that he did concerning the omission to return his own Foster notes for taxation,—that Foster was not to deduct the value of them from his assessment. But Foster says he did not make the deduction because Crawford did not charge him interest on the interest in arrear.

After the mortgage tax law of 1882 went into effect, in July, 1883, Mr. C. H. Stewart, the county clerk of Linn county, in looking over the record of mortgages for the purpose of making an abstract thereof for the assessor, found a mortgage of many years' standing from Foster to William Crawford on the mill property in question, given to secure the payment of a sum which then amounted, principal and interest, to about \$25,000. He naturally supposed from the circumstances that it had been satisfied, and at once wrote to Mr. William Crawford to call and make the proper credits or cancellation, or it would be returned to the

assessor as in force. Mr. Crawford called immediately, on July 31st, and said the mortgage had been paid several years before, and that he had no knowledge of it being on the books of record, and then and there canceled it.

Mr. Stewart also testified that, a few days before the conveyances in question were filed with him for record, John A. Crawford was in his office, and spoke of the transfer of Foster's property, and said he was compelled to take it to protect himself; that he had indorsed largely for Foster, and thought the notes were paid, but they had lately "turned up" in Portland; and that the purchase notes for the mill had been sold and indorsed away by him long before, and he thought they were paid, but now they had "turned up" also, in Portland, unpaid.

I attach much importance to the testimony of this witness. His official position implies public confidence in his integrity. He speaks cautiously, and a rigid cross-examination only served to confirm and strengthen his opening statement. He cannot well be mistaken about the interview with William Crawford, nor the cause nor consequence of it. They affected his official duties, and the record of the cancellation corresponds with his statement. The conversation with John A. Crawford was on a subject that was then attracting the attention of that public, and was calculated to make an impression on him. Moreover, the witness, unlike some of those who testify to other alleged conversations in this case, has no grievance against Foster or the Crawfords, but is disinterested, and apparently unprejudiced.

True, it now appears that these mill notes were not indorsed to any one; and if they had been, Crawford would have had no right to cancel the mortgage. But this false statement as to the cause and consideration of the transfer of this block is at least a badge of fraud. Bump, Fraud. Conv. 42. William Crawford's action in canceling the mortgage, with the declaration that it had been paid several years before, tells a different story.

John Conner, a banker of Albany, testifies that between 1878 and 1880—he thinks in 1879—Foster was owing him \$20,000 of borrowed money, when his cashier informed him that this Foster mortgage was on record uncanceled, whereupon he spoke to Foster on the subject, who replied "it had been paid and settled."

It may be admitted that this declaration of Foster's is not competent evidence in chief against William Crawford, to prove the payment of these notes. But Foster is introduced as a witness by Crawford to prove that the notes were not paid at the time of the transfer, and the plaintiff has a right to impeach him by evidence of contradictory statements made out of court. Mr. Conner is a disinterested witness, and no one questions that Foster made this statement to him. The effect of his testimony is to make Foster's now statement that the notes were unpaid of no effect. This leaves the fact of their non-payment at the time of the transfer to rest on the testimony of the Crawfords, which is also materially affected by their declarations and acts to the contrary out of court.

In addition to the evidence of these disinterested witnesses, the unpaid

creditors and others interested against the Crawfords, testify to various conversations with John A., which strongly imply, when they do not assent, that the mill notes were paid before the transfer.

Thomas I. Anderson testifies that 13 or 14 months before the transfer he asked John A. Crawford if he had anything to do with the mill, when he answered: "Oh, that is all settled. I have nothing more to do with the mill than you have."

It is true that John A. had then nothing to do with the mill in his own right, nor, so far as appears, ever had. But he always speaks in the first person when speaking for his brother William or of his affairs. And what he meant to say was "all settled," concerning this mill, unless it was William's mortgage thereon, is past finding out.

Thomas Monteith testifies that in the latter part of 1883 he had a conversation with John A., in which the latter said that Foster seemed to be getting along well. When he said, "Why don't he pay off the mortgage that has been on record, then, ever since he bought the mill?" John A. replied, "Why, that mortgage was paid off long ago."

There never was but one mortgage between Foster and the Crawfords, and that was the one to William on the mill, and unless these witnesses are false or mistaken, John A. said to them in effect if not in words, "these mill notes are paid off."

In answer to the testimony of all these witnesses concerning these statements of his, John A. Crawford, when called as a witness for himself, can only say, "I do not remember."

Another circumstance of which there is no doubt is entitled to some weight in this connection.

Between the giving of the mill notes in 1867 and the transfer in 1884, Foster expended \$40,000 on the mill property in repairs and improvements. He also built the brick block in question, which cost him probably not less than \$12,000, his dwelling-house and his share of the water-works. To my mind it is quite improbable that a person with this amount of money at his disposal would allow a mortgage, to secure a debt of \$10,000, to remain on his mill for 17 years. And it is equally improbable that William Crawford, or his other self, John A. Crawford, would allow the unpaid interest on such debt to accumulate to \$6,000, and then take a note for the amount without interest or security. Being unable to deny the cancellation of the mortgage, as stated by Stewart, the Crawfords offer in their testimony this explanation: It was done to avoid the operation of the mortgage tax law of 1882. In other words, they swear that, rather than pay the taxes on the mortgage, they released security for the debt; and this, notwithstanding the law of 1854 gave the mortgagee the right to pay the taxes on the whole interest in the land, and add the same to the mortgage, if not paid by Foster. *Dundee, etc., Co. v. School-Dist.*, 10 Sawy. 61, 19 Fed. Rep. 359, and 21 Fed. Rep. 151.

On the whole, my conclusion is that the mill notes were paid before the conveyance to William Crawford was made, and therefore it is voluntary,—without consideration. And, this being so, it is fraudulent as against the plaintiffs and others, the creditors of Foster, the grantor

therein. The decided weight of the evidence supports this conclusion.

And yet it may be that these notes were existing obligations between the parties thereto on February 6, 1884, and that all the acts and declarations of the Crawfords to the contrary are falsehoods and pretenses, spoken and acted for the selfish purpose of avoiding the payment of the taxes thereon; but, if so, they have been ensnared in their own net, and cannot complain that the court has taken them at their own word.

Some question is made by counsel for the Crawfords as to the right of the plaintiff to maintain this suit. The testimony is satisfactory—indeed there is no room for doubt about it—that Sibson, Quackenbush & Co. and Noon & Co. sold and assigned their respective judgments to the plaintiff absolutely and for a valuable consideration,—\$5,000 in the first case, and \$500 in the second,—through the agent of the plaintiff's attorney in fact, William S. Ladd. And if Ladd & Tilton advanced him the money wherewith to make the purchase, as suggested in the argument, of which there is no proof, it would make no difference. The only question to be considered is, did the judgment creditors sell and assign the judgments in question absolutely, without any trust or reservation in their own favor? In other words, was the sale a real, and not a fictitious, one? As I have said, the evidence is satisfactory on this point. The sale was absolute and unqualified. This being so, it is altogether immaterial that the judgment creditors may have been induced to make this sale as they did, because they feared they could not succeed in enforcing the judgments in the state court,—the tribunal of the defendants,—or that the plaintiff made the purchase because, being a citizen of Illinois, he thought he could enforce the same against the property of the judgment debtor in the hands of the Crawfords, by a suit in this court,—the interstate tribunal,—and that he intended to do so when he bought them.

The motive with which a party purchases property or a claim has nothing to do with his right to maintain an action thereon or thereabout in this court, any more than in a state court. *McDonald v. Smalley*, 1 Pet. 623; *Barney v. Baltimore City*, 6 Wall. 288; *Collinson v. Jackson*, 8 Sawy. 363, 14 Fed. Rep. 305. The conveyances to John A. Crawford and Ashby Pearce being valid as against the plaintiff, the bill will be dismissed as to them, with costs.

The conveyance to William Crawford, being void as against creditors, will be declared fraudulent, and set aside, and the property sold by the master, and the proceeds applied, first, on the judgments of the plaintiff and his costs and disbursements in this suit, and the remainder, if any, *pro rata* on the judgments and costs and disbursements in this suit of Walden, Baltimore, and Liles. The decree will also provide that, if the proceeds of the sale are not sufficient to pay the judgments of the plaintiff and his costs and disbursements, execution may issue against the property of William Crawford for the remainder.

The judgments of the plaintiff are prior in time to those of Baltimore and Liles, but subsequent to that of Walden. Neither of the judgments, however, are liens on the property in question, the title of the judgment

debtor thereto having passed to William Crawford before the judgments were given or docketed. There was no interest of Foster's left in the property for the judgments to operate on. The conveyance was valid between the parties thereto. The right of the creditors to have it set aside for fraud as to them was all that was left. The plaintiff being the first creditor to assert this right, by the filing of his bill, then acquired a prior right to whatever may be made out of the property of the suit. *Burt v. Keyes*, 1 Flip. 72; Wait, Fraud. Conv. § 392; *In re Estes*, 6 Sawy. 459, 3 Fed. Rep. 134, and cases there cited.

In the latter case, after a careful examination of the subject, I held that under the law of this state the lien of a judgment only attached to property belonging to the judgment debtor at the date of its docketing, and that a conveyance, though void as to creditors who might assert their right against it, was valid between the parties, and passed all the estate of the grantor in the premises to the grantee; and therefore the lien of a subsequent judgment does not attach to the property.

### DAVIS v. CHAPMAN.

(Circuit Court, D. Indiana. August 18, 1888.)

#### 1. TENANCY IN COMMON—RIGHTS OF CO-TENANTS—ACCOUNTING—MORTGAGE PURCHASER ON FORECLOSURE.

The co-tenancy of a purchaser at a sale on foreclosure of the interest of a tenant in common in real estate commences, for the purpose of an accounting between the tenants, from the date of the deed, and does not relate back to the date of the mortgage, and the accounting should embrace no charge for repairs or improvements made or taxes paid by either tenant prior to the date of the deed.

#### 2. SAME—USE AND OCCUPATION—REPAIRS—SET-OFF.

While one tenant in common cannot recover of another for mere occupation of the premises, yet such occupation may be considered and made an equitable set-off against the occupying tenant's claim for repairs, which, in the absence of an agreement, is likewise not the subject of an action between co-tenants.

**In Equity.** Action for partition and accounting.

The action is for partition of real estate, and for an accounting in respect to rents and profits. The defendant claims a set-off for repairs and improvements and for taxes paid. The title of the complainant has been established in an action at law in this court, and for the history of that title, and the disputes and litigation of the parties over it, reference is made to the decision in 24 Fed. Rep. 674. Upon the matters now in question the master says:

"This suit is the last chapter in the litigation that has been in progress between the parties in different courts and in various forms for ten or eleven years; complainant making claim to the ownership of the undivided half of certain real estate (hotel and livery stable property) in the city of Warsaw, Kosciusko county, this state. Chapman, the defendant, until the May term

of this court, 1885, denied the title of the complainant; but this court at that time, in an ejectment suit on the law side of the court, gave judgment against him, and confirmed plaintiff's title as owner of the undivided half of the property. In its present form, this is a suit for partition and sale, with a prayer that defendant account to complainant for the half of the rents and profits of the real estate during the period of her ownership. The bill as originally filed in this case was of much wider scope, and contains a history of the efforts of the defendant, Chapman, to secure title to the plaintiff's undivided half of the real estate by means of tax deeds, the foreclosure of mortgages, and various other legal proceedings, which have enabled the defendant to retain the possession of the premises, and which litigation has subjected the complainant to great expense in defending her title and enforcing her rights. The evidence shows, in the master's opinion, that the efforts of the defendant to defeat the title of Mrs. Davis do not exhibit him in the light of a man who was seeking in good faith to assert and maintain his legal rights, but rather as a litigant who was doing everything in his power to vex and harass her by futile but expensive lawsuits. It was said at the argument, for the defendant, that in the present proceeding these considerations could have no proper weight in the matter of accounting; that, the judgment of this court in the ejectment suit having settled and confirmed Mrs. Davis' title, there remained nothing to be done but an examination of the accounts of the defendant, with a view of ascertaining the amount of rents with which he should be chargeable, and the deductions or credits to be made in his favor on account of necessary and proper repairs and taxes. While this may be true, the master thinks that, in view of the fact that the defendant has been in the wrongful possession of the complainant's property for so many years, he should be charged with the full value of the rentals coming to his co-tenant, rather than the amount he charges himself with as having been actually received therefor. It appears in the evidence that the defendant was the owner of some furniture and other personal property which is used in the hotel. In making his contracts with tenants he would apportion the amount, allowing so much for the real estate, in which the plaintiff had half interest, and so much for the use of the furniture, of which he was the sole owner. In the master's judgment, these apportionments were inequitable. The property is a three-story brick hotel and basement, sixty-six feet front, on one of the principal business streets of the city of Warsaw. In addition to the hotel, there is a stable adjoining, which is a part of the premises in which the plaintiff has an undivided half interest. The defendant admits that from the stable he received in rents from January 22, 1877, to March 1, 1888, some \$1,250; that for the house and furniture, and for the good-will of the house, etc., he received from August 1, 1877, to January 29, 1885, the sum of \$8,665; making a total of \$9,915, according to his own showing. The defendant occupied the hotel himself from January 22, 1877, to August 1, 1877,—seven months. He was also in the possession of the property from January 30, 1885, to June 15, 1885, the date at which the judgment in ejectment was rendered in this court. From that time he has been in the exclusive occupancy of the premises. The description of the furniture, as it appears in the depositions of Mr. George W. Green, Mrs. Jennie Reed, and Mr. and Mrs. Newberger, indicates that it was inferior in quality, and of no great value. The record shows that the defendant himself bought it at a chattel mortgage foreclosure sale in 1876 for \$900, which was probably all it was worth. Mr. Green, who rented the hotel and furniture from August 1, 1877, to October 1, 1881, for \$90 per month, after speaking of the character and condition of the furniture, says it was not worth over \$500, and that the fair rental value of it was from \$30 to \$35 a month, which certainly is a fair and liberal estimate. Mrs. Jennie Reed rented the hotel from October 3, 1881, to May 3, 1882. She was to pay \$1,000 for the hotel and \$500 per year for the fur-

niture. At that time she says that Chapman only wanted to sell the entire furniture for \$600 or \$700. He finally asked her if she would give \$500 for it. She says she told him she would give \$300 a year for it, but she does not think it worth over \$50 a year rental. Mr. and Mrs. Newberger rented the house from May 3, 1882, to January 30, 1885. They were to pay \$1,000 per year and \$500 for the furniture. Mr. Newberger says that Chapman would not rent the hotel unless he agreed to take the furniture. He also says that the fair cash value of the furniture at that time would not exceed \$250, and that \$50 a year would be full rental value for it. Mrs. Newberger says the furniture was not worth over \$300. The effect of this evidence is to show that in dealing with this property Mr. Chapman was taking much better care of his interests in what belonged to him exclusively than he was of the joint property which was owned by himself and the plaintiff. In view of all the facts, I find and report that the defendant should be charged with the rental value of the hotel proper from January 27, 1877, to April 1, 1888, a period of eleven years, two months, and eight days. At the rate of \$75 per month, this would amount to \$10,070. I report and find that he should be disallowed for his claim for repairs put upon the property prior to 1877, which repairs amounted to the sum of \$2,595. Taking this from the total repairs proved by him, which is \$5,223.67, would leave a balance of repairs, for which he is entitled to a credit, of \$2,628.67. In addition to this, the defendant Chapman paid taxes from time to time amounting to \$1,175.37. This, added to the repairs for which he should be allowed, makes the total of credits in his favor, \$3,804.04. Subtracting this amount from the \$10,070 rentals, leaves a balance of rent for the hotel property, \$6,265.96. He should account to the complainant for one-half of this, which is \$3,132.98. In addition to the rentals from the hotel, Col. Chapman received \$1,250 rent for the stable. Half of this amount, \$625, should be added to the half of the hotel rentals, which makes the amount due Mrs. Davis on an accounting, allowing Col. Chapman for repairs and taxes as indicated above, the sum of \$3,757.98. In this computation no account has been taken of interest either way. The master has preferred to take the short method of allowing the interest on repairs to offset interest on rents, without attempting to arrive at the exact figures by making monthly or annual rests. I report and find that out of the defendant's share of the proceeds of the sale of the real estate the complainant be allowed the sum of \$3,757.98."

Both parties have excepted to the amount of this allowance, and to the calculations by which it was reached. The plaintiff demands rents from January 22, 1877, the date of her deed; and insists that the demands of the defendant for improvements and repairs, and for taxes paid before that date, are merged and extinguished in his title as sole owner of the entire property, acquired November 15, 1876, (or, if the doctrine of relation to the date of purchase be applied, November 15, 1875;) and that for the time since that date he should be allowed nothing, because wrongfully and in bad faith he had denied her rights in the property, had excluded her from possession, and had subjected her to the expense of vexatious litigation.

*J. M. Van Fleet and Hill & Lamb*, for complainant.

No case in the books, either at law or in equity, holds that a willful and perverse wrong-doer can recover or be allowed anything for improvements or any apportionment whatever for rents incurred by way of improvements. The counsel will cite none. Many cases can be found holding that where one tenant in common, supposing that he owned the whole, without notice of adverse claims, has been allowed in equity a deduction for the rents occasioned

by his improvements, as well as the present value of the improvements at the time of the trial. That doctrine of equity has been codified by the fourth subdivision of section 1076, Rev. St. 1881. This necessarily implies that one not within the statute shall be allowed no reductions whatever. *Carver v. Coffman*, (Ind.) 10 N. E. Rep. 567; *Mining Co. v. Sydnor*, 39 Wis. 600; *Vannoy v. Blessing*, 36 Ind. 349; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Patterson v. Brown*, 32 N. Y. 81; *Hilgenberg v. Rhodes*, 12 N. E. Rep. 149; *Osborn v. Storms*, 65 Ind. 325; *Ethel v. Batchelder*, 90 Ind. 525; *Walker v. Quigg*, 6 Watts, 87; *Shand v. Hanley*, 71 N. Y. 319; *Haslett v. Crain*, 85 Ill. 129; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Austin v. Barrett*, 44 Iowa, 488, and cases cited.

*Harrison, Miller & Elam*, for defendant.

We insist that the only penalty the law inflicts upon the defendant for the denial of complainant's title is the costs of the litigation; that this question of an accounting can only arise between tenants in common, where one has excluded the other and taken sole possession; and that the fact that he denied his co-tenant's title, as well as his right to possession, does not in any degree influence the equitable principles upon which the accounting is to be made. We state these propositions, with some cases in support of them: *First*. For the time since the defendant invited the complainant to share the possession and occupancy with him, or to unite with him in leasing the property, she can recover no rents; the defendant having received none. *Second*. For the time when the property was occupied by defendant himself, under a claim of an exclusive right, the complainant might recover the one-half of the reasonable rental value of the property, if she had offered any evidence of the rental value; but she did not. The evidence is that it could not be rented, and was kept going by defendant at a loss. *Third*. At common law one tenant in common cannot recover of another for mere occupation at all; and by statute, when there has not been an actual exclusion, there can be a recovery only for actual receipts of money, etc. Our statute, section 228, simply takes place of statute of 16 Anne, c. 4. The language is the same. The word "received" is the same in both, and is adopted with a well-settled construction in England and America. *Fourth*. In the absence of evidence of rental value, the accounting must proceed by charging the defendant only with the money actually received by him for rents. *Fifth*. Against this he is entitled to be credited with the cost of such repairs and improvements as were necessary to the beneficial use of the property, and with any taxes paid by him. The complainant cannot receive the increased rental produced by the improvements, and refuse to share their cost. *Pickering v. Pickering*, (N. H.) 3 Atl. Rep. 744, and cases cited; 1 Washb. Real Prop. 661, 662; *Pico v. Columbet*, 12 Cal. 414; *Ford v. Knapp*, (N. Y.) 6 N. E. Rep. 283; *Alexander v. Ellison*, 79 Ky. 148; *Tyner v. Fenner*, 4 Lea, 469; *Osborn v. Osborn*, 62 Tex. 495.

WOODS, J., (after stating the facts as above.) In respect to the title of the parties it is enough to restate briefly here, what is shown more at large in the report of the case at law; that in 1873 Chapman and Charles Ford were equal co-tenants of the property, and continued so until November 15, 1876, (erroneously stated "1875" at page 75 of the report,) when by force of certain judicial sales, the title of Ford was transferred to Chapman, terminating the previous co-tenancy and making Chapman the sole owner of the property, subject to the mortgage of July 2, 1875, made by Ford upon his half interest to Nelson Davis, upon foreclosure of which Mrs. Davis purchased, January 22, 1876, and on January 22,



1877, on default of redemption by Chapman or any other, received the sheriff's deed of that date, whereby she became and has continued to be co-tenant with the defendant, but without recognition by him of her rights, until since the date of the judgment in the case at law. The important question arises here, whether, for the purpose of the accounting between the parties, this co-tenancy shall be regarded as beginning with the execution of the deed to the plaintiff, or by relation shall be carried back to the date of the mortgage, or at least to the date of the sale made upon foreclosure of the mortgage, from which the plaintiff's title is derived. The plaintiff claimed and has been allowed nothing for rent before the date of her deed; but the defendant insists upon bringing into the account his expenditures for repairs and taxes before that time, including the taxes of 1873-74, for which the defendant purchased the property at the tax sale of February, 1875. Rejecting the charges for repairs, the master allowed those for taxes paid, but by mistake treated the amounts allowed as having been paid upon the entire property, instead of the half, as was the fact.

In support of the defendant's claim in this respect, his counsel contend that by force of the doctrine of relation the co-tenancy of the parties should be deemed to have commenced, if not with the execution of the mortgage, at latest on the day of the sale to the plaintiff on the decree of foreclosure of the mortgage. This proposition seems to me inadmissible. Without doubt the title of a purchaser at judicial sale relates to the date of sale, and, if the sale be upon foreclosure of a mortgage, to the date of the mortgage; but does it follow, upon the sale of an undivided interest, that the co-tenancy consummated by the conveyance must also be deemed, like the title, to commence with "the original" of the "divers acts concurrent to make the conveyance?" If so, then Mrs. Davis and Chapman must be held to have been co-tenants since July 2, 1875, (for the relation goes as certainly to the date of the mortgage as of the sale,) notwithstanding both in law and fact she actually had neither title nor right of possession until she received her deed, and until November, 1875, Ford, in common with Chapman, had the title and the right of possession, to her exclusion. To apply the doctrine of relation to these facts in the manner proposed, might be characterized as an attempt to "make that not to have been which was," as well as to make that to have been which never was, and which, by the will of either party, without the consent of the other at the time, or even by the will of both parties without the consent of Ford, could not have been. But if the co-tenancy during this time or any part of the time were conceded, still, in order to hold Chapman accountable to Mrs. Davis for the use or occupation of the property during such time, (as a substantive and direct cause of action,) it would be necessary to add to the fiction of co-tenancy the further assumption of an ouster, or wrongful denial of the right of the plaintiff in the premises by the defendant. But it is a recognized limitation upon the doctrine of relation that it shall not be applied in such way as to make that tortious which, when done, was lawful. 13 Washb. Real Prop. 277. *Frost v. Beekman*, 1 Johns. Ch. 297. The only precedent claimed

for the proposed application of the doctrine is the case of *Ford v. Knapp*, 6 N. E. Rep. 283. In that case the owners of an undivided half interest in a mill bought at execution sale the other half, and, being in possession, proceeded during the period of 15 months allowed by the law of New York for redemption from such sales to make necessary repairs and alterations; but before the end of that period creditors of the execution debtor redeemed from the sale, and, having acquired the title of the debtor, sued for partition; and, in determining whether there should be compensation for the repairs so made out of the proceeds of the sale of the mill ordered in the suit for partition, the court held that "by relation, and through their redemption," the creditors became "vested with the right of the debtor from the date of the sale, and thereby tenants in common with the defendants from that date, by relation, or vested with the rights of such a co-tenant." It will be seen, on reference to the opinion, that the court put out of view as immaterial the execution sale, which, it is to be observed, never ripened into a conveyance, and decided the case as if it had arisen between the original co-tenants, whose relation as such had remained undisturbed. The case would have been very different, and essentially like this one, if, no redemption from the execution sale having been effected, the purchasers had become the sole owners of the property, and afterwards, by the enforcement of some paramount lien, had lost the half interest so acquired, and, in a suit for partition thereafter brought, had sought compensation for repairs made during or before the time of their sole ownership. So, too, on the record presented here, if the mortgage to Davis had not been made, or no foreclosure or sale had been had under it, and if Ford or any creditor of Ford had redeemed from the sales to Chapman, and then sought partition, and Chapman in that proceeding had brought forward his claim for repairs made before such redemption, the question would have been the same as in the case cited, but manifestly and broadly different from the question presented upon the facts as they are in this case. By making repairs and improvements the defendant certainly acquired no lien upon the property itself, and without such lien there seems to be no ground for enforcing his demand for compensation against the purchaser under the mortgage.

The court is of the opinion that the accounting should embrace no charge on either side for matter which occurred before January 22, 1877; and, as this includes taxes accrued before that time, the error of the master in that respect is reduced to \$212.43.

The finding of the master in respect to the monthly rental value of the hotel is sufficiently well supported by the proof of prices obtained by the defendant of lessees of the property, and in some measure by other evidence; and if for any part of the time this estimate could be deemed high, the overcharge has been well compensated by the master's disposition of the subject of interest, which, computed in the ordinary way, would have added a considerable sum to the amount of the finding.

The proposition that at common law one tenant in common cannot recover of another for mere occupation is recognized, and, under the maxim that equity follows the law, I suppose the plaintiff ought not in this ac-

tion to recover anything for such mere use or occupation by the defendant; that is to say, for the time after August, 1885, when, the action at law having been decided, the defendant acknowledged the plaintiff's title and invited her to share in the possession and management of the property. But while such use and occupation may not be made the direct ground of recovery, it does not follow that it may not be considered in connection with, and made an equitable set-off against, the defendant's claim for repairs, which, at common law, in the absence of agreement, are likewise not the subject of an action between co-tenants. The same principle which admits one of these claims into the computation opens the door to the other as a set-off against the first. The case of *Hyatt v. Cochran*, 85 Ind. 231, affords a close analogy. That was an action for rents and profits of real estate under a statute which permitted a recovery for six years only. The defendant claimed an allowance for repairs, and the plaintiff was permitted to bring forward in set-off a demand for rents accrued more than six years before the commencement of the action.

The attitude and conduct of the defendant in the case have shown him throughout a determined and persistent litigant, and the result has shown him to have been in the wrong; but in the judgment of the court, if the subject of *bona fides* be within the scope of the present inquiry, there is not such proof of bad faith on the part of the defendant as to exclude his claims from all equitable cognizance. Upon a careful consideration of the case in all its aspects, as presented by counsel, the court is not able to discover a basis of adjustment different from that adopted by the master, which it could regard as more consonant with equity and good conscience; and the amount reported, reduced by \$212.43, that is to say, \$3,545.55, to be paid by defendant to complainant, is confirmed, and all exceptions to the report inconsistent with this conclusion are overruled. Decree and judgment accordingly.

# INVESTMENT CO. OF PHILADELPHIA v. OHIO & N. W. R. Co. et al.

(Circuit Court, S. D. Ohio, W. D. August 17, 1888.)

## RAILROAD COMPANIES—INSOLVENCY AND RECEIVERS—AUTHORITY TO ISSUE CERTIFICATES.

The petition of a receiver of an insolvent railroad company for authority to borrow \$347,577.18, and issue his certificates therefor, specified that \$111,904 of the amount was to be used in completing a portion of the road and widening its gauge, \$35,000 for purchasing and laying track over another portion already graded and bridged at an expense of \$49,000; \$47,243.18 to pay claims for material furnished, etc., which were not a lien on the road; \$20,000 to reimburse bondholders for advances to meet arrearages of wages and avert a strike; \$100,000 to purchase leased rolling stock, for which the company paid an annual rental of \$28,800, the lessors also canceling a claim for \$7,000 unpaid rent, if the purchase was made; \$4,000 to relay a line of track on a connecting road, and thus cancel a debt of \$8,000 due that road, and secure enough additional business to pay the cost in three months; and \$29,-

430 to make final payment on a valuable tract of real estate. Holders of \$943,000 of first mortgage bonds and \$293,000 of second mortgage bonds consented to the issuance of the certificates, the remaining holders of \$257,000 first mortgage bonds and \$219,000 second mortgage bonds not consenting, and a portion of them, together with other lienholders, objecting. *Held* that, it being doubtful whether the improvements would add to the selling price of the road, the petition would be denied absolutely as to the items of \$35,000 and of \$20,000, and as to the item of \$47,243.18, except upon consent of all lienholders; but that certificates would be issued for the remaining items, if desired by the consenting bondholders, with leave thereafter to petition to have the same made a charge on the non-consenting bondholders.

In Equity. Petition of receiver to borrow money and issue his certificates therefor.

*Howard G. Hollister and John G. Johnson*, for complainant.

*Harmon, Colston, Goldsmith & Hoadly, C. B. Matthews, and Healy & Brannan*, for respondents.

*Ramsey, Maxwell & Ramsey*, for receiver.

SAGE, J. This cause is before the court upon the petition of the receiver, for authority to borrow \$347,577.18, and to issue his certificates therefor. Before referring in detail to the petition, it will be necessary to state the condition of the defendant, the Ohio & Northwestern Railroad Company, and that of its road, as disclosed by the bill, the petition, and by other papers on file. The precise date of the organization of the railroad company does not appear, but it must be within about two years. The first mortgage is dated 13th September, 1886. The capital stock is \$3,500,000. There are outstanding \$1,200,000 first mortgage bonds, and \$512,000 second mortgage bonds. The company is hopelessly insolvent, has never paid any interest on its bonded debt, is wholly without credit, and can raise no money from any source excepting its earnings, which are not, and for more than six months last past have not been sufficient, to pay its operating expenses. Its line of road is 106 miles in length, extending from Idlewild, a station on the Cincinnati, Lebanon & Northern Railroad, about 3 miles from Cincinnati, to Portsmouth, Scioto county, Ohio; but its track is laid only to Sciotoville, 5½ miles out from Portsmouth, so that the road does not reach either to Cincinnati or to Portsmouth, the terminal points. It has, however, for some time had, at heavy cost, an entrance to Cincinnati over the tracks of the Little Miami Railroad, from Batavia Junction, a distance of some nine miles; and into Portsmouth, from Sciotoville, over the tracks of the Scioto Valley Railroad. It owns no equipment, locomotives, or cars, but is operated by leased rolling stock throughout, at charges for rentals too onerous for the company to bear, or the receiver to pay. A portion of its line, extending eastwardly from Idlewild 43 miles to Sardinia, (perhaps beyond,—the papers on file do not show,) was originally the Cincinnati & Eastern Railroad, a narrow-gauge road, and was purchased at judicial sale made by order of the court of common pleas of Clinton county, Ohio. That sale was confirmed February 3, 1887; the order reserving a first lien for the deferred purchase money, of which \$56,099.50 remains unpaid. The track, excepting six miles upon this portion of the line, has been widened to

standard gauge by relaying the narrow-gauge rails, which are old, rapidly wearing out, and of too light weight for use with heavy freight engines; trestles need strengthening, and generally the track is in so bad a condition as to be unsafe. Other particulars relating to the condition of the road will be referred to in considering the receiver's petition.

The receiver itemizes his petition as follows: (1) \$111,904 to meet the expense of purchasing and laying steel rails of sufficient weight, of changing six miles of narrow gauge to standard gauge, and of strengthening trestles, between Idlewild and Sardinia. (2) \$35,000 for rails and ties, and for laying the track between Sciotoville and Portsmouth. All the other work, including grading and bridging, has been done at an expense of \$49,000. Unless completed, the right of way of this portion of the line will be forfeited, and the labor and material already expended will be lost to the company; whereas upon its completion the company will receive, under an arrangement already made, \$3,000 per annum from the Scioto Valley Railroad Company, for its joint use, and will have free access to certain fire-brick works, from which the company now derives a large share of its business, but is compelled to pay 40 per cent. of its freight rate from Sciotoville to Cincinnati for use of track between Sciotoville and Portsmouth, and from \$2 to \$2.50 switching charges per car for all business out of Portsmouth proper. (3) The receiver asks for \$47,243.18 wherewith to cash a list of unpaid vouchers for claims against the company, none of which are liens upon the road. Twenty thousand dollars of these claims are timber and ties furnished the company by parties who were induced by promises of payment to omit the steps necessary to secure statutory liens. The residue of the claims are in large part in favor of regular shippers, whose good-will is valuable, whose hostility would be injurious to the road. (4) \$20,000 to reimburse large bondholders, who advanced that sum to meet arrearages of wages to employes, in December, 1887, and January, 1888, when a strike was threatened, and immediate payment was an absolute necessity. (5) \$100,000 for the purchase of the locomotives and cars now used by the receiver in operating the road, and constituting its entire equipment. The annual rental of this equipment is \$28,800. Allowing 6 per cent. interest on the purchase price, which is actual cost and interest, the saving to the company would be \$22,800 per annum. The lessors are willing also to cancel their claims for unpaid rentals amounting, approximately, to \$7,000. (6) \$4,000 to cover the cost of relaying on the line of the Columbus & Maysville Railroad, which gives to the Ohio & Northwestern a connection with and traffic from Hillsboro, the perfect 42-pound rail taken up from the track of the Ohio & Northwestern. The result will be to cancel a debt of \$8,000 due to the Columbus & Maysville Company, and give the Ohio & Northwestern Railroad Company enough additional business to pay the cost of the work in three months. (7) \$29,430, the price of a piece of land at Red Bank, on the line of defendant company's road, six miles from Idlewild, purchased by the company; the cash payment of \$9,810 for which was advanced to the company, and its note therefor taken. The company's line passes over this

tract, which is mortgaged for the deferred payments. The land is especially valuable because of its containing a deposit of gravel available, not only for the uses of the road, but for sale. The receiver enumerates advantages and benefits which, in his opinion, will result to the company and its creditors, by way of curtailing expenses, increasing business, enlarging receipts, and accumulating good-will; but it is unnecessary to particularize them. The receiver files with his petition the consent to the issue of the certificates asked for of the holders of \$943,000 of the first mortgage bonds, and of \$293,000 second mortgage bonds; leaving \$257,000 first mortgage bonds and \$219,000 second mortgage bonds for which no consents are filed. No consents of lienholders other than bondholders are filed, and it does not appear from the bill or petition whether there are any such. The petition was filed Saturday, August 3d, and presented for allowance Wednesday, August 8th, to me, at Asheville, N. C. How many of the non-consenting bondholders, or of other lienholders had notice, does not appear, but none of them were present in person or by counsel. On the evening of the day when the application was presented, the Mercantile Trust Company of New York city, trustee of the first mortgage, telegraphed that it had been advised by telegram of the application, and that it objected to any order which should affect rights of bondholders not joining in the petition. Letters also were received, one dated at Cincinnati, August 6th, from counsel representing parties there resident holding \$47,500 first mortgage bonds and \$97,000 second mortgage bonds, who object to the issuing of certificates. They complain that they only learned incidentally, the evening of the day previous, the time and place of the application, to which they object vigorously, stating that "the object of the application seems to be to enter upon a general plan or scheme of enlargement of the property," and that "the only part of the application that could by any possibility be an exception to the above objection taken by us is for the laying of new rails between Sardinia and Batavia Junction." There is also presented on behalf of contractors for building a part of the company's line of road, who object to the issue of certificates, and who claim to have a statutory lien for a portion of the amount due them for work done, an affidavit dated August 11th, setting forth, among other things, that \$2,000,000 only of stock have been issued; that not a dollar has been received on stock subscriptions; and that the entire issue was parceled out between the president and board of directors, who paid nothing for it, and who still hold it. Whatever the fact may be, it cannot be allowed to prejudice bondholders or claimants who it is not even suggested were parties to it. The condition of the company and of the road, which has been only outlined in this opinion, from papers on file, strongly indicates, however, that, if the stock subscriptions have been paid, neither the money derived from that source, nor that from the sale or hypothecation of bonds, has been applied to the road, or to the proper purposes of the company to any greater extent than it was possible to avoid.

The power of United States courts to authorize the issue of receiver's certificates, and to make them a charge upon railroads and their prop-

erty, superior to the lien of mortgages and statutory liens, has been so frequently affirmed by the supreme court of the United States that it is not open to be questioned. But, as was said by the supreme court in *Wallace v. Loomis*, 97 U. S. 146: "It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the funds." In some instances certificates for very large amounts have been authorized. In *Kennedy v. Railroad Co.*, 2 Dill. 448, the receiver was authorized to borrow \$5,000,000, and issue certificates therefor, which were made the first lien on the road and lands of the company. But that was done at the instance of bondholders, to enable the receiver to complete the unfinished portion of the road, and prevent a valuable land grant to the company, which was the principal security to the bondholders, from lapsing. The total length of the line of the road was 700 miles, the land grant was of 10 sections to the mile, and it was admitted or shown that the average value of the lands was six dollars per acre. That was a case where there was a morally certain outcome for the road upon its completion. But what have we in the case before the court? A wrecked road, irretrievably insolvent. Its business is altogether local; and its future, even if it be put in complete running order, and furnished with an equipment of its own, altogether problematical. No certain prediction can be made. Apparently, the only thing to be done for the interest of the bondholders, whose rights are vested, and to be fully protected by the court, is to sell the road, and distribute the proceeds. If the court authorizes certificates to be issued and made a lien upon the railroad superior to the mortgages, for the purchase and laying of steel rails, for the purchase of equipment, and for the completion of the road, the result may be to cause those things to be done at the expense and to the detriment of the bond and lien holders, and for the benefit of the purchasers, or of a syndicate holding a majority in amount of the bonds and liens, having peculiar advantages as bidders, and intending to become purchasers at the sale; for it rarely occurs that improvements and betterments add to the salable value of the road anything near their cost. In this case the court cannot say that they would at all increase the bids at the sale, which, in the condition of the railroad company and of the road, is the proper test. The showing in favor of the second item of the receiver's petition, relating to the completion of the road between Sciotoville and Portsmouth, made a strong impression, at the time, upon my mind, that for that purpose certificates ought to be issued; but subsequent examination led to the conclusion that it was extremely doubtful whether, if that work were done, it would add a dollar to the selling price of the road. Moreover, objection has been made to that item since the presentation of the petition, upon the ground that the Scioto extension is entirely problematical, and that there is no certainty that the Scioto Valley Railroad Company will rent the property. That company's road is now in the possession of a receiver, who, it is reported, has taken possession of that property. The fourth item of the receiver's petition is altogether inadmissible. The receiver has no interest in it. It is his business to represent all the bond-

holders and all the lienholders, and not one or two against the others. If the parties interested wish to have that claim considered, they will have to apply for leave to file an intervening petition. The third item, relating to unpaid vouchers, and amounting to \$47,243.18, is one for which the court will not, without the consent of all the bond and lienholders, allow certificates. Two vouchers of the list will be rejected absolutely, as the court is at present advised. They amount to \$2,241.42, and are for the services and expenses of the president of the Ohio & Northwestern Railroad Company, up to June 14, 1888. As for all the remaining items, under existing circumstances, the presentation of the petition having been practically *ex parte*, some bondholders and lienholders and the trustee under the first mortgage objecting, others not notified, and none present, or having had sufficient opportunity to be heard, the application for leave to borrow money and issue certificates to be made a charge upon the road is denied. This is the conclusion of the court upon the merits also; but, inasmuch as the holders of \$943,000 first mortgage bonds, and of \$293,000 second mortgage bonds, have by their consents on file signified their confidence that the granting of the receiver's petition will be advantageous to the bond and lien holders, the court will, if they desire it, authorize the issue of certificates, excepting the second item, and the two vouchers of the fourth item, which have been specified as absolutely rejected, and make them payable as prayed in the petition, excepting that they shall not be a charge upon the interest, or affect the lien of the non-consenting bond and lien holders. The consents on file are not sufficient; but upon the filing of consents to the issue of certificates, as above suggested, the order will be made. The court will also reserve to the consenting bondholders the right hereafter, when the books of the company shall be accessible for thorough investigation, and all interested shall have due notice and opportunity to be heard, to move to enlarge the order so as to charge also the non-consenting bond and lien holders. But that there may be no misapprehension, it is to be distinctly understood that the showing must be so strong as to make it quite clear to the court that the salable value of the road is so increased by the improvements and betterments as to make it equitable to require the non-consenting bond and lien holders to pay their ratable proportion of the cost.



PRESTON *et al.* v. CINCINNATI, C. & H. V. R. Co. *et al.*

(Circuit Court, S. D. Ohio, W. D. August 28, 1888.)

## 1. CORPORATIONS—STOCKHOLDERS—LIABILITY TO CREDITORS—FRAUD.

Defendant H., being the owner of a railroad, organized a company to whose stock he was the only actual subscriber, some shares being issued to others at his instance, and sold his road to the company at a price about 15 times its value, taking in payment the stock and bonds of the company. To pay a debt he owed complainants, H. sold them a portion of the bonds, amounting to about three times the value of the road, upon which bonds judgment was rendered against the company. Complainants had refused to receive the road itself, or the capital stock, in payment of their debt, and the sole object of the organization of the company was to make use of the road in the payment of the debt; but whether complainants knew that fact was doubtful. *Held*, that the stockholders were liable, respectively, for the payment of said judgment, to the amount of their subscriptions, in spite of a provision in said bonds that no stockholder should be individually liable therefor.

## 2. GAMING—GAMBLING CONTRACTS—EVIDENCE.

Evidence that an alleged indebtedness was a balance resulting from dealings on the board of trade in margins on wheat is not sufficient to prove the transaction a gambling one.

In Equity. Creditors' bill against stockholders.

Bill in equity by Josiah W. Preston and others against the Cincinnati, Columbus & Hocking Valley Railway Company, and E. L. Harper and others, stockholders of said company, to compel the payment by the stockholders of their subscriptions, and to apply the same to the satisfaction of a judgment in favor of the complainants against said company.

*Francis A. Riddle, Boyce & Boyd, Paxton & Warrington, and Otto Gresham*, for complainants.

*Jordan & Jordan and Taft & Lloyd*, for respondents.

SAGE, J. This is a creditors' bill to subject the amount due to the defendant railway company from the defendant E. L. Harper and his co-defendants upon their subscriptions to the capital stock of said company, to the payment of complainants' judgments against said company, amounting to \$255,938.48. The railway company was incorporated and organized in the latter part of the year 1881. On the 10th of December of that year defendant E. L. Harper subscribed for 2,500 shares of its capital stock of the par value of \$100 each, and caused eight co-defendants—as he states in his answer—to subscribe for one share each, to enable them to become directors. Subsequently certificates representing 3,000 shares of the capital stock were issued by the company to defendant W. D. Lee, at the special instance and request of defendant E. L. Harper, and for his use and benefit. No money was paid upon any of the subscriptions, nor for the 3,000 shares issued to Lee for account of Harper, but they were regarded by him and by the company as fully paid for in the manner following: At the date of the organization of the company Harper was the owner of a narrow-gauge railroad which had been bought from an insolvent railroad company by purchasers who sold it to him, as he testifies, for "about scrap-iron price." It was some 20 miles in

length, had never paid operating expenses, and was worth just about what the rails, which were light and worn, would bring for scrap-iron. On the 13th December, 1881, at the first meeting of the board of directors, Harper submitted a proposition in writing to broaden the gauge of this road to standard gauge, and extend it on the west to the Little Miami Railroad, at a point near Corwin, and on the east to Jeffersonville, on the Springfield Southern Road, say about 30 miles of railroad, and to sell the same to the company for \$1,800,000 of the par value of the securities of the company, as follows: \$600,000 of its first mortgage bonds, \$600,000 income bonds, and \$600,000 of the capital stock, "including subscriptions already subscribed." A motion to accept this proposition, subject to ratification by the stockholders of the company, was promptly made and unanimously carried. Harper testifies that it was agreed with all the directors and all the stockholders, before the company was organized, that nothing was to be paid in cash upon the stock subscriptions, and that the directors "were to assist in the organization, or be promoters in this enterprise," for the purpose of enabling him to carry out his contract of October 12th with J. W. Preston & Co. and others, to organize said company, to change the gauge of his railroad to standard gauge, to extend the road as hereinbefore stated, to convey it to said company, to cause the company to issue its first mortgage bonds for an amount not to exceed in the aggregate \$20,000 per mile of the length of the road and its extensions, and to issue income bonds not to exceed in amount the limit named for the first mortgage bonds, and to deliver to said J. W. Preston & Co. and others, in payment of their respective claims against him, \$214,906 of said first mortgage bonds, and \$107,453 of said income bonds. The judgments upon which complainants' bill is based were obtained upon bonds delivered by Harper in pursuance of said agreement, the bonds by their terms having become due by reason of the default of the company to pay the interest thereon. Upon the 2d of January, 1882, at a special meeting of the stockholders, all being present, the proposition made by Harper to the company, as above, was unanimously accepted. The only stockholders besides Harper were his co-defendants, who, at his instance, subscribed each for one share of the stock, with the understanding that they were to pay nothing for it, and that they were to become directors, and carry into effect Harper's plans and purposes, already stated. Harper widened the gauge of the road to standard gauge, extended it to the points named in his proposition, and conveyed it to the company, and the company issued and delivered to him the bonds specified; but, as the proposition recited that it was based on 30 miles of road, and the total length of the road was but 28 miles, the issue of bonds was \$560,000 first mortgage and \$560,000 income bonds.

The condition of the road is best stated by Ralph Peters, superintendent of the Little Miami Railroad, an experienced and thoroughly competent railroad manager. In August, 1883, his company having been solicited to operate the road, he, with his general manager, passed over and inspected the entire line. He testifies that they "found a very poor road,—badly constructed, with heavy grades; only temporary work in

the culverts and trestles; the embankments were narrow, and the cuts very narrow, the ditching in bad shape. It had been originally built as a narrow-gauge road. The gauge was widened out, the rails having been spread on the narrow-gauge ties, a few standard-gauge ties being put in, probably six to each rail, the balance of the ties under each rail being the original ties that were put in when the road was first constructed as a narrow-gauge. \* \* \* The rail that was laid on that road was from thirty to forty pounds. It was entirely too light for the traffic of a standard-gauge road; that is, for the cars and locomotives of a standard-gauge road. They had no water stations, no station-buildings that amounted to anything, and seemed to have little or no business. \* \* \* The trestles all seemed to be in good condition. They had been overhauled by parties who had reconstructed the road, but they were too light for any heavy traffic. The culverts were of timber. Many of them had been washed out or had caved in, and were only repaired with old ties." He further testifies that the only thing valuable about the road were the rails and material, and that it was worth, "as a railroad enterprise, or business venture for the purpose of making or earning money to its owners," not more than \$2,000 per mile, or about the scrap-iron value of the material in it; but to anybody "wanting to keep it as a railroad it was worth at least \$4,000 per mile." The \$2,000 per mile valuation might properly be regarded as the correct one, but for the purposes of this case it may be taken at \$4,000 per mile, or \$112,000 for the entire road. As a consideration for the transfer of this property to the company, being its entire line of road, Harper actually received \$550,000 of the capital stock of the road, \$560,000 of its first mortgage bonds, and \$560,000 of its income bonds. It goes without saying that the entire transaction was grossly fraudulent from first to last, without a single honest incident or redeeming feature.

The complainants charge that Harper is indebted to the company for the 2,500 shares of the capital stock for which he subscribed, and for the 3,000 shares issued to the defendant Lee for his use and benefit, and they pray that this indebtedness may be subjected to the payment of their judgments. In *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. Rep. 495, it was held that a railroad company having authority to purchase a railroad may pay for the same in paid-up stock. "But," says the supreme court of the United States in *Coil v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. Rep. 231, "where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud." There is no doubt that the defendant railroad company had authority to purchase Harper's road; and, this being so, the authorities cited make it clear that the complainants are entitled to the relief sought, unless the defenses made by and on behalf of Harper—all the other defendants who have been served with process being in default—are well taken.

Harper's defense is that the contract of October 12th was a contract of compromise and settlement with the complainants, fully performed on

his part; that the bonds were received by complainants in satisfaction of their claims against him, and with knowledge of the manner in which he had fulfilled his contract with the railway company, and of the entire history of the transaction; that complainants' judgments were rendered on said bonds, and that the stock issued to Harper was the only stock subscribed for, or issued by the railway company. Pending this suit Harper became insolvent, and made a general assignment in favor of his creditors. Thereupon his assignee was, upon his motion, made a defendant, and filed an answer, setting up that the sole consideration for the claims against Harper upon which said bonds were delivered by him to the complainants was a gaming transaction in the form of a deal in options in wheat at Chicago, in which there was no wheat actually owned, or bought or sold, but only a betting on future prices, and that the complainants won from Harper more than \$600,000, on which he paid in cash or its equivalent not less than \$400,000, and that complainant's claim was for the pretended balance of said winnings. For the amount so paid by Harper the assignee, by cross-bill, prays for decree and judgment.

Waiving all technical questions made with reference to these pleadings, the short answer to both is that there is absolutely no testimony in the record in support of either the answer or the cross-bill. Harper testifies that the parties claimed, "after absorbing some four hundred thousand dollars in cash of margins on wheat in Chicago," that he owed them a balance of over \$200,000, which he disputed, but finally settled and compromised. On the examination of Preston, he was asked by Harper's counsel whether the consideration claimed to have been received by Harper for the bonds which he agreed to transfer to complainants did not grow out of dealings between Harper and complainants on the Chicago board of trade. To the question complainants' counsel objected, and instructed the witness not to answer, and he did not answer. He was not pressed, but Harper's counsel stated, as appears by the record, that he proposed to show that the contracting parties had dealings on the Chicago board of trade; that the books of the complainant would not show the amount claimed; "that the entire transaction was disputed and repudiated by Harper as fraudulent;" that the claim was exaggerated; and that it was in settlement of this fictitious claim that he compromised with complainants. This is all that appears in testimony, or that it was proposed to show. Taking it altogether, it falls short of what is required to establish that complainants' claims arose from a gambling transaction. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160.

In support of Harper's defense, *Coit v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. Rep. 231, is cited. But in that case the court found that there was no intentional and fraudulent undervaluation of the property in payment for which the stock of the company was issued; and the court said that, "Where the charter authorized the capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money, in payment of their subscription, third parties have no ground of complaint." But here neither Harper's contract

with the complainants, nor his contract with the defendant company, was performed honestly or in good faith. From the testimony of Peters, hereinbefore quoted, and from all the circumstances of the transaction, it is clear that his pretended performance of his contract to broaden the gauge of the road and extend it to the *termini* named, was nothing but a sham and pretense; and his organization of the defendant company "under the laws of Ohio," which, as construed by the supreme court of the state, require that stock subscriptions be paid in money or its equivalent, was no better. The complainants must be presumed to have relied upon a faithful performance of his contract with them, which was, in effect, to convert the road into a standard-gauge road, and to organize a railroad company, which should have an existence in fact as well as in name. But it is claimed that complainants knew when they entered into the contract with Harper that he was to have all the stock of the company, as well as all the bonds, as the consideration for the transfer of the road. Harper so testifies, but the complainants Preston and McHenry, who conducted the negotiation, deny it. There are other witnesses who testify on the subject. The evidence is conflicting. It is true that Harper, in his negotiation for settlement, proposed to complainants to deliver to them a block of the capital stock of the new company, but they declined, for the reason—which is significant in its bearing on the defense that complainants placed no reliance on the capital stock—that they were not willing to incur the risk of the individual liability which the laws of Ohio imposed upon stockholders. He had before that offered them his entire road in settlement, but, after making inquiry as to its condition and value, they declined to take it. It was worth no more than the rails would bring for scrap-iron, or, in other words, than what Harper paid for it. Put these facts, which are not in dispute, together, and they seem to me to solve all doubts that the correct conclusion to be drawn from the testimony is that they understood that the stockholders of the new company were to be subject to the liabilities imposed by the law of Ohio, namely, full payment in money or its equivalent, and, in addition, 100 per cent. individual liability, and that they did not understand that they were to accept less than fourth-tenths of the first mortgage bonds, and less than two-tenths of the income bonds of the new company, secured by mortgage upon a railroad—which they had refused to take entire in settlement—so wretchedly improved as to have, at the expiration of 18 months after its completion, an actual value no greater than it had when Harper bought it, to-wit, what the iron would sell for as scrap. This conclusion sweeps away the defense, and results in the finding that the complainants are entitled to a decree, with costs. The decree will be against all the defendants excepting George Clymer, who was not found, and Lewis Seasongood, against whom there is no evidence that he was a stockholder. I have not referred to the amended bill and the answer thereto, (which did not, in my opinion, bring any new issue into the cause,) nor to the fact that some of the complainants were not parties to the contract with Harper, but took their bonds by assignment before maturity, because, in the view taken of the cause, it was not necessary to do so. The decree will also

be in favor of the intervening petitioners Martin Erwin and Alfred Sully, bondholders. The provision in the bonds that no stockholders shall be individually liable thereon for principal or interest does not exempt stockholders from the subjection of their contractual indebtedness to the company to the payment of its creditors holding judgments obtained upon such bonds, but it does refer to the stockholders' individual liability, which is statutory, and not sought to be enforced in this cause.

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FIRST NAT. BANK OF MONTGOMERY v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. May 10, 1888.)

BANKS AND BANKING — INSOLVENCY — DRAFT FOR COLLECTION — TRACING PROCEEDS.

A draft sent to a bank specially indorsed for collection was paid by the drawee, by check, which the bank collected through the clearing-house. A memorandum was placed with the bank's cash, to indicate that the proceeds of the draft was the property of the sender. The bank was closed the next morning, and the receiver credited such proceeds to the sender of the draft on the books of the bank. *Held*, that the fund was not so mingled that it could not be traced and identified, and that the sender could recover the same.

At Law.

*Edward Colston*, for complainant.

*W. B. Burnet* and *E. W. Kittredge*, for respondent.

JACKSON, J., (*orally*.) The material facts of this case are the following: On the 16th June, 1887, the Montgomery Oil-Works drew its draft on the American Cotton-Oil Company of Cincinnati, for the sum of \$2,379.56, in favor of the First National Bank of Montgomery, Ala. The payee forwarded the draft to the Fidelity National Bank for collection, under a special indorsement thereof, as follows: "Pay to Ammi Baldwin, cashier, or order, for collection, for account of the First National Bank of Montgomery, Ala." The draft so indorsed was received by the Fidelity National Bank, at Cincinnati, on June 18, 1887; was duly presented on that day for payment, and was paid and taken up by the drawee, who gave its check on the Citizens' National Bank of Cincinnati, to the Fidelity National Bank, for the amount of the draft. This check of the drawee, so accepted by the Fidelity National Bank, was received and treated as money. It was placed in the cash-drawer of said collecting bank as so much cash, and at the close of that day's business the amount of said collection was deducted from the total amount of cash on hand belonging to said Fidelity National Bank, and the letter of transmission from the First National Bank of Montgomery was placed in the cash-drawer of said collecting bank to indicate that said sum of \$2,379.56 so deducted from the total cash, but still left in the cash-drawer in the shape of said check given by the drawee in tak-

ing up the draft belonging to the First National Bank of Montgomery. On June 20, 1887, the check of the drawee (the American Cotton-Oil Company) was collected by the Fidelity National Bank, through the clearing-house, by a change or exchange of credits, and the Fidelity National Bank thus actually realized and received the amount of said draft on the afternoon of June 20, 1887. At the close of that day's business the cash and cash assets of said Fidelity National Bank showed an excess over what actually belonged to it of \$2,379.56; and to account for this excess, and to show to whom it really belonged, that amount was deducted from the total of cash and cash assets, and that same memorandum, in the shape of the transmitting bank's letter, was placed with the cash assets, to indicate the fact that \$2,379.56 of the money in the cash-drawer of the bank was the property of the First National Bank of Montgomery, Ala. The clerk who transacted the business gives this account of the matter: In reply to the question as to what was done by the collecting bank, if anything, to distinguish the proceeds of said draft, or to indicate to whom said surplus of cash really belonged, he stated:

"Well, at the end of this day's business, [June 18, 1887,] as that money was not remitted, by order of Harper, [the vice-president,] and as they, the First National Bank of Montgomery, had no regular credit account with the Fidelity, instead of remitting it we simply took that much off the total amount of our cash; not actually taking the money out, but taking off the total of our cash, the \$2,379.56, which made our cash appear that much less than it really was."

This was again done on the afternoon of June 20, 1887, after the drawee's check, which took up the draft, had been collected by the Fidelity Bank through the clearing-house. It thus appears that this fund belonging to the First National Bank of Montgomery was, so far as the book-keeping of the collecting bank could do so, separated and kept distinct from the other cash belonging to the Fidelity Bank, and was further identified by placing in the cash-drawer the transmitting bank's letter, to indicate that said excess of cash on hand belonged to that bank. The Fidelity National Bank transacted no business after June 20, 1887. It was insolvent, and the comptroller of the currency, on the morning of June 21, 1887, caused its doors to be closed, and took possession of its assets. The defendant, David Armstrong, was appointed receiver, and upon taking possession of the bank's effects he found on hand said excess of \$2,379.56 more than belonged to the Fidelity National Bank, and in the cash-drawer said memorandum indicating that said excess belonged to the First National Bank of Montgomery. Finding in the cash assets of the bank this sum of \$2,379.56 more than the Fidelity National Bank was entitled to, with the memorandum indicating to whom it actually belonged, the receiver, for the purpose of disposing of it, or of accounting for the same, on the 15th September, 1887, credited the amount to the First National Bank of Montgomery on the books of the Fidelity Bank. "He did that," says the clerk, "because we had this \$2,379.56 more cash than our books called for."

The First National Bank of Montgomery seeks by the present suit to recover this fund, which thus came into the actual possession of the receiver. Its claim is resisted on the grounds that the Fidelity Bank never really received the money, or, if it did, the fund was mingled and blended with other cash of the bank, and cannot be so identified as to entitle the claimant to recover it, and that the Montgomery Bank can now only be regarded and treated as a general creditor of the Fidelity Bank for the amount so collected. Neither of these positions, interposed for the defense, can be maintained under the facts of the case and the law applicable thereto. It admits of no question that the Fidelity Bank did in point of fact receive and realize the amount of plaintiff's draft sent to it for collection, and that, as the result of the transaction, there was found in the collecting the bank's assets, when the same went into the hands of the receiver, the sum of \$2,379.56 more cash than the Fidelity Bank was entitled to, or its books called for as belonging to it. It is equally clear that this excess was derived from the plaintiff's draft, which the Fidelity Bank actually collected. The mode or method of collection is not material. The result of the transaction was that the Fidelity Bank obtained and held \$2,379.56 of funds that did not belong to it, but was justly and equitably the property of the Montgomery Bank, and this fund, having actually come into the possession of the receiver without right, cannot properly be withheld from the true owner. If, after having accepted the check of the drawee in payment of the draft sent to it for collection, the Fidelity used the check as money, and thereby retained in its coffers an equal amount in cash, how can it be said that it did not receive the money on the draft it had received for collection for account of the transmitting bank? Equitable rights and trusts are not to be adjusted and enforced on grounds so narrow and technical as defendant's position assumes.

It is well settled by the authorities, and was so held by this court in the case of *Winter's Bank v. Armstrong*,<sup>1</sup> that, under a special indorsement like that placed upon the draft forwarded for collection, the relation thereby created between the transmitting and receiving bank was merely one of principal and agent; that no act of the collecting agent could change that relation; and that the principal could follow and recover his funds so long as they could be traced and identified. The act of the receiver, on the 15th September, 1887, in crediting the Montgomery Bank with the amount of the collection on the books of the Fidelity Bank, in no way changed the agency relation of the parties, and could not lawfully operate to convert the Montgomery Bank into a general creditor of the Fidelity, and thus force it to share with other creditors in the distribution of its own funds. The old idea that because money has no ear-marks it cannot be followed when mingled with the funds of a wrongdoer, has long since been exploded. The decisions in England and in this country now allow a trust fund to be followed as long as it can be traced, and its identity ascertained, whether in its original or in some substituted form. A leading case on this subject is *Taylor v. Plumer*, 3

<sup>1</sup>No opinion filed.



Maule & S. 562, where the trust fund was traced through several changes; Lord ELLENBOROUGH holding that the property in its new form still belonged to the principal, notwithstanding the changes which the agent had made in its character. He laid down the principle, since generally recognized, that "the product of or substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails." In *Knatchbull v. Hallett*, 13 Ch. Div. 696, the beneficial owners were allowed to follow their trust funds into the agent's or bailee's bank-account, and into certain bonds in which it had been invested. In *Overseers v. Bank*, 2 Grat. 544, an attorney, having collected money for his clients, deposited the same in the bank in his own name, and mixed with his own funds. The rightful owner was allowed to recover it, tracing it simply as a gross sum; the court holding that whether the fund remain in the hands of the agent or of his representative or assignee, it could be followed until it was transferred to some *bona fide* purchaser or assignee for value without notice. So, in *Whitley v. Foy*, 6 Jones, Eq. 34, an agent had deposited his principal's funds in his own name. The principal was allowed to follow and to recover the same. The same rule was applied in *Kip v. Bank*, 10 Johns. 63, where the trustee had deposited the trust fund in bank in his own name. The trustee became insolvent, and the funds so deposited passed into the hands of his assignee in insolvency. The beneficiaries were allowed to follow it; KENT, C. J., saying that the necessary requirement of distinguishing the trust fund was met by showing that it went into the bank deposit, and thence into the hands of the defendants. That the right to follow and recover trust or *quasi* trust funds does not cease until "the means of ascertainment fail," is settled by numerous later cases, which need not be noticed in detail. See *Van Alen v. Bank*, 52 N. Y. 1; *Cragie v. Hadley*, 99 N. Y. 131; *Long v. Majestre*, 1 Johns. Ch. 305; *Bank v. King*, 57 Pa. St. 202; *Cook v. Tullis*, 18 Wall. 332; *Bank v. Insurance Co.*, 104 U. S. 54; *Schuler v. Bank*, 27 Fed. Rep. 424. In the present case the means of ascertainment of the plaintiff's fund have not failed. Its money has been clearly traced into the possession of the Fidelity Bank, and thence into the hands of the receiver, who is in no sense an assignee or transferee for value, so as to defeat the plaintiff's right to follow and recover its property. It follows that the plaintiff is entitled to a decree against the defendant for the recovery of said sum of \$2,379.56, with costs of suit. No interest will be allowed on the \$2,379.56 while held by the receiver, as he has not made interest on the funds. A decree will be entered awarding plaintiff the said fund of \$2,379.56, with costs of suit.

ARMSTRONG v. SCOTT *et al.**(Circuit Court, S. D. Ohio, W. D. September 3, 1888.)*

## 1. BANKS AND BANKING—NATIONAL BANKS—INSOLVENCY—ACTIONS—SET-OFF AND COUNTER-CLAIM.

Rev. St. U. S. § 5242, makes payments of money by an insolvent national bank to shareholders or creditors, with a view to preference, or to evading the disposition of assets as required by statute, null and void. Sections 5234 and 5236 require the receiver, after collecting debts, etc., to turn over all money to the United States treasurer for a ratable distribution among creditors. *Held*, that funds received on the discounting of a note, and deposited with the discounting bank, subject to the check of the depositor, and which had been drawn upon by him, but were intended by him to meet the note when due, cannot be pleaded as a set-off in an action on the note brought by the receiver of the discounting bank, who received the note before maturity; and this conclusion is not affected by the provision of Code Civil Proc. Ohio, which provides that a cross-demand which might be pleaded as a counter-claim or set-off shall not be extinguished as such by the assignment or death of either party, as this provision does not apply to the assignment of a demand before maturity.

## 2. NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER—RIGHTS OF MAKER.

The fact that one who signed a note was in fact only an accommodation maker, and signed, without consideration, in order that the indorser, who was really the principal debtor, might get the note discounted, and that these facts were known to the bank which discounted the note at the time of discounting, is no defense for such accommodation maker in an action on the note.

## 3. SAME—AGREEMENTS PRIOR TO EXECUTION.

An agreement, made prior to the signing of a note, that the bank discounting the note would regard it as the obligation of the indorser, and would look only to the indorser for payment, is no defense for the principal on the note in an action thereon, both because the agreement was prior to the signing, and also was in conflict with the note.

At Law.

*E. W. Kittredge* and *W. B. Burnet*, for plaintiff.

*Paxton & Warrington*, for defendants.

SAGE, J. The plaintiff's action is upon a promissory note for \$10,000, made by the defendant Scott, and discounted by the Fidelity National Bank for account of the indorser, the defendant the Farmers' & Mechanics' State Bank. The note came to the possession of the plaintiff before its maturity. The amended answer of Scott is that, at the request of his co-defendant, he being its cashier, he signed the note as maker, without consideration, and solely to enable his co-defendant to have it discounted, all which was at the time known to the Fidelity National Bank. In other words, Scott was an accommodation maker, and that fact was at the time known to the Fidelity National Bank. This is no defense. The answer also sets up that the Fidelity Bank took the note under an agreement that it was the obligation of the defendant bank, and that the Fidelity Bank would look to said bank only for payment. But it appears from the answer that this agreement is evidenced by correspondence between the Fidelity Bank and the defendant bank, prior to the signing of the note, which is fatal to the plea, as is also the fact that

the agreement is in conflict with the note. The amended answer of the defendant bank sets up the facts pleaded by its co-defendant Scott, who, it alleges, signed the note as maker, "without consideration, and merely for the purpose of complying with a custom of the Fidelity National Bank, requiring two names upon paper discounted." These allegations establish, as against the demurrer, that the defendant bank is the principal debtor, and that Scott, although the maker, is only a surety. The answer further sets up that the proceeds of the discount of the note were placed by the Fidelity Bank to the credit of the defendant bank, subject to check or draft, "and to pay and meet said note when the same became due;" that the defendant bank drew upon said proceeds for \$1,009.23, leaving a balance of \$8,809.94, which has not been drawn against, and that at the maturity of the note defendant tendered to the plaintiff the sum of \$1,190.06, the balance due on the note, after deducting said sum of \$8,809.94, which "was permitted to remain with said Fidelity National Bank to meet a like amount to become due upon said note." The tender was refused, and the defendant now brings into court said balance for the plaintiff, and prays that the \$8,809.94 may be allowed by way of set-off against the note. The plaintiff demurs to each of these answers for insufficiency.

The question suggested upon the argument of the demurrer, whether the defendant bank, being the indorser, is entitled to plead the set-off, is disposed of by the finding already made, that the defendant bank is in fact the principal debtor. It is contended for the defendant bank that the receiver took the note subject to all equities. That is true as to all equities in favor of the defendant bank and against the note at the time when the receiver took possession. The note was not then due. When it was delivered to the Fidelity National Bank, and the proceeds credited to the defendant bank, the note and the proceeds thereby became at once separate, distinct, and altogether independent each of the other. The fact that the defendant bank voluntarily left the greater portion of the proceeds on deposit to be applied towards payment of the note did not create any equity against the note, for the defendant retained the right to draw out the entire balance at any time. In *Hade v. McVay*, 31 Ohio St. 231, the supreme court of Ohio holds that the receiver of a national bank holds to the bank and its creditors the relation, substantially, of a statutory assignee, and that "a right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's insolvency. He succeeds only to the rights of the bank existing at the time it goes into liquidation." The provision of the Ohio Code of Civil Procedure that, "when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other," does not apply to the assignment of a demand before its maturity. Mr. Pomeroy, in his work on Remedies and Remedial Rights, says, at section 163:

"If an insolvent holder of a claim not yet matured assigns the same before maturing, and the debtor at the time of this transfer holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected."

Numerous cases are cited in support of this rule, which is said to be founded upon equitable considerations, but it does not apply here, for the reason that the national bank law, recognizing only the government and the bank-note holders as preferred creditors, makes all payments of money by a national bank to its shareholders or creditors after the commission of an act of insolvency, or in contemplation thereof, "with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes," utterly null and void. Rev. St. U. S. § 5242. The provisions of sections 5234 and 5236 require the receiver to take possession of the assets of the bank, collect all debts, sell all property, real and personal, and pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, whose duty it is, after refunding to the United States any deficiency in redeeming the notes of the bank, to make a ratable dividend of the money among the creditors. The unmistakable force and meaning of the law is to place all unsecured creditors upon the same footing of equality. When the plaintiff was appointed receiver, the defendant was in the list of unsecured depositors, to whom payment, the bank being insolvent, was prohibited. The defendant had then no right of set-off, nor any equity against its note, not then matured, which passed to the receiver. To allow the set-off, now that the note has matured, and thereby make payment in full to the defendant in part discharge of its obligation to the bank, would be contrary, not only to the policy of the law, but also to the plain meaning of its provisions. See *Bank v. Taylor*, 56 Pa. St. 14. The demurrers are sustained. Judgment will be entered in favor of the plaintiff for the amount claimed in the petition, against the defendant bank as principal, and the defendant Scott as surety.

The circuit judge concurs in the conclusions of this opinion, which is in accord with his opinion in *Bung Co. v. Armstrong*, 34 Fed. Rep. 94.  
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GREEN *et ux.* v. PENNSYLVANIA R. Co.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. October 14, 1887.)

## 1. CARRIERS — OF PASSENGERS — INJURIES TO PASSENGERS — DANGEROUS APPROACHES.

Railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers or those who have purchased tickets with a view to take passage on those cars would naturally be.<sup>2</sup>

## 2. SAME—NEGLIGENCE.

It is negligence in a railroad company to leave unguarded a hole in a passage-way at a railroad station likely to be employed by persons going to and from the company's cars.<sup>2</sup>

## 3. SAME—MEASURE OF DAMAGES—COMPENSATORY.

Where the injury inflicted is not the result of either wanton or willful wrong, only compensatory damages will be allowed.<sup>3</sup>

## At Law.

This is an action for damages for injuries alleged to have been received by Mrs. Anna M. Green, wife of Hiram Green, of Camden, N. J., on October 12, 1882, at East Moorestown station, upon the Pennsylvania Railroad in New Jersey. Mrs. Green, then aged 23 years, married, and having one child, had, upon the day of the accident, been to the fair at Mount Holly, and had returned to East Moorestown station, near which she then lived, upon a train on the Pennsylvania Railroad, arriving between 7 and 8 o'clock in the evening. The night was very dark and misty. She was accompanied by her little boy aged four or five years. Upon alighting at the station she found herself near the east end of the station building, and, wishing to take a stage from the station to her home at once, and without pausing on the platform, went, leading the child with her right hand, down a dark passage-way upon the east side of the station, in order to reach the rear of the building, where the stages usually stood, turned sharply to the right, and went along the rear of the station. About midway the rear of the station she fell into an opening constructed in the ground to form an entrance to the basement of the station. The uncontradicted evidence showed that the entrance-way was in the condition in which it had been originally constructed; that there was no light at the east end of the station, in the eastern passage, or in the rear of the station; that stages were usually to be found standing in the rear of the station outside a line of posts, and that it was necessary to go along Chester avenue to go to Moorestown. The evidence was contradictory as to the existence of a railing along the top of the posts, and

<sup>1</sup>Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

<sup>2</sup>Respecting the duty of railroad companies, as carriers of passengers, to maintain safe and proper station accommodations and approaches to trains, and their liability for injuries caused by defects therein, see *Ryan v. Railroad Co.*, 1 N. Y. Supp. 899, and cases cited in note.

<sup>3</sup>As to when punitive damages may be allowed in actions for personal injuries, see *Railroad Co. v. Roberts*, (Ky.) 8 S. W. Rep. 459 and note; *Railroad Co. v. Arnold*, (Ala.) 4 South. Rep. 359.

as to the use of the eastern passage by passengers. But upon this question the plaintiff testified as to herself that she had frequently, during the two years preceding the accident, arrived at this station after dark, and at other times, that she had never ridden home before, but had walked, going along the platform to Chester avenue, and thence home; she knew the stages stood behind the station, having seen them there from Chester avenue. She had never been in the rear of the station before. She had never gone down the eastern passage before, nor did she see other people do so at this time. She knew there was a water-butt upon the corner of the station, which was raised about 12 inches from the ground. She had seen this from the platform of the station upon previous occasions, and walked around it upon the night of the accident. The evidence upon the part of the defendant was decided that neither this passage-way nor this rear portion of the station were intended to be used by passengers, and that, if they were so used, it had no knowledge of such use. Mrs. Green, having turned the corner around the water-butt, proceeded along the line of the building, until she fell into the opening, bruising her knees and forehead. It was so dark she could not see the opening, of the existence of which she was ignorant. The stage which she wished to take was standing diagonally to the wall of the station building west of the opening; the horse attached to it being hitched to a post, with his head towards the hole, and with the rear of the stage towards Chester avenue. At the time of the accident Mrs. Green was a vestmaker; and evidence upon her behalf was produced to show that she was in good health, and free from organic or constitutional disease. In falling into this opening she received a wrench or jar which it was claimed produced Pott's disease of the spine, and caused her present condition. Upon the part of the defendant evidence was produced intended to show that she had a predisposition to this disease, which would naturally have resulted in her present condition, and that, had there been no such predisposition, her present condition could not have been caused by such a fall.

Verdict for plaintiff for \$8,750, and motion for new trial overruled.

*Wescott, Melick & Robbins*, for plaintiff.

*John Hampton Barnes and George Tucker Bispham*, for defendant.

McKENNAN, J., (*charging jury*.) The plaintiff in this case seeks to recover damages for an injury alleged to have been sustained by falling into a hole, a passage-way, into a cellar under the defendant's station at East Moorestown, state of New Jersey. It appears that on the 12th of October, 1882, she visited the fair at Mount Holly, and returned on one of the defendant's trains to the station at East Moorestown, alighted from the cars very near or beyond the east end, as she alleges, of the station building. It was a dark night; very dark. She was accompanied by her little child, and she concluded to take a carriage from the station to her home. She passed down a pathway on the east end of the station in the direction of where she had seen carriages standing before, and in going to the usual place at which carriages were to be found, passing over the ground

of the defendant, she fell into this passage-way, which was unfenced and unguarded, which she did not see; and that the injury of which she complained was thereby sustained.

It is obvious that the liability which she seeks to enforce against this company rests upon its alleged negligence in providing the necessary safe-guards against injury to persons who are passing along, as this woman was, from the platform of the station to a conveyance behind it; and it is necessary that that should be made apparent by the testimony as the first question to be established by the testimony on the part of the plaintiff. I do not propose to restate the testimony of the witnesses,—you have heard such numbers before you,—but simply to indicate the questions this case, and the principles of law by which you are to be governed in the determination of the cause, and to do it in the briefest possible manner.

What, then, was the duty imposed by law on the railroad under the circumstances? I give that to you in the very concise language of Chief Justice DILLON, in the *Case of the Chicago & N. W. R. Co.*, 26 Iowa, 124, that they are bound—that is, the railroad company is bound—to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers or those who have purchased tickets with a view to take passage on those cars would naturally or be liable to be. Was the course pursued by this woman, the direction which she took, the ground over which she passed, ordinarily used by passengers, coming to or going away from that station? If it was, then it was the duty of the railroad company to provide all such protection as was necessary to secure passengers going to and coming from that depot from liabilities to danger or injury. This passage-way or hole was entirely unguarded, and, as is evident from what occurred on this occasion, persons in passing that way were liable to fall into it. If it was, then, the course or pathway usually employed by persons,—not exclusively employed by persons who were going to and from the railroad, but usually and likely to be employed by persons going to and from the railroad,—then it was the duty of the railroad company to provide all reasonable and proper protection against injury to persons passing that way, and their omission to do so would amount to negligence; but that is a matter for you to determine under all the circumstances. I simply indicate generally the legal duty of the railroad company, and it is for you to determine whether, under all the circumstances, that duty has been performed or not. If the railroad company failed thus to perform the duty which the law required of it, negligence would be imputed to it, and it would be liable, so far as that fact is concerned, for any injury sustained by a person lawfully at that place. That is the fundamental fact in this case, to which your attention must be directed, and which you will primarily determine in your consideration of this case.

If negligence is imputable to the railroad company, then it would be your duty further to inquire whether the injury complained of was due

in any measure to want of prudence, want of care and cautiousness, or the negligence of the plaintiff. Although the railroad company might have been guilty of negligence, which, under ordinary circumstances, would render it liable for injuries sustained by persons lawfully in that place at the time, yet, if the person contributed by his or her own wanton imprudence and lack of caution to the injury, the defendant would not be liable. It is not for us to attempt to measure the degree of culpability of either party. If the plaintiff is chargeable with contributing to the injury of which she complains by want of the caution and prudence which the law requires of her, then the person whose negligence is shown is not liable for the injury complained of. In other words, upon her rested the duty of such care and caution which may be reasonably expected to be observed by reasonable persons under all the circumstances. In the first place, was it prudent for this woman to take the direction which she did in passing to this conveyance? The night was very dark, and, as she testified, it was the first time she had ever passed in that way to or from the station. At the western end of the platform was a pathway leading to the side and to the rear of this station, and to the place where carriages were stationed to receive passengers, or waiting to receive passengers. At the end of the platform, and throwing light upon that path, was a lamp kept there for the very purpose of lighting it and enabling passengers to go to and from the depot with safety. That was the path which this woman had always pursued before in going to and from that depot. According to her own testimony she passed along the pathway, came down Chester avenue, and passed along the pathway leading along the western side of the depot. She was accompanied by her child, and that, perhaps, was an additional admonition to her to pursue the safest course,—the one with which she was familiar,—and the night was very dark. There was no light in the rear of the depot; and, in view of all these circumstances, did this woman observe such care and caution as might reasonably be expected to be observed by reasonable persons? If she did not, then negligence is imputable to her, and she is not entitled to recover. If she did, however, and the company is guilty of negligence, as I have defined it to you according to the legal definition, then she is entitled to recover.

She complains of an injury sustained to her by this fall. You have had that fully explained and discussed before you, and you have had a large mass of evidence touching her present condition. Apparently the woman is disabled, and presumably or inferentially from the evidence she has been a victim of protracted suffering. Is all that due to the fall which she received, as described by her and by Mr. Walton, when she fell into this hole. In other words, is this injury traceable to that fall, and was the fall the cause of it? Because, if it was not, if she did not sustain any injury by falling into that passage-way, even though the railroad company may have been negligent, and she may have been free from fault, she could not recover any more than mere nominal damages. You have had a great deal of evidence; and the learning in reference to the disease with which she is confessedly afflicted now has been almost



exhausted, and I do not propose to discuss that in detail. You heard it, and you heard a very full statement of it by counsel. Is the injury from which she suffered traceable to the fall in that hole as its cause. She says, and her husband says, and some others have said, that before she fell into that place she was in apparently good health, with the exception that she had an abscess; and she testified, and so did her husband, that for some time before she met with this accident the abscess had entirely healed, and she did not suffer in any degree from it. So that you have the coincidence, at least, that after—and immediately after—she met with this accident she suffered from the symptoms which she has described, and which the physicians on both sides say have resulted in Potts' disease of the spine. Whether this injury is the cause of that or not is for you to determine under the evidence, and I will not detain you or weary you by referring to it in detail. You must be satisfied under all the evidence that the fall which she received on the occasion produced or led to the injury of which she complains now, and the suffering under which she has labored for some years. If you come to the conclusion that the defendant omitted or failed to perform a duty in reference to the protection of persons passing that way from injury, which the law imposes upon it, and that the plaintiff did not contribute to this accident by her own want of proper care and caution, under all the circumstances, and that the injury under which she is suffering now was the result of that fall, then it will be your duty to determine what measure of compensation shall be given to the plaintiff under the circumstances. You will remember that nothing more than compensation would be proper for the jury to allow. There was not wanton or willful wrong committed by this railroad company, or by any of its agents; all that is claimed, and properly claimed, is that it was derelict in the performance of some duty which the law imposed upon it, and in consequence this plaintiff suffered injury. So that, if you come to that branch of the case, you will allow such compensation—such damages—to the plaintiff as will compensate her for the suffering which she has already endured, and for the disability under which she is apparently suffering. Excessive damages in cases like this are not to be allowed or found by the jury; they are not to measure them by their own sympathies for the unfortunate condition of the person who has suffered, but they are to measure them only by the rule of compensation to the party claiming, and for what she has suffered, and for her present condition.

I have been asked by the defendant's counsel to instruct you upon certain points. *First.* "There is not sufficient evidence in the case to maintain the cause of action on the part of the plaintiff as set forth in the first count in the *narr.*, and hence there can be no recovery by the plaintiffs under that count." That point I deny. *Second.* "The evidence in the case is insufficient to maintain the cause of action as set forth in the second count in the *narr.*, and hence there can be no recovery by the plaintiffs under that count." That point I deny. *Fourth.* "The railroad company is held only to responsible care, so far as means of ingress and egress to and from its stations are concerned." That point I affirm, as I have

already stated to you. *Fifth.* "To entitle the plaintiffs to recover in this case it is not sufficient for the jury to reach the conclusion that the present condition of Mrs. Green is possibly due to the fall in October, 1882. The jury, if they find for the plaintiffs, must have a reasonable belief, based wholly upon the evidence in the case, that the injury complained of was actually the result of the fall." I affirm that point, as I have already stated to you in the general remarks that I have made. *Sixth.* "Before the plaintiff can recover in this action, she must show by a preponderance of the evidence that any injuries, ailments, or diseases from which she is now suffering, if any such there be, are the result of her injuries sustained at the time of the accident in 1882." That point I also affirm. *Seventh.* "Under all the evidence in the case the verdict must be for the defendant." I refuse this point.

So that, gentlemen of the jury, to restate the questions involved in this cause in very few words: You must be satisfied, in the first place, that the defendant failed in the performance of its legal duty in not providing necessary safeguards at this place where this accident occurred. If you are satisfied that under all the circumstances the railroad company has done all that could be reasonably required of it for the protection of persons lawfully passing in the vicinity of this passage-way, then the defendant is not derelict in any sense that would make it liable in this case, and your verdict should be for the defendant. If you are satisfied that the defendant has failed in the discharge of the duty imposed upon it by law, under the circumstances that I have given you as to that, and that the plaintiff by the want of reasonable and proper care and caution contributed to the injury of which she complains, then, also, irrespective of the first inquiry in the case, your verdict should be for the defendant. If you are satisfied that negligence resulting in this accident is imputable to the defendant, and that no fault is shown to have been committed by the want of observance of proper care by the plaintiff, then you must be satisfied that the injury of which she complains resulted from the accident as described to you. If she was not hurt, and her present condition is due to other causes, then your verdict should be for the defendant, because her damages would be inappreciable, merely nominal, in that event. If you are satisfied that the defendant was negligent, and that the plaintiff was not, and that the injury of which she complains resulted from the accident, then you will give such damages as will be a fair compensation to her for the pain and suffering which she has endured, and for the permanent disability under which she is at present.

## GRIMES v. PENNSYLVANIA CO.

(Circuit Court, N. D. Ohio, E. D. April Term, 1888.)

## 1. CARRIERS—OF PASSENGERS—STATION ACCOMMODATIONS.

It is the duty of a railroad company to properly light the platform connected with its depot within a reasonable time before the arrival and departure of its trains, so as to insure the safety of persons coming to the depot as passengers.<sup>1</sup>

## 2. SAME—WHO ARE PASSENGERS.

A person in good faith coming to the depot for the purpose of taking passage on the cars is to be regarded as a passenger, although a ticket may not have been purchased.

## 3. SAME—PROVINCE OF JURY.

Schedules of times of arrival and departure of the different trains at the depots at which they stop, published by a railroad company, are an invitation to persons desiring to use the road to be at the depots at the time of, and a reasonable time before, the arrival and departure of trains; and what is a reasonable time depends upon the circumstances of the case, and is for the jury.

At Law. Action for damages for personal injuries.

*McCoy & Taylor* and *M. R. Dickey*, for plaintiff.

*J. R. Carey*, for defendant.

WELKER, J., (*charging jury*.) The plaintiff, a resident of Augusta, Columbiana county, Ohio, on the evening of the 21st of March, 1887, went to the station called Kensington, on the Cleveland & Pittsburgh Railroad, then operated and run by the defendant, to take a train upon the railroad to Alliance, the regular passenger train being due at 2:25 A. M., and freights at different times before that hour. She arrived at the station about 9 o'clock in the evening, and went upon the platform near the waiting-room, and, while her husband was getting the key to the waiting-room, she, with a lady friend, walked around the corner of the station-house, it being dark, and, intending to go off the platform upon the ground, stepped off the platform at a point where it was some five feet high, falling to the ground, and thereby was severely injured. She sues the defendant to recover damages for her injury, and alleges in her petition, as the grounds of recovery, that the defendant was negligent and careless, in that the platform of the railroad was improperly and dangerously constructed, and station carelessly managed; that it was dark, and the platform was not properly lighted, so as to make it safe to be used by her as such passenger, and that the east end of the platform, where she stepped off, had no railing around it, to protect passengers from danger

<sup>1</sup>Railroad companies must keep their stations and approaches reasonably and properly lighted at night for the safety and accommodation of passengers, and are liable for injuries occasioned by their neglect of such duty, *Fordyce v. Merrill*, (Ark.) 5 S. W. Rep. 329, and note; *Cross v. Railway Co.*, (Mich.) 37 N. W. Rep. 361, and note; but are not liable where the passenger is also negligent, *Reed v. Railroad Co.*, (Va.) 4 S. E. Rep. 537.

In general, as to the duty of railroad companies to maintain safe and proper station and traffic accommodations, see *Railroad Co. v. Fox*, (Tex.) 6 S. W. Rep. 569; *Railroad Co. v. Arnold*, (Ala.) 4 South. Rep. 359; *Ryan v. Railroad Co.*, 1 N. Y. Supp. 899.

of going off the same. She also alleges that her injury was produced by this negligence and carelessness of the defendant, and that she was herself not guilty of any fault or carelessness. These allegations and denial form the issue you are to try. To entitle the plaintiff to recover she must establish the negligence and carelessness on behalf of the defendant described in her petition, or some one or more of them, and that such negligence caused her injury. Not much claim is made of negligence in the original construction of the platform at the station, except the want of railing at the east end thereof; but the principal complaint as to negligence is the absence of proper lights upon the platform at the time of the injury.

Negligence and carelessness very largely depend upon the duties required of the parties. As a general proposition, a railway company, being common carriers of freight and passengers, has the right to construct its depot and platform used on its road so as to make it convenient, safe, and proper to safely and conveniently transact the business to be done at the station. It is also its duty to make and keep its platforms, waiting-rooms, and approaches in such a way as will be safe for those having business there as passengers, proposed passengers, or otherwise, who may be expected to come there for such lawful purposes. For the convenience and safety of the public, and for their own safety and transaction of the business of common carriers, railroads adopt and publish time-tables, giving schedules of times of arrival and departure of the different trains at the depots at which they stop, and these schedules constitute an invitation to the public and persons desiring to use the railroad as passengers or for business to be there at such times of arrival and departure of trains, and also, impliedly, within a reasonable time before such arrivals and departures, to enable persons desiring passage to avoid hurry and confusion in the purchase of tickets, and getting ready to enter the cars. It was the duty of the defendant to place and keep upon its platform, in the night-time, suitable and proper lights to protect and make it safe for passengers who may desire to go upon the trains or get off trains, at the times of the arrivals and departures of trains so advertised to stop, or which were accustomed to stop, at the station. It was also the duty of the defendant, within a reasonable time before such arrivals and departures of trains, to properly light its waiting-room, and the platform connected therewith, so as to make them comfortable and safe for the use of passengers desiring to take such trains as passengers, and in that respect to exercise a high degree of care for the safety of passengers. It was not the duty of the defendant to keep its waiting-room and platform lighted in the night-time, at unreasonable hours, or during the whole night; but it was its duty to keep the platform in its construction in a safe condition to persons who might lawfully go upon it at all times.

The plaintiff had the right to go to the depot and upon the platform of defendant, for the purpose of taking a train or any lawful purpose, at any time she might desire, and would not be a trespasser in so doing. But to place the defendant under obligation to light the platform for her safety, she must avail herself of that right, and exercise such right, in a

reasonable manner, and at a reasonably proper time; that is, she had a right to come upon the premises within a reasonable time next prior to the regular time of departure of the train on which she intended to go, and remain until such train left. This right to enter and remain exists only by virtue of, and as an incident to, the right to go upon the train, and it is to be extended so far only as is reasonably necessary to secure to her the full and perfect exercise and enjoyment of her right to be carried upon the cars. If she came upon the platform at an unreasonable hour, and found it not lighted up, she would take her own risk as to want of light in walking about the platform in the dark; but she had a right to suppose it was safely constructed. What would be a reasonable time must depend upon all the circumstances of the case, taking into consideration the situation of the station with reference to public houses, the distance she resided from the station, and any other circumstances that may have surrounded the plaintiff at the time, bearing upon such reasonable time. The question of reasonable time is one of fact, which you must decide in the light of the evidence in this case, under these directions. I direct you, then, that the defendant was required to light the platform properly, to insure her safety at such time as she had a right to be and remain at the station and on the platform, as I have heretofore directed you. If the defendant did not at such time properly light the platform, it would be guilty of negligence and carelessness, for which it would be liable; or, if the platform was not safely constructed and guarded at the time, and injury resulted from want of such proper construction, defendant would be guilty of negligence. A person in good faith coming to the depot for the purpose of taking passage on the cars is to be regarded as a passenger, although a ticket may not have been purchased. To entitle the plaintiff to recover it must also appear in the evidence that the plaintiff at the time herself exercised ordinary care and diligence to avoid the injury; such care as a person of ordinary prudence would or should exercise under like circumstances. If by her negligence and want of care she contributed to the injury, although the defendant may have been guilty of want of care and diligence, she is not entitled to recover in this action. The injury must have been produced without her fault, and by the fault and want of care of the defendant. What constitutes due care and diligence must be determined by you from all the circumstances surrounding the party at the time. What would be proper care under some circumstances and situations, may not be such under other circumstances. It will be your duty to consider all the circumstances surrounding the plaintiff at the time of the injury; the darkness upon the platform, or the character of the light there as she walked upon it; where she intended to go; how she got upon the platform; the knowledge or want of knowledge she had of the situation of the platform and its construction; whether in the darkness she should have been more or less careful in walking upon the platform; any caution or care by her companion at the time; and all other circumstances bearing upon her conduct at the time. If you find from the evidence, under these directions, that the defendant was guilty of negligence and carelessness,

as alleged in the petition, and that the plaintiff did not by her own carelessness and negligence contribute to her injury, you will find for the plaintiff. But if you find the defendant was not guilty of such negligence, or if you find that the plaintiff so contributed to her injury, you will find for the defendant. If you find for the plaintiff you will assess to her such reasonable damages as you think, under the evidence, she is entitled to recover, and will compensate her for the injury. The amount of such damages is entirely with you to determine. There are some elements that enter into the damages in this case,—such as the pain and suffering endured, the expense of nursing and doctors' bills, time lost in sickness, diminished capacity for labor, and any permanent disability received by reason of such injury.

Verdict for the plaintiff for \$7,166.<sup>1</sup>

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STANLEY v. NORTHWESTERN LIFE ASS'N.

(Circuit Court, D. Kentucky. November 25, 1887.)

1. INSURANCE—ACTION ON POLICIES—PLEADING.

A petition on a certificate of insurance against a mutual benefit association, alleging that defendant was the legal successor of another such association which had issued the certificate, having received all its assets and effects, and assumed to pay all its liabilities, and to fulfill all its obligations and engagements, including the demand sued on, sufficiently states that the first association no longer exists, and that defendant is its legal successor, to maintain the action.

2. SAME—MUTUAL BENEFIT INSURANCE—ASSESSMENT.

In the application assured agreed to pay "one assessment" within 30 days from its date, when made as provided in the by-laws. The by laws provided that a member failing to pay his assessment within 30 days from its date should stand suspended, etc. *Held* that, by failure to pay any one assessment within the time prescribed, the certificate would lapse, but the payment of at least one assessment was not a condition precedent to recovery.

3. SAME—NOTICE OF ASSESSMENT.

The by-laws also require the secretary to send a notice of each assessment to the member at his last known post-office. *Held*, that the act of sending the notice is an essential part of the "notice" or "assessment," and, unless done within a reasonable time after its date, the 30 days should not be estimated from such date.

At Law. On demurrer to the petition.

Henry Burnett, for plaintiff.

Green & Gilbert, for defendant.

BARR, J. This suit was brought against the defendant, although the beneficiary certificate was issued by the Northwestern Benevolent & Mutual Aid Association, which is not a party to this litigation. The

<sup>1</sup>In this case, on motion for new trial, verdict was set aside, JACKSON, J., sitting with WELKER, J., because verdict was contrary to the evidence—it showing contributory negligence of the plaintiff.

petition states, as a reason for this, "that the defendant is the legal successor of the Northwestern Benevolent & Mutual Aid Association, of Bloomington, Ill., having received all its assets and effects, and for a valuable consideration it assumed to pay all its liabilities, and fulfill all its engagements, and meet all its obligations, including the demand now sued on." The allegation that the defendant as a corporation is the legal successor of the first association must mean that the corporation has ceased to exist, and that the defendant is its legal successor, and has taken its assets, and assumed its liabilities. This, I think, is sufficient to entitle plaintiff to maintain this action. The certificate sued on is issued to Mrs. Stanley, in consideration of the membership fee of \$10 paid, the warranted representations, covenants, and agreements made in her application, "and the further payment of one assessment within thirty days after the date of such assessment, whenever made in accordance with the terms and conditions of the constitution and by-laws of the association, as they now exist or may hereafter be modified." It is somewhat difficult to ascertain the purpose of this recital of the consideration, and it is insisted that the payment of one assessment within the time specified is a condition precedent to a recovery. In a subsequent part of the certificate it is provided "that if the said Mrs. Alice Stanley shall not pay the assessment hereinbefore specified, on or before the time mentioned for the payment hereof, then this certificate shall be null and void, and of no effect." The only assessments which are "hereinbefore specified" is the one assessment mentioned in the recital of the consideration for the issuing of the certificate. It may be that the word "one" is an error of the printer, and that it should have been "all" assessments; but the court must construe the certificate as it is, if it can be done. There are "no assessments heretofore specified" in the certificate, but assessments, if needed to pay benefits, are provided for in the by-laws of the association. The eighteenth by-law provides: "The constitution and by-laws are a part of the contract between the association and all of its members, and all certificates should be so interpreted, whether so expressed in the certificate or not;" and another by-law (5) provides "that every member failing to pay his assessment, within thirty days from the date of said assessment, shall stand suspended from all benefits and privileges of the association." I conclude that, taking all of the provisions, if one assessment is not paid within the time as therein provided, the certificate will be null and void; but the certificate does not mean that, unless one assessment is paid, there can be no recovery. It might be there would be no assessment made before the death of the member. By-law 5 directs how the assessment shall be made, and, as I read it, there is no assessment distinct from the notice, but the notice is to be in the form of an assessment. The secretary is required to cause to be sent a notice which is in the form of an assessment to every member of the association at his last-known post-office. The act of sending this notice is, however, distinct from the notice, which is in the form of an assessment, addressed to a member. It is insisted that a member must pay his assessment within 30 days after the date of the assessment, even though no

notice is sent, else his certificate is null and void. I am inclined to the opinion, in view of the eighteenth by-law, that the 30 days should not be estimated from the date of the notice, which is really the assessment, unless the secretary has sent, or caused to be sent, such notice or assessment to the last-known post-office of the member within a reasonable time after the date of the assessment. It is made the duty of the secretary to send members notice of the assessments, both by the constitution and by-laws of the association, and unless he does this it will be utterly impossible for the members to pay their assessments within 30 days after the date of the assessment. This view is strengthened by the peculiar language of the fifth by-law. Although it is true the act of sending the notice is distinct from the writing called a "notice," which is to be in the form of an assessment, the use of the word "notice" in this connection would mean to the ordinary member of the association that sending to the last-known post-office was part of and included in the notice mentioned in this by-law. Demurrer overruled.

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VAN BUREN v. UNITED STATES.

(District Court, D. Indiana. August 15, 1888.)

1. UNITED STATES COMMISSIONERS—EXAMINATION OF OFFENDER—WAIVER.

Rev. St. Ind. 1881, § 1628, makes it the duty of a justice, in a criminal proceeding, to docket and hear the cause, and either acquit, convict, and punish, or hold to bail the offender. Section 1634 requires a justice to recognize a defendant charged with felony, if upon the hearing he is of opinion that he should be held. Section 1639 provides that a justice shall not discharge a defendant against whom the proper offense has not been charged, but shall cause the proper offense to be charged, and recognize him to answer it, and also recognize any witness deemed important. These sections are made applicable to United States commissioners' examinations held in Indiana, by Rev. St. U. S. § 1014. *Held*, that they contemplate a trial and hearing, and a commissioner is not bound to accept an offer of the accused to waive examination, but may suspend the examination or not, as he deems best for the public interest.

2. SAME—RIGHT TO COMPENSATION—ERRONEOUS DECISION AS TO JURISDICTION.

Where an affidavit for arrest is such in form and substance as fairly to call for the deliberate judgment of a United States commissioner whether or not a criminal violation of some federal enactment is charged, and he, in good faith, holding it sufficient, proceeds with the examination, he is entitled to the fees allowed by law, though his decision was erroneous.

3. SAME—FORGERY OF TALLY-PAPERS—FEDERAL COURTS—JURISDICTION.

Forging or unlawfully tampering with the tally-papers or other returns, which show, in addition to the number of votes cast for a member of congress, the number of votes cast for state officers at the same polls, is an offense against the federal election laws, of which the federal courts and commissioners have jurisdiction.

At Law. On demurrer to answer.

*Keeling & Hugg*, for plaintiff.

*Emory B. Sellers*, Dist. Atty., for the United States.



Woods, J. No formal or technical objections have been made either to the complaint or to the answers, and the questions to be decided may be disposed of without a presentation of the pleadings. The action is brought under the act of congress of March 3, 1887, (chapter 359,) to recover compensation for services claimed to have been rendered by the plaintiff as a commissioner of the circuit court for this district. The services were rendered in the case of the *United States v. William F. A. Bernhamer and others*, brought before the commissioner upon an affidavit, a copy of which is set out in the report of the case, *Ex parte Perkins*, 29 Fed. Rep. 900; and upon the authority of that case it is insisted that the commissioner acted in the matter without jurisdiction, and therefore is entitled to no compensation. The claim was presented for allowance, and was rejected by the comptroller of the treasury department in May, 1887, after the passage of the act of congress; and consequently the case is not within the interpretation placed on the proviso of that act in *Bliss v. U. S.*, 34 Fed. Rep. 781. It is shown that the plaintiff was engaged in the hearing in question for 12 days; and, as it does not appear when the question of jurisdiction was mooted, it may be presumed that it was not raised before the last day, or, if raised sooner, that it was held under advisement until that time; so that, broadly stated, the proposition of the government is that its commissioners, at their peril in every instance, whether moved thereto by either party or not, must decide upon the sufficiency of the affidavit presented to confer jurisdiction, and, if a hearing be proceeded in without jurisdiction it shall be without right to compensation, even for the time given to the consideration and decision of that question. To so establish the law would, as it seems to me, impair the public service in this important branch; or if, in many instances, the public interest should not suffer, it would be, as this case strongly illustrates, at the expense of private right. I think the safe and proper rule on this subject must be that if the affidavit is such in form and substance as fairly to call for the deliberate judgment of the commissioner, whether or not a criminal violation of some federal enactment is charged, and the commissioner, in good faith, holding the presentment sufficient, proceeds with the examination, he will be entitled to the fees allowed by law, though it should turn out that his decision was erroneous. However, as was pointed out in *U. S. v. Coy*, 32 Fed. Rep. 543, it was not held in *Ex parte Perkins* that the affidavit in the case was absolutely and in itself insufficient under the law to give jurisdiction. The decision on that point was based largely upon an agreement or concession of counsel that "the specific facts stated in the affidavit" were "all the facts in the case," and on that admission it was held that the commissioner was without power to proceed further. But, besides the specific facts stated, there is in the affidavit a charge in general words, quite material to the question of jurisdiction, namely: "And otherwise to change, alter, and forge said tally-sheets and said returns thereon at said election." Moreover, the Indiana Statutes (section 1639, Rev. St. 1881) in respect to preliminary examinations before justices of the peace

provide (and the same rule applies to federal circuit court commissioners conducting examinations in this state) that if "it appears to such justice that a mistake has been made in charging the proper offense, or that he is guilty of an offense not charged, the justice shall not discharge the defendant, if there appears to him to be good cause to detain him in custody; but he must cause an affidavit charging the proper offense to be made against the defendant, and recognize him to answer the same, and, if necessary, also recognize the witnesses to appear and testify." If, therefore, it be conceded, as declared in *Ex parte Perkins*, that under the laws of Indiana "a tally-paper contains a separate statement of the votes cast for each candidate for every office, and, although it is one in form, it is several in its essence and character," and that, therefore, an alteration or forgery of such papers in respect to state or local officers alone could not be deemed to affect the election of a congressman, it is still true that the general terms of this affidavit were broad enough to embrace the election in respect to the congressmen, and to establish the jurisdiction of the commissioner; it being in his power to require the general averments to be made more specific, or even a new affidavit specifying a different offense, according to the proofs adduced. It was doubtless competent and proper enough for counsel, in order to obtain the opinion of the court upon the specific facts stated in the affidavit, to make such an agreement as was made in *Ex parte Perkins*, but the decision so made and limited can have, and, it is to be presumed, was designed to have, no conclusive effect upon the commissioner's right to compensation for his services in the matter, or upon the question of jurisdiction considered from a broad stand-point. Upon the facts stated in this affidavit, and other facts proved at the examination had under it before this agreement of counsel was made, the grand jury of this court, acting upon a somewhat different phase of the law, reported indictments which have been upheld both in the circuit court and in the supreme court, (see *In re Coy*, 31 Fed. Rep. 794, and *Ex parte Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263;) and consequently, as can now hardly be disputed, it was competent for the commissioner to have held the accused under recognizance, if not to answer the charge as brought, certainly an amended one, formulated according to the proofs adduced; and, this being so, he is entitled to compensation, unless there be other good reason to the contrary.

Speaking to the proposition that the certificate made by the board of election "is to be deemed a separate document in respect to each candidate voted for," Justice HARLAN says:

"In these views I do not concur. It was conceded in argument, and it may be inferred from the statutes, that the certificate in question was, in fact, one paper, in that it stated the result of the election as to each candidate. So, also, as to the copy of the tally-paper and poll-list placed in the hands of the inspector. They were none the less documents in regard to an election for representative in congress because they also showed the number of votes cast at the same polls for state officers. \* \* \* If mutilated or changed before they reached the board, [of canvassers,] their value as legal evidence in regard to the election both for state and national officers might be impaired or

destroyed. If skillfully altered by bad men, the will of the people, as expressed at the polls, might be defeated. Common prudence, therefore, suggested the necessity of guarding against every possibility of such mutilation or alteration."

The supreme court, in its opinion, says:

"The charge is that the conspirators unlawfully and feloniously induced the election officers to omit to perform their duty in this respect; which is, in general, conceded to be expressive of an evil intent. But counsel demand something more than this general evil intent in tampering with the poll-lists, tally-papers, and certificates, although it is not denied that the object of the parties accused, in inducing the election officers to violate their duty, proceeded from a criminal intent, or that it was done for the purpose of affecting the returns contained in the papers that were withheld, or exposing them to the danger of mutilation and alteration. It is said, however, that, since the evil intent is not shown to have been specifically aimed at the returns of the vote for congressman, the statutes of the United States can have no force, so far as the infliction of any penalty is concerned; and it is asserted that congress had no power to provide for any punishment where no intent affecting the congressional election is averred. It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd, with the purpose of killing some person against whom he bore malice, but with no intent to injure or kill the individual who was actually struck by the shot, he should be held excused, because he did not intend to kill that particular person, and had no malice against him. The analogy of this example to the present case is close. The persons accused did desire and intend to interfere with the election returns, and they did purpose to falsify those returns, as to some of the persons, at least, who were then voted for as candidates. It is argued on their behalf that because it is not averred in the indictment that they intended to falsify the election returns with regard to the congressional vote, or to affect those particular returns, it is to be held bad. It is also insisted that the felonious intent had relation to the action of inducing the officers to omit the duty of keeping carefully the poll-books and tally-sheets; and, although the records of the votes for congressman might possibly also suffer along with a number of other persons who might be affected by that omission, yet, because there was not in the minds of the conspirators the specific intent or design to influence the congressional election, they are not to be held liable under this statute. The object to be attained by these acts of congress is to guard against the danger and the opportunity of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result."

Bearing more directly on the subject of jurisdiction, in the same opinion, occurs the following passage, the first part of which is a quotation from the opinion in *Ex parte Watkins*, 3 Pet. 193:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record, having general juris-

diction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force, unless reversed regularly, by a superior court capable of reversing it.'

"It may be said that this language is too broad, in asserting that, because every court must pass upon its own jurisdiction, that such decision is itself the exercise of a jurisdiction which belongs to it, and cannot, therefore, be questioned in any other court. But we do not so understand the meaning of the court. It certainly was not intended to say that because a federal court tries a federal prisoner for any ordinary common-law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, that he cannot be released by *habeas corpus*, because the court which tried him had assumed jurisdiction. In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses,—as forgery of its bonds, or perjury in its courts,—its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of *habeas corpus*."

In the light of this opinion, I think it may be said that any forging or unlawful tampering with the tally-papers or other returns containing evidence in respect to the congressional election comes clearly within "a class of offenses" of which the federal courts and commissioners have jurisdiction, and the class may be designated as offenses against the federal election laws.

The fifth paragraph of the answer shows that the accused parties, when arraigned before the commissioner, offered to waive examination, and to enter into the proper recognizance, but the commissioner refused to accept the waiver, and proceeded to hear testimony; and the government insists that for the time so employed the commissioner is entitled to no compensation. The question whether a commissioner, justice of the peace, judge, or other officer conducting a preliminary examination is bound to accept an offer by the accused to waive examination is an important one, and, so far as I know, there is no reported decision on the subject. By the federal statute (section 1014 of the Rev. St.) the commissioner's examination must be held "agreeably to the usual mode of process against offenders" in the state, and "recognizances of the witnesses for their appearance to testify in the case" are to be taken and returned to the clerk of the court. The provisions of the Indiana statutes on the subject are in article 6, Rev. St. 1881, §§ 1625-1645. These provisions all contemplate a trial or hearing, and some of them are inconsistent with a waiver of the hearing, though the contrary practice is well known to be general. Section 1628 makes it "the duty of such justice to docket \* \* \* and to hear the cause, and either acquit, convict,

and punish, or hold to bail the offender." By section 1634, "when the offense charged is a felony, and the justice upon the hearing is of the opinion that the accused should be held to answer such charge, he shall be recognized," etc. The provisions of section 1639 have already been quoted. By section 1642, "whenever any justice shall hold any prisoner to bail or commit him to jail in default of bail, he shall also recognize, with or without surety, such witnesses as he may deem important, to appear and testify before the court." Whether or not a witness is important can ordinarily be best determined by hearing his testimony, and if it is to be determined whether the witness shall be committed, in default of recognizance with the required surety, it may be necessary to examine other witnesses, whose testimony might make his unnecessary, or so unimportant as to render recognizance with surety unnecessary; and without a hearing it would be impossible to comply with the provisions of section 1639. But, aside from the literal terms of the statutes, there are considerations of public policy upon which, in the absence of express provision to the contrary, it must be held to be in the discretion of the examining officer to suspend the examination or not, upon a waiver by the accused, as he shall deem best for the public interest. If an arrest be made without good ground, an examination will show the fact, and save the expense of an inquiry by the grand jury. The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one. Ordinarily, I doubt not, an offer of the accused to waive an examination should be accepted; but if the commissioner be convinced that the public interest will be better subserved by an investigation, and especially if the district attorney request it, he may and should proceed to a full hearing. The demurrers to the fourth and fifth paragraphs of answer are therefore sustained.

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DIMMICK v. UNITED STATES.

(*District Court, M. D. Alabama. November 23, 1887.*)

CLERK OF COURT—UNITED STATES COURTS—SUPERVISOR OF ELECTIONS—FEES.

The clerk of the United States district and circuit courts, and chief supervisor of elections, should file and indorse each paper that comes into his possession officially, although pertaining to the same case or matter, and not simply the outside paper or wrapper, and he is entitled to fees for each paper filed. He is also entitled as supervisor to fees for indexing and entering records of elections as required by law.

At Law. On demurrer to petition for fees as court commissioner and chief supervisor of elections, and upon the merits.

*Geo. H. Patrick*, for plaintiff.

*Geo. F. Moore*, Asst. U. S. Atty., for the United States.

BRUCE, J. This is a suit brought under the recent act of congress approved March 3, 1887. The plaintiff is clerk of the district and circuit courts of the United States, and chief supervisor of elections for the Middle district of Alabama, and sues for amounts due to him for services rendered by him for and on behalf of the United States. He charges that the amount sued for was included in accounts which, as such clerk and chief supervisor, respectively, he made against the United States, and which were verified by oath and duly presented to the district court of the United States for this district, for approval; and that such accounts were duly approved by the court, and transmitted to the proper accounting officer at Washington, except one account not forwarded; and that the first comptroller of the treasury department disallowed a portion of his accounts so transmitted, as per his statements of differences which were submitted in the evidence in the case, and the same reasons apply to the account not forwarded. To the petition the district attorney of the United States interposes a demurrer, and says that said accounts have been adjusted by the first comptroller of the treasury department; and that the reasons that induced the comptroller to disallow said items are sufficient in law to sustain his action. The questions of law presented by the demurrer have been substantially decided in the case of *Barber v. U. S.*, 35 Fed. Rep. 886, at the present term, and that decision is followed herein.

The principal items in this suit objected to by the comptroller are the filing of papers from United States marshals, and from commissioners, and indexing, filing, and entering records of chief supervisor of elections. It would be an unsafe precedent to follow the suggestion of the comptroller that only the outside paper or wrapper should be filed, the entire package or file being made up of separate papers, although appertaining to the same case or matter, or that but one of such package of papers should be filed. Penalties are prescribed against abstracting or altering papers filed in any federal court. It would not do for the fact of such filing to depend upon the uncertain memories of the clerk or his deputies, nor for the clerk to arbitrarily consider some papers in a package filed and others not filed, and to keep no written record even of this. The embarrassments consequent upon such practice are apparent. The clerk's indorsement *prima facie* proves the filing, and such indorsement is the usual manner of evidencing the filing, and is the proper one. It should be upon every paper filed in his office. For all papers filed by him, the clerk is entitled to the compensation provided by law. It was manifestly the duty of the clerk to file all of the papers referred to in this suit and proved upon the trial. It was equally his duty to mark these papers filed in the usual manner. As he has actually done the filing charged for, his fees therefor are allowed. The same may be said of the services performed by

plaintiff as chief supervisor of elections. The work charged for was required by law to be done, and was done, and the charge per folio for recording is the fee allowed by law. Judgment will therefore be entered in favor of the plaintiff for the sum of \$682.55, with interest from date, together with the costs to be taxed.

NOTE. In this case the appeal taken by the United States was argued and dismissed in the United States circuit court for the Middle district of Alabama, at Montgomery, July 16, 1888.

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UNITED STATES *v.* TWO BAY MULES, ETC.

(*District Court, W. D. North Carolina. June Term, 1888.*)

INTERNAL REVENUE—VIOLATION OF LAWS—FORFEITURE.

Rev. St. U. S. § 3450, providing that animals and conveyances used in removing spirituous liquors to evade payment of the tax shall be forfeited to the United States, subjects them to forfeiture when used in such removal; though they were so employed by a person who had hired them from the owner representing that they were to be used for another purpose.

At Law. Information to enforce forfeiture.

*H. C. Jones*, U. S. Atty., and *Geo. F. Bason*, Asst. U. S. Atty., for the United States.

*Gidney & Webb*, for claimant.

DICK, J. From the facts set forth in the "agreed case," it appears that the mules and wagon mentioned in the information were, at the time of seizure, in the possession of Nick York, and were then actually employed by him in the removal of a package of spirituous liquors in violation of law. The statute upon which this information is founded (Rev. St. U. S. § 3450) expressly provides that such property so employed shall be seized and be forfeited to the United States; and that the proceedings to enforce such forfeiture shall be in the nature of a proceeding *in rem*. It also appears that W. H. York, the owner and claimant of the mules and wagon, hired the same to Nick York at the sum of \$2.50 per day, for the purpose of hauling a load of produce to market; and said claimant had no knowledge or information that his property so hired for a lawful purpose would be employed in removing the package of spirits in violation of law; and he insists that his property should not be forfeited for a fraud in which he in no respect participated. There is no exception in the statute under which such defense can be made available in the courts, which cannot give relief in contravention of the provisions of a positive statute. The principles of law announced in *Peisch v. Ware*, 4 Cranch, 347, are not applicable in this case, as the offending property, under a contract with the owner, was in the rightful possession of Nick York at the time the offense was committed.

The opportunities, facilities, and inducements for persons to evade the internal revenue laws, and the frequent violations that escaped without detection and punishment, induced congress to enact very comprehensive, specific, and stringent measures for the prevention and punishment of frauds in regard to the tax on whisky and tobacco, so extensively manufactured and sold. To make this purpose still more effectual the bureau that has charge of the collection of such taxes, is invested with the authority to prescribe regulations that may be deemed necessary to secure the proper observance and execution of the law.

In applying and enforcing such laws, where they impose an absolute forfeiture for fraud, the courts adopt a liberal construction, so as to accomplish, as far as possible, the well-considered and necessary measures devised and enacted by congress to secure the effectual collection of the public revenue. The experience of the officers of the internal revenue, and the facts that so often appear on trials in the courts, show that it is very difficult to prevent frauds in regard to the tax on whisky and tobacco, on account of the various and numerous artifices resorted to by wrong-doers, and the extent of the territory in which such offenses can be easily committed, often with impunity. As long as taxes are imposed upon these articles, so largely manufactured, sold, and used by the people, the most stringent enforcement of the law is necessary to prevent frauds, and suppress crime. In criminal cases the courts may properly be influenced by mitigating facts and circumstances, and temper their judgments with mercy; but in civil proceedings to enforce forfeitures imposed by positive statutes they cannot, on account of the peculiar hardship or apparent injustice of the case, exercise a discretion in the matter by mitigating the severe penalties of the law. When property becomes liable to forfeiture under the positive provisions of a statute, owners who have in no way participated in the frauds which caused the forfeiture, must seek redress from the wrong-doers who unlawfully used the property with which they were intrusted; or they can apply to the officers of the government invested with the authority to remit forfeitures. In this proceeding *in rem* the mules and wagon are considered as the offenders, and are liable to forfeiture without any regard whatsoever to the personal misconduct or responsibility of the owner. The principles of law upon this subject are clearly and fully announced in *Distillery v. U. S.*, 96 U. S. 395, and cases cited. Let a decree of condemnation be drawn in conformity with this opinion.



## THE NITH.

THOMPSON *et al.* v. THE NITH.

(District Court, D. Oregon. August 30, 1888.)

## 1. SHIPPING—CARRIAGE OF GOODS—BILLS OF LADING—EXPLANATION.

The term "rusty" in a bill of lading is a statement of fact, and not an article of the agreement, and is therefore open to explanation or contradiction.

## 2. SAME—STOWAGE—SALT OVER IRON.

Salt should never be stowed over iron, where there is any chance that water may come through from above onto the salt.

## 3. SAME—CARGO AROUND MAINMAST.

Cargo, and particularly salt, stowed around the mainmast, ought to be dunnaged away from the mast, so that if any water comes through the mast-coat it will not come in contact therewith.

## 4. SAME—NON-DELIVERY—MEASURE OF DAMAGES.

The measure of damages for the non-delivery of goods is their value at the port of destination, with interest on that amount from the time the delivery ought to have been made.

## 5. SAME—BILL OF LADING—BURDEN OF PROOF.

The bark Nith received a lot of Swedish iron in bars and bundles at Liverpool for carriage to Portland, and upon its discharge here the iron was found to be badly damaged, and corroded with rust from salt water. The master signed a bill of lading for the iron in "good order and condition," with the qualification, "Bars and bundles rusty," and it appearing that Swedish iron, at Liverpool, was generally more or less covered with a light atmospheric rust, which did not affect its commercial value, and that the usage was to insert "rusty" in bills of lading therefor from Liverpool to this port, *he'd*, the burden of proof is on the carrier to show that the iron was otherwise affected than by atmospheric rust at the time of its receipt by the vessel.

## 6. SAME—PERILS OF THE SEA—DILIGENCE TO REPAIR INJURY.

Admitting that the breaking of the mast-coat during a storm, in which the decks are flooded, whereby a stream of water goes down the mast into the hold, is a peril of the sea, the exercise of proper skill and diligence would lead to the discovery of the rust, and secure the repair of the same in a less period than 12 or 18 hours.

(*Syllabus by the Court.*)

Edward N. Deady and Horace B. Nicholas, for libelants.

C. E. S. Wood, for claimant.

DEADY, J. The libelants, Edward J. De Hart and William Honeyman, doing business as partners under the firm name and style of Thompson, De Hart & Co., bring this suit against the British bark Nith on a contract of affreightment to recover damages in the sum of \$3,700.17 for a violation thereof.

It is alleged in the libel that in February, 1887, the libelants shipped on the bark, then lying at the port of Liverpool, England, and bound on a voyage to the port of Portland, about 24 tons of Swedish iron, and 52 anvils, weighing about 7,017 pounds, in good order and condition, and worth at this port \$3,700.17, upon a contract with the master thereof that, in consideration of certain freight then paid by the libelants, he would deliver said iron and anvils to them at this port in like order and condition, loss and damage from the perils of the sea only excepted; that

said iron and anvils were not so delivered, but by the misconduct of the master and his servants the same "became wetted and damaged to such an extent as to be a total loss to the libelants," whereby they are damaged in the said sum of \$3,700.17, for which they pray a decree, with costs, and the arrest and sale of the vessel to satisfy the same.

On the arrest of the bark, the master, John Adair, filed a claim of ownership on behalf of Bramwell and Gardiner, and the same was delivered to him on the stipulation of John A. Brown and Thomas Hislop in the sum of \$8,000.

In his answer, the master admits the receipt of the iron and anvils on January 20, 1887, at Liverpool, and the contract to carry and deliver the same at this port, and alleges generally that said articles were properly stowed and cared for during the voyage.

As to the iron, he also alleges (1) that it was damaged by rust when received on the Nith, and that the bill of lading was given therefor accordingly; and (2) that the damage was caused during the voyage by a peril of the sea, to-wit, the carrying away of the mainmast coat on April 20, 1887, "by reason of the heavy rolling and straining of the bark" in a severe storm, whereby "some water was unavoidably precipitated into the hold." As to the anvils, he admits they were "apparently in good condition," but alleges they were so encased as not to be open to inspection; that they were stowed in the hold around the mainmast, and that probably "some of the water that entered the hold" when "the seam of the mainmast coat was carried away fell upon or reached said anvils," and caused the rust, if any; which is a peril of the sea. He also alleges that the anvils are only slightly rusty, and that such rust is "the inevitable result" of the "straining of the bark on the voyage," and "the large quantities of water shipped during" the same.

The iron, which is in bundles and bars, when it reached this port was very badly damaged with rust. It is in the condition known to the trade as "froze;" that is, stuck or run together. No use can be made of it unless it is rerolled. The anvils are more or less rusty on the face, and cannot be used unless the rust is ground off. Neither is in a merchantable condition, and the carrier is liable for their value at this port, unless they were in the same condition when received, or the injury occurred during the voyage by a peril of the sea, to which the negligence or misconduct of the owner or his servants did not contribute.

The bill of lading acknowledges that the anvils were "shipped in good order and condition," to be delivered at this port in like order and condition. But the faces of the anvils were covered with canvas. The admission as to their condition is qualified by this circumstance, and, if the fact was otherwise, the carrier may show it. The words "in good order and condition," in a bill of lading, are, like the admission of any other fact in an ordinary receipt for money, open to explanation or contradiction. They do not constitute an agreement, though contained in one. *The Pacific*, Deady, 21. The admission establishes the fact, *prima facie*, that the anvils were in good order when shipped, and the burden of proof is on the claimant to show the contrary. The bill of lad-

ing for the iron, consisting of 700 bars and 777 bundles of Swedish rolled iron, weighing 24 tons and 908 pounds, admits in the printed formula that it was also "shipped in good order and condition," which admission is qualified by the addition in writing of these words, "Bars and bundles rusty."

The Nith is an iron vessel, built at Glasgow in 1860, and was once known as the "City of Shanghai." Her length is 212.5 feet, beam 32.3 feet, and depth 21.5 feet. Her registered tonnage is 990 tons, while she will carry 1,400 tons. She is divided into three compartments. The between-decks in the middle compartment is not floored over. Her cargo on this occasion consisted of 1,052 tons of "factory filled" salt in 50 and 100-pound sacks, 100 tons of coke, 2,540 boxes of tin, some crystals of soda, and the iron and anvils in question. She left Liverpool on February 7, 1887, and the voyage occupied 182 days to Astoria, and 191 to Portland. She drew 20 feet aft and 19.8 forward.

The defenses are inconsistent and hypothetical: The iron was damaged when it was shipped; but if it occurred on the voyage it was caused by a peril of the sea; which peril was also the cause of the injury to the anvils, if they were injured.

The disputed questions in the case are: (1) What was the condition of the iron when it was shipped? (2) was it rusted on the voyage, and, if so, from what cause? and (3) what caused the anvils to rust on the voyage?

And, first, the words in the bill of lading, "Bars and bundles rusty," like the words, "in good order and condition," are a mere statement of fact that is open to explanation or contradiction.

The evidence shows that this iron was brought by the steamer *Sliepner* from Gothenberg, Sweden, to Liverpool, and that such iron, owing, I suppose, to the humidity of the climate, is always more or less, and generally more than less, covered with a slight atmospheric rust; and that it is the usage in signing bills of lading at Liverpool for such iron destined to this port to insert therein the word "rusty." A bundle of five bars taken from a shipment of 520 bundles and bars of Swedish rolled iron, lately brought from Liverpool to this port in the vessel *Roscraa*, was produced in court. It is somewhat affected or colored by this thin atmospheric rust, but yet good, merchantable iron. The bill of lading given by the carrier is also produced, which first admits the iron is shipped in good order and condition, and then, referring to the whole shipment, the words, in writing, are added, "All more or less rusty."

Under the circumstances, the bill of lading must be taken and construed as meaning nothing more than that the iron was more or less covered with the atmospheric rust common to Swedish iron in that port, which did not, however, affect its commercial value. Nor does it seem reasonable or probable that a master would sign a clean bill of lading for iron in the condition which this now is, or even a much better condition, only qualified by the addition of the mild and uncertain term "rusty." The most natural thing in the world would have been to write, "very rusty;" "badly rusted."

So far, then, as the case stands on the bill of lading, the proof is that the iron, when shipped, was in the usual condition of Swedish iron at Liverpool; that is, more or less covered or colored with atmospheric rust, which did not diminish its commercial value. The burden of showing that it was otherwise rusted or thereby badly damaged, as alleged by the claimant, now rests on him.

On this point both parties have taken testimony. The claimant has introduced the deposition of the master of the Nith, taken here, and those of the ship-keeper, freight clerk, and wharfinger of the Nith, and the two stevedores and their foreman, who loaded the vessel, taken at Liverpool. They all state substantially that the iron, when taken aboard, was badly rusted and corroded, as if it had been wet with sea-water. The master adds that it lay on the quay of the Nith some days before it was shipped, because he refused to receive it on account of its condition, when word came from the shipper—but how or by whom he does not say—that the iron was bought for Portland, and must go forward “rusty or no rusty;” and that “they said” that the iron got rusty coming across from Sweden, the steamer having sprung a leak; so he “took the iron and gave them a rusty receipt,” and added, “I was quite willing to take it, as long as I protected myself.”

The ship-keeper only saw a part of the iron, having kept tally for the freight clerk on the quay, where it was delivered, while the latter was at dinner.

The two stevedores, father and son, and their foreman, tell a story about the stowage of the iron that is so flatly contrary to the admitted facts of the case, that they are either mistaken about the vessel they loaded, or intentionally false in a very material matter concerning the same. The stevedores say directly, and the foreman in effect, that the iron was first stowed under the direction of the son on the floor in the wings at the main hatch, who, in doing so, said the iron was so badly rusty that there would be no harm in putting it there, and stowing salt immediately on top of it; but the father interfered, saying, “This will not do, for when the iron reaches its destination the owner will claim that the salt caused the rust;” whereupon the iron was moved to the after-hold, and stowed on the floor on either side of the mainmast, and three tiers of crates of earthenware stowed on it. And now, to prevent the salt that was afterwards stowed in front of the iron—not on top of it—from coming in contact with it, a bulk-head was made of boards and matting against the ends of the crates; and as the crates extended forward over the iron,—in the language of the witness, “overlapped it,”—there was a foot of space between the iron and the salt. The witnesses do not say, in so many words, that there was no salt stowed above the iron, but such is the necessary conclusion from what they do say as to how it was stowed, and why it was so stowed.

Now, the fact is that there were at least eight or ten tiers of 50 and 100-pound sacks of salt stowed over the iron and immediately on top of the crates; and therefore, if this statement is a falsehood, it is a lie with a circumstance. But it goes too far. And whether the witnesses are

mistaken in the vessel, or have told a falsehood about the stowage of the iron, to give an air of verity to their statements concerning the condition of the same, their testimony is entitled to but little, if any, weight.

Considering the relation of the master to the controversy, and the contradictory, reckless, and absurd statements in his testimony generally, he is not entitled to much credit on this point. This leaves the proof of the claimant to rest mainly on the testimony of the freight clerk, wharfinger, and ship-keeper,—all persons with an evident bias and sympathy for the vessel in whose employ they appear to have been at the loading of the cargo. Add to this the statement of the mate that the iron was on board the vessel when he joined it, and the surface was rusty, but he could not see it underneath, this implies, probably, that the iron was not then covered with the crates; but the witness does not say so, nor does he say that the iron was anything more than merely "rusty," which is admitted.

Against this testimony the libelants produce the depositions, taken in Liverpool, of the master, stevedore, and porter, the shipping clerk, and warehouseman, and the delivery foreman of the agents at Liverpool of the shippers of the iron at Gothenberg. They say they have had many years' experience in handling Swedish iron, and that this lot passed through their hands in their several capacities on the way from the steam-ship *Sliepner* to the *Nith*, and that it was in good condition for Swedish iron; that it was not corroded or scaled, but more or less covered with atmospheric rust, which would rub off with the hand. Both the delivery foreman and the freight clerk say they never heard that the master made any objection to receiving the iron; and the latter says he has shipped thousands of tons of Swedish iron in the same condition, and nothing was said about it.

The libelants also produce the deposition, taken at Liverpool, of *Emil Bruhn*, the chief officer of the steam-ship *Sliepner*, when the iron was brought from Gothenberg. He says he forwarded the iron to the *Nith*, and that when it left the *Sliepner* it was in good condition; that it was not damaged in the slightest, and, if there was any rust on it, it was atmospheric; and that he had been engaged nine years in handling Swedish iron.

On this state of the proof the only reasonable conclusion is that the iron was in good condition when it was received on the *Nith*, as stated in the bill of lading, barring the atmospheric rust, which did not affect its commercial value. Although the burden of proof is on the claimant to show that the iron was damaged, yet the decided weight of the evidence, considering both the number and credibility of the witnesses, is to the contrary.

The claim that the anvils were not in good condition when received on the *Nith* is not made out in proof. In fact, there is no evidence worth considering in support of it; and the finding must be, as stated in the bill of lading, that they were in "good condition."

The next question is, what caused the iron and anvils to rust on the voyage, and is the carrier liable for the injury caused thereby?

The evidence introduced on the question includes a protest made by the master of the Nith, the first and second mate, and the carpenter, at the British vice-consulate in this city, on September 17, 1887, and a report of the port-warden of this district, appointed under the act of June 3, 1859, of a survey of the vessel and cargo, made by him at the request of the consignees of the former on September 20, 1887. The protest was introduced by the claimant, subject to the objection of the libelants, and the report was introduced by the latter without objection.

The protest is an *ex parte* statement, not required or authorized by any statute that I am aware of. It is made by the agents of, and in the interest of, the owners; and on general principles it is not competent evidence for them, though it may be used against them. It purports to be written by a third person, and not one of the "appearers." It is said to be made from the log, but the book is not produced. 1 Greenl. Ev. § 495; 1 Whart. Ev. § 648. See, also, 2 Conk. Adm. 338. However, on their examination, the master, mate, and carpenter each swore that the protest was correct, and it will be considered as a part of their testimony.

The report is made, pursuant to a statute, by a public officer acting under oath. The survey was made at the request of the consignees of the vessel, and the statute required the warden to keep a record of it, open to the inspection of persons interested in the same, and to furnish a certified copy thereof, under his "hand and seal," to any person requiring it. In my judgment this record, or a copy thereof, is *prima facie* evidence of the pertinent facts contained therein, for or against the parties of this suit. 1 Whart. Ev. §§ 640-643.

The paper introduced is under the hand and seal of the warden, and purports to be a triplicate original. It is neither the record, which the statute requires to be kept in a "book," nor a copy thereof. But the warden, who was called as a witness by the libelant, testified that it was in fact the report of his survey, and it was so accepted by the parties.

There is no conflict in the testimony as to the place and manner of stowing the iron and anvils. The bundles and bars are from eight to fourteen feet long. They were stowed "grating fashion" on the floor of the vessel, properly dunnaged, on either side of the mainmast. The anvils were stowed around the mast on either side of the kelson. On top of these were placed three tiers of earthenware crates, and over all eight or ten tiers of the salt in sacks. Between the mast and this cargo there was a mat and an inch board.

On taking out the cargo it was found that sea-water had gone down the mast in such quantity as to wash out or drain away several sacks of salt, leaving a hole around the mast and next to the deck two feet wide on either side. Going down, the damp and wet from this inflow spread out through the straw in the crates 12 feet on each side of the mast, and as far aft, but less forward; but the floor was dry. The straw in many of the crates, when discharged, was still wet or moist, and in some it was soaked and rotten. It also appears that in a blow off Cape Horn the vessel shipped considerable water, and that during the night of April 20, 1887, a rent was made by some means in the mast-coat, down which

the sea-water poured when the decks were flooded for a number of hours.

Undoubtedly this was the way the salt around the mast was filled with water and sluiced out into the crates below, where the brine thus formed gradually found its way along and through the straw and ware in the crates downward and outward to the iron and anvils, where it was arrested by its affinity for the metal and converted into dry rust.

The protest, evidently written up in high colors for effect on shore, is filled with florid accounts of almost continual high winds and rough seas, from the river La Plata to the Pacific ocean, during a period of six weeks, in which the vessel is represented as straining and laboring as if on the verge of shipwreck. The casualties, however, are not material, except the breaking of the mast-coat, which the claimant attributes to the straining of the vessel in the heavy seas and high winds. But this is absurd. An iron vessel does not strain or work as a wooden one may. If it did, the rivets which hold the plates together would soon be cut off and the vessel go to pieces or to the bottom. Neither did the rolling and laboring of the vessel cause the iron mainmast to spring or work so as to tear the coat. The mast is wedged tight in the timbers where it passes through between the decks, and has four inches play where it passes through the main deck. If the coat was broken by the working of the mast, it would most naturally be torn from its fastening on the mast or the deck, but the evidence is that it was not so torn, but the seam which runs up from the deck to the mast, and on the after side of the latter, was ripped, so that a hand could be thrust in the opening. How it took place does not appear, but it probably was caused by the water carrying something that got adrift against it, or it may be the direct result of a blow from a volume of water thrown on the deck by the shipping of a sea. However, this latter supposition is not very probable, unless the coat was rotten, to which effect there is some evidence. But, however this is, it may be admitted that the ripping of the coat, whatever caused it, was a peril of the sea, within the exception of the bill of lading. And then the question arises, did the misconduct or negligence of the carrier contribute to the injury resulting therefrom to the cargo; or, in other words, would the exercise of proper skill and diligence in the stowage of the cargo or the repair of the coat have prevented this injury, notwithstanding the accident?

From the evidence it appears that the break in the mast-coat occurred some time in the night. The mate says it was repaired next morning. The carpenter says:

"It was my place to go around in the morning and evening, and sound the ship. The mast-coat is near the pumps, and that is where I noticed it when I sounded the ship in the morning. The seam was between five and six inches on the aft part of the mast, and the hole was in the seam."

He adds that it was all right when he sounded the ship in the evening; and in the morning he discovered the break, and repaired it immediately by tacking a piece of lead over it.

During this period it appears that the deck was flooded with water, which may have been running down this hole for at least 12 hours.

This, in my judgment, was negligence. According to the evidence of the claimant, the breaking of the mast-coat may be expected under such circumstances; and particularly if the material is rotten or decayed, as this probably was. Under the circumstances, it should have been discovered before it was. But in the protest, which is signed and sworn to by these witnesses, and which they now swear is correct, it is stated:

"At 4 P. M. (April 20th) discovered seam of mainmast coat gone, caused by the heavy rolling and straining; a large quantity of water must have gone down into the hold."

And the master who made this protest, and thereby declared, what is apparent, that "a large quantity of water must have gone down into the hold" in this way, in his answer to the libel, as well as his deposition, gingerly admits that "some water was precipitated into the hold" by this means, but "is almost certain" that it did not reach the iron. The protest also states that on April 12th "sounded pumps, and found eight inches of water in the forward hold, and six and one-half in main hold;" while the carpenter in his deposition says: "We had no occasion to pump her, [the Nith.] She made no water. An inch or an inch and a half is what we have taken out of her."

But even admitting that the water going into the hold through this rent in the mast-coat is a peril of the sea that could not by ordinary skill and diligence have been prevented or remedied sooner than it was, still, in my judgment, the carrier is liable to the libellant for the injury thereby done to the iron, because it was improperly stowed. There are some things that one person of common sense and ordinary intelligence can understand and have an opinion about as well as another, be he ever so expert; and, in my judgment, one of them is that salt and iron, unless it may be pig, should not be stowed contiguous to one another, and particularly that the former should not be stowed over the latter, when there is any chance for water or drainage to come through or from the salt to the iron.

In Stevens on Stowage, an English work (1869) of admitted authority, it is said, (page 478, § 849:)

"Salt, from its moisture, should be divided by bulkheads from other goods; even crates should not come in contact, for the straw will rot, and breakage ensue. \* \* \* The evaporation from salt, which settles against the under parts of the decks, will, when it falls, prove very injurious to some descriptions of perishable goods below,—iron and machinery especially."

But it is said that this was dry salt; and so, I suppose, is the salt of commerce generally. But, however dry it may be when shipped, it will absorb the moisture around it; and if any water falls on it from above, it will drain out below in the form of brine, and corrode and destroy whatever iron it comes in contact with.

Of course, the master says it was properly stowed. The mate avoids giving an opinion on the question, and says the iron was in the ship before the salt was offered, and the master had to take it. But the stevedores, who know more about the matter than the mate, speak of this salt as a part of the cargo while yet the iron was unstowed. And the



mate is mistaken as to the law. A carrier is not bound to take goods which are likely to injure goods already received for carriage. 2 Pars. Cont. 174.

But it is not likely that the master had anything to do with receiving or stowing the cargo. The owners put the Nith up for Portland, and the freight clerk received the freight as it came on the quay, and gave receipts for it, which were afterwards extended into formal bills of lading, and signed by the master as the agent of the owners; and in the mean time the cargo was stowed by the stevedores, who were especially employed by the owners for that purpose.

On the trial, the claimant produced six witnesses who testified as experts that the stowage was good. Three of them are British ship-masters temporarily in this port. One of them, the master of the Roscrana, undertook to emphasize his testimony on this point by saying that on his voyage out from Liverpool he had brought a cargo of salt and iron, in which the latter was stowed in the hold under the salt. But on being presented with his own bill of lading for 520 bundles and bars of Swedish iron, noted, "Stowed in 'tween-decks," he was taken back, and tried to get out of the dilemma by saying there was some pig iron stowed in the hold.

On the other hand, the libelants produced five witnesses who testified as experts that this iron was badly stowed, and that salt should never be stowed over iron, except pig, unless a tight deck or bulkhead is put between them, which will carry the drainage, if any, to the sides of the vessel. These witnesses are all persons of good standing in this community. They are not sea-tramps, here to-day and gone to-morrow, but men of substance and permanence, who are responsible for what they say. They are all seamen now living ashore. Four have served as masters for many years, and the other, who rose to the rank of first officer, is now engaged in the hardware business.

Their testimony, under the circumstances, far outweighs that of the claimants on this question. But, as I have said, it needs no expert testimony to show that this stowage was bad. The fact is apparent to any person of common sense and ordinary intelligence.

But the error of this stowage can be demonstrated on another ground, beyond cavil. Admitting, for the present, that the salt might have been safely stowed over this iron, as it was, still it should not have been stowed so near the mast. One of the most candid and considerate of the claimant's seafaring witnesses, C. C. Planch, admitted that in this particular the stowage was bad, and that the dunnage between the salt and the mast ought to have been at least four or five inches, instead of one or two; and in my judgment he might well have said one or two feet, and included the crates and iron as well as the salt. Had this been the case, the water that went down the rent in the mast-coat would have run off to the bottom of the vessel without touching the cargo. The fact that the mast-coat is liable to break in such weather as may be expected off the Horn in the passage to the west during the winter, is a circumstance which proper skill and diligence in stowing cargo will take

into consideration, and provide against. This was certainly not done in this case, when at least four or five feet of salt was stowed over crates and iron, within an inch or so of the mast. And so, when the peril came, and the water went down the mast in a stream of some inches in quantity, it necessarily came in contact with the salt, which carried it downward and outward, on either hand, in the form of pickle, to the straw in the crates, which naturally conducted it still further in the same direction, until, as I have said, it was arrested by its affinity for the iron, and converted into rust.

And this gives occasion to notice the argument or suggestions of some of the claimant's expert witnesses, that the presence of the salt added nothing to the peril, as the sea-water that went down the rent was sufficient to have rusted the iron anyway. But the difference between the corrosive power of simple sea-water, which contains only four ounces of salt to the gallon, and water drained through a bank of salt, and containing probably 33 per centum of the same, is something material. Besides, if the salt had not been there, the water would not have been diverted from a direct line, and at most would only have wetted the ends of the iron, and the injury would have been comparatively small. But, in my judgment, it was bad stowage to place either of the articles so near the mast, where they were liable to become wet, or even moist, from the passage of water down the same.

If the salt, crates, iron, and anvils had been dunnaged away from the mast one or two feet, the water that went through the rip in the mast-coat would have passed down to the bottom of the vessel without touching either of them; and the cargo would have reached its destination, so far as this peril is concerned, in good condition.

Admitting that the cargo was properly stowed in every other respect, it was faulty in this. It was the duty of the carrier to guard against this peril of the sea by leaving a sufficient space between the cargo and the mast to allow any leakage at this point to pass directly down the latter, without coming in contact with the former, into the bottom of the vessel, and within the suction of the pumps.

In *The Reeside*, 2 Sum. 571, Mr. Justice STORY says:

"Dangers of the seas, whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In *Richards v. Hansen*, 1 Fed. Rep. 61, Mr. Justice CLIFFORD, after citing this passage from the opinion in *The Reeside*, *supra*, says:

"Hence it is that if the loss occurs by a peril of the sea that might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability."

In this case there was a manifest failure to exercise such skill and diligence (1) in discovering and repairing the rent in the mast-coat, assuming that it was broken in the night, and not discovered or repaired, as stated in the protest, until 4 P. M. the next day; (2) in stowing the salt over the iron and anvils, as was done; and (3) in stowing the iron, crates, and salt, and particularly the latter, around the mast, without leaving sufficient space for any water that might come through the mast-coat to pass down without coming in contact with the cargo.

The only remaining question is that of damages. The measure of damages in this class of cases, where there has been a failure to deliver, is the current value of the goods at the port of destination, with interest on the same. Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for non-delivery. From the date of such non-delivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested in the goods, and should have redress by being allowed legal interest thereon. The tendency of the modern authorities is to allow interest in all cases, and surely this is one in which it ought to be allowed, if in any.

The libelants are wholesalers and jobbers in iron, and sell to retailers and consumers in this market. The current price at this port, in their trade, of the iron and anvils, at the time delivery ought to have been made, is the measure of their damages; and that is the sum claimed in the libel,—\$3,700.17. *The Gold Hunter*, Blatchf. & H. 308; 3 Suth. Dam. 217; *Railway Co. v. Jurey*, 111 U. S. 596, 4 Sup. Ct. Rep. 566; Fland. Mar. Law, 158, note 4; *Watkinson v. Laughton*, 8 Johns. 164; *Bracket v. McNair*, 14 Johns. 170; *Sturgess v. Bissell*, 46 N. Y. 464; Carv. Carr. by Sea, § 727; 2 Sedg. Dam. 355.

One year and ten days have elapsed since the arrival of the Nith in this port, and, allowing ten days for the delivery of the goods, the libelants are entitled to the legal rate of interest, 8 per centum, on the amount of the damages for one year,—\$296.01.

A decree will be entered that the libelants recover the sum of \$3,996.18, together with their costs and disbursements; and, unless the same is paid within 10 days from the date of the decree, execution may issue to collect the amount from the stipulators.

WOOLDRIDGE v. MISSISSIPPI VALLEY BANK *et al.**(Circuit Court, S. D. Mississippi. January Term, 1888.)*

## ATTACHMENT—PRIORITY—MORTGAGE—DEED ABSOLUTE.

H. was owner in fee of a tract of land which he conveyed to W. for the sum of \$800 in cash, paid at the time. The conveyance was absolute on its face, and was duly acknowledged and recorded. Subsequently H. repaid to W. part of the money received, and procured W. to convey the land to K., by deed absolute on its face, K. paying to W. or to H., who paid it to W., the balance of the money with interest received from W. This deed was duly acknowledged and recorded. H. joined in the deed from W. to K., conveying all the timber cut or to be cut on the land. W. also in her deed conveyed all the timber cut or to be cut on the land to K. H., at the time this deed was executed, with the amount so paid to him by K., was indebted to K., or the bank of which he was cashier, in the sum of \$4,550.26, for which he gave his two notes. Two days after the deed was executed K. addressed a letter to H. in which he promised, upon the payment of these two notes, to convey the land to any one whom H. might designate. Subsequently the bank and K. became insolvent, and the land was levied upon by G., a creditor of K. and the bank, upon which judgment was rendered. B., another creditor of K. and the bank, sued out an attachment, and garnished H. as debtor of K. and the bank. The creditor had no knowledge of the letter or defeasance of K. to H. *Held*, that G.'s attachment fixed a lien upon the land for the amount of his judgment prior to any indebtedness from H. to K., liable to the garnishment of B. against K. or the bank.

*(Syllabus by the Court.)*

In Equity. On motion to set aside decree.

*L. Magruder*, for defendant Bowles.

*M. Marshall*, for defendant Gilbert.

HILL, J. The questions now for decision arise upon the motion of Mrs. L. H. Bowles to set aside a decree theretofore rendered in this cause, upon the petition of James H. Hays, exhibits and agreed state of facts, and to have the proceeds of the sale of the land described in said petition paid over to Mrs. Bowles. The question is, was the decree sought to be set aside right or wrong? If wrong, it ought to be set aside; but if right, it should stand, and the fund arising from the sale should be paid over to Mrs. Bowles. From the exhibits and agreed state of facts, the following is made to appear:

Hays was the owner of the land in fee, and procured from Mrs. Mary Walsh the sum of \$800, and, either in payment for the money or as security for its repayment, executed to her a deed in fee, absolute on its face, conveying to her the land described in the petition, which deed was duly acknowledged and recorded. Some time after this was done, Hays repaid to Mrs. Walsh a portion of the money received from her, and procured her to execute to G. M. Klein, as cashier of the Mississippi Valley Bank, a deed absolute on its face to this tract of land. Klein paid to Mrs. Walsh the balance of the money, with interest so paid by her to Hays. Hays at the time owed the bank other debts which, with the sum so paid to Mrs. Walsh, amounted to the sum of \$4,550.26, and for which he executed his two notes. Two days after the execution of the deed, Klein addressed Hays a letter, as follows:

"VICKSBURG, MISS., April 25, 1879.

"*James J. Hays, Vicksburg, Miss.*—DEAR SIR: I hereby agree to make to any one whom you may designate a deed to the property, purchased by me from Mrs. Mary Ann Walsh, upon the payment to me of your two notes of twenty-one hundred and eighty-five dollars 31-100 (\$2,185.31) and twenty-three hundred and sixty-four 95-100, (\$2,364.95,) in accordance of the terms of said notes. I further agree to refund to you the interest at the same rate as charged you upon any credit that may be made on said notes, and to credit you with all money collected from the steamer Vicksburg claim in my hand.

"Yours, respectfully,

GEO. M. KLEIN, Cashier."

Gilbert, a creditor of the bank or of J. A. & G. M. Klein, who composed the bank as private bankers, sued out his attachment against them, and caused the same to be levied upon the interest of defendants in the land so before conveyed to George M. Klein, cashier, and has obtained judgment thereon in the circuit court of Warren county. Mrs. L. H. Bowles, another creditor of the Kleins, or of the bank, sued out her attachment in the same court against said Kleins, and caused Hays to be summoned as a garnishee, to answer what sum he was indebted to said Kleins, who answered that he owed them or the bank the sum of \$1,000 on said notes. Hays filed his petition in this cause against said Kleins and the receiver, alleging that the deed to Klein of the land, though absolute on its face, was in fact only a mortgage to secure the payment of said notes, and exhibited with his petition, as part thereof, the letter written by Klein to him on the 25th April, 1879. Hays, in his petition, alleged that he had been summoned as a garnishee in the suit above stated, and prays that the said deed be declared a mortgage, and that upon the payment of the said sum of \$1,000 the title to said land be vested in him. By consent of all parties, including Mrs. Bowles, the case was submitted to the court upon the petition, exhibits, and agreed state of facts, for such decree as the court might deem to be the rights and equities of the respective parties. The court, upon examination and consideration of the questions involved, found that, as between the bank or the Kleins and Hays, the deed conveyed the legal title to the lands to said George M. Klein as cashier of the bank, with the obligation of Klein to convey the title to Hays or any other person designated by him upon payment of said notes; that the legal title to the lands being in said Klein, absolute on its face, as it appeared on the records, without any notice of any defeasance or other equity to Gilbert, or other creditors, the land was subject to the attachment of Gilbert, which fixed a lien upon it for the payment of the judgment afterwards recovered in said suit, so far as it related to the title of said Klein in said land, and which would pass to the purchaser under a sale to be made for the satisfaction of the judgment rendered thereon; but that Hays, upon the payment of the balance due Klein, would be entitled to a conveyance of the land, which, if paid by Hays, would go to Gilbert. As the land had not been sold, it was agreed that it should be sold, and that, if it sold for more than enough to pay the balance due to Klein, the balance should be paid to Hays. It was further held that, as the attachment of Gilbert was served before the garnishment of Mrs. Bowles, she could take nothing by her garnishment until Gilbert's

judgment was paid. The land was sold, but did not bring enough to pay Gilbert's judgment, so that neither Hays, nor any one claiming through him, has any interest in the proceeds of the sale.

To sustain the motion in this case, it is insisted with great earnestness that the possession of Hays, in continuing to cut and remove the timber on said land, and by the temporary sheds or camps in which his employes staid while so employed, was notice to the world that the deed was in fact a mortgage, and of his title as a mortgagor, and that Klein's interest as a mortgagee was not subject to Gilbert's attachment, but could only be reached by garnishment or bill in equity; that as Gilbert did not pursue either remedy, and as Mrs. Bowles did pursue the remedy by garnishment, she is entitled to the proceeds of the sale of the land. But Hays having joined in the deed conveying the timber on the land cut, and to be cut by him, his possession was entirely consistent with Klein's title under his deed, and left Gilbert with no notice, actual or constructive, of Hay's equity in the land, or that he was indebted to Klein or the bank in any sum whatever, so that Gilbert had a right to suppose that Klein was the legal owner of the land, without any equity or claim against his title, and hence his right to pursue his remedy by attachment. The questions raised have been ably presented by counsel in favor of the motion, but I am unable to find any error in the decree sought to be set aside. Therefore, the motion will be overruled, and an order entered that the proceeds of the sale be paid over to Gilbert.

## NORTON v. TAXING DISTRICT OF BROWNSVILLE.

(Circuit Court, W. D. Tennessee. June, 1888.)

### 1. MUNICIPAL CORPORATIONS—BONDS—AUTHORITY TO ISSUE—STATUTES—REPEAL BY CONSTITUTION.

An act authorizing a municipality to issue bonds upon a majority vote of the qualified electors is abrogated by the new constitution of Tennessee of 1870, taking effect before the election is held and the bonds are issued, and requiring a three-fourths vote to pledge the credit of the municipality, although at the election the new requirement as to the vote be complied with in fact. So held by the former circuit judge, the district judge *dubitante*.

### 2. STARE DECISIS—PRACTICE IN FEDERAL CIRCUIT COURTS.

If municipal bonds be declared invalid by the judgment of one of the judges holding the circuit court, and the case be pending on writ of error in the supreme court, in a subsequent suit involving the same bonds, tried by one of the other judges holding the court, the former judgment should be followed, notwithstanding any difference of opinion as to the validity of the bonds, until the supreme court has passed upon the questions involved by the controversy.

At Law. On motion for new trial.

Suit upon coupons of bonds in aid of a railroad corporation, issued by the defendant in pursuance of an act of the legislature of February 8, 1870, c. 55, upon an election held June 13, 1870, under an ordi-

nance of the municipality passed May 12, 1870, the bonds reciting that they were issued in conformity with that act; the vote for the bonds being unanimous. The date of the bonds was July 1, 1870. But on the 5th day of May, 1870, the new constitution of Tennessee took effect, before the new election was ordered or held, and before the bonds were issued; and by that instrument it was declared that "the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election." Const. Tenn. 1870, art. 2, § 29. The late Circuit Judge BAXTER, in a suit between these same parties upon other coupons of the same bonds, declared the bonds invalid, and directed judgment for the defendant, upon the ground that the new constitution abrogates the old act of the legislature entirely, and that there was no legislative authority whatever for the bonds. Before the new constitution only a majority of the votes cast was required to authorize bonds to be issued. The court directed a verdict and judgment for the defendant.

*Craft & Cooper*, for plaintiff.

*Smith & Collier* and *Bond & Rutledge*, for defendant.

HAMMOND, J., (*after stating the facts as above.*) This case, by agreement, was heard with another for convenience, and upon the agreed statement of facts filed in the record. The motion for a new trial involves only the same questions raised at the trial, and proceeds upon the ground that the court erred in directing a verdict for the defendant upon the law of the case. I do not deem it necessary to consider the merits of the controversy involved in the case at any length, for the reason that, following a former decision of this court in a suit involving the same bonds, or the coupons upon them, it seems to me that the same judgment must result here. And as that case is pending in the supreme court, to which this may be likewise taken and heard along with it, there seems to be no good cause for any further expression of opinion in this court upon these questions. But at the request of counsel on both sides it is proper to state that there was in that case no written opinion by the late Circuit Judge BAXTER, who heard it sitting alone. He consulted me, however, about the questions presented, and died, pending the motion for a new trial there made, after having reached a determination to direct a verdict for the defendant, and requesting me to have that order entered, as he passed through to the Hot Springs, where his death took place before his return to Memphis. The duty of directing a verdict before another jury and of signing the bill of exceptions was devolved on me, and in this way I became familiar with the disposition of that case, and fully informed as to his opinion concerning it. It is that opinion I am endeavoring to follow and enforce in this case, notwithstanding any judgment of my own which might be reached by an independent consideration of the questions argued on this trial. Manifestly this is the wisest course, and that which proper judicial treatment

requires, under the circumstances, particularly as the self-same issues of bonds are involved in all the cases, and that which he decided is yet pending in the appellate tribunal. Diverse judgments should be avoided, if possible, under such circumstances, always.

But it is contended that this case presents a somewhat different state of facts, and demands a different judgment, and that it would be proper for the court as now constituted to proceed independently of that precedent to another judgment, if this case requires it. The only additional facts were considered by him, as I know; and while, technically, perhaps, there is that difference suggested, it was about those very facts that there was some divergence of opinion, or a tendency to that, between us upon the law of the case as then presented; and it was only because of the needlessness of these very facts that he concluded that it was not worth while to reopen the case. It will be remembered that, as tried before him, there was, owing to the absence of counsel, a verdict for the plaintiff in that case, with an agreement of counsel that the case was to be argued on motion for a new trial, and, if he came to the conclusion that the bonds were invalid, he was to direct a verdict for the defendant, which he did, but died before the entries could be made. The plaintiff's counsel then desired a new trial, to present these additional facts in the record; and, knowing that the circuit judge had considered them upon the argument as immaterial and irrelevant, I did not feel authorized to grant a new trial because of these facts; particularly as the plaintiff might have presented them originally if he had deemed them material, and thereby invoked a ruling upon that point. So, here, I follow the ruling of the circuit judge in that case, and direct a verdict in this as he would have done if it were tried before him.

Perhaps I should explain that these additional facts are that the election upon which the bonds were issued was, in point of fact, a compliance with the new constitution of the state, and that the proposition to issue the bonds received the majority required by that instrument, and not the less majority only which had been required by the authorization act of the legislature. Now, before the circuit judge, he was asked to imply that fact, and he did; or, at least, he concluded that it was wholly immaterial, since it was his opinion that the new constitution had the effect to abrogate the original authorization act *in toto*, so that the city of Brownsville no longer had any authority to issue these bonds, and that it would require a new act of the legislature conferring the authority in conformity to and upon compliance with the new conditions established by the constitution of 1870. He thought, therefore, that the fact of the election having resulted in a majority sufficiently large under the new constitution would not avail the plaintiff in the least. I suggested to him that the actual fact did not appear by that record, and should not, possibly, be implied upon the face of the bonds, from the bare fact that the election had been held subsequently to the adoption of the new constitution, as it was contended by plaintiff should be implied; that it was a fact that might be either way, and that the implications might be evenly balanced, whether the authorities proceeded on the authority of the original act to issue bonds



upon a mere majority of the votes cast at the election, or upon the theory of the new constitution not to issue them unless there was a majority of three-fourths, as required by that instrument; that, possibly, the law should be held to be that the new constitution only modified the act of authority to issue the bonds, and supplemented that legislative grant of power with a new condition, which, if complied with, would make the issue of bonds as valid as if the original act had so required, or as if any new act had incorporated that new condition; and further that I was inclined to that opinion. *Green v. Dyersburg*, 2 Flip. 477; *Norton v. Town of Dyersburg*, 127 U. S. 163, 8 Sup. Ct. Rep. 1111. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121. The circuit judge took a different view, and asked me to set aside the verdict for the plaintiff, and to direct one for the defendant, which, owing to delays of counsel, was not done till after his death; and, knowing my inclination as above stated, the plaintiff's counsel sought on motion for a new trial before me to obtain a different result by reopening the case, and upon another trial proving the fact, now proved in this case, that there was in fact a three-fourths majority. But I thought that justice required that the parties should be held to their agreement before the circuit judge, and that, he being dead, it was more particularly important that the defendant should have the judgment he had rendered in the case, as the parties had made it before him. And, for the same reason, I have disregarded here any inclination of my own, and do not take the trouble to determine how far that inclination would lead towards a different view from that of the late circuit judge, it being my judgment that the bonds should stand as he left them, so far as this court is concerned, his judgment on the first case to be taken as the precedent for these cases. No injustice is done, as the parties by writ of error may invoke the judgment of the supreme court, and thereby settle the law of the case for each and all the bonds alike. But the parties have the right, no doubt, that this court shall declare the basis of this ruling. Motion overruled.

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### HARPER v. NORFOLK & W. R. Co.

(Circuit Court, W. D. Virginia. November 5, 1887.)

#### 1. ACTION FOR WRONGFUL DEATH—JURISDICTION—FEDERAL COURTS.

Code Va. 1873, c. 145, requires an administrator, when suing for damages for causing the death of his intestate, to bring the action in his own name, the amount recovered to go to the widow and children, if any; otherwise to be assets of the estate. *Held* that, where the administrator and defendant are citizens of different states, the action may be brought in the federal courts, though the deceased was a citizen of the same state with defendant, where his widow and children still reside.

#### 2. SAME—PARTIES.

In such action the real beneficiaries need not be named in the declaration.

## 3. SAME—NEGLIGENCE—PLEADING.

A declaration alleging that the defendant did not use its trains, provide servants, etc., so as to avoid extraordinary risk to its employes, is not too general, where it is also alleged that by reason of the careless and negligent use of its cars, engines, etc., and by failure to employ a sufficient number of servants, the extraordinary risk was not avoided.<sup>1</sup>

At Law. Trespass on the case for causing the death of plaintiff's intestate. On plea in abatement and demurrer.

*Daniel Trigg*, for plaintiff.

*Fulkerson & Page*, for defendant.

PAUL, J. This is an action of trespass, brought by Isaac Harper, administrator of Anderson Harper, deceased, to recover damages of the defendant for causing the death of the plaintiff's intestate. The action is brought under the provisions of chapter 145, Code Va. 1873, which authorizes the administrator of the decedent to bring an action of this character; the statute requiring the action by the administrator, and in his name, and provides that the amount recovered of the defendant shall be for the benefit of the widow and children of the deceased, where there are such; if none, the recovery is assets in the hands of the administrator, to be disposed of according to law. The declaration alleges that the plaintiff is a citizen of the state of Tennessee, and the defendant is a resident of the state of Virginia. The defendant files a plea to the jurisdiction of this court, on the ground "that the said Anderson Harper, before and at his death, was a citizen of the state of Virginia, and that the said Anderson Harper left a widow and children surviving him, and that the said widow and children of the said Anderson Harper were, at the time of his death, and still are, citizens of the state of Virginia." To this plea the plaintiff files a demurrer.

It is conceded that the plaintiff, the administrator of Anderson Harper, is a citizen of the state of Tennessee, and that the defendant is a resident of the state of Virginia; but the defendant contends that Isaac Harper, the administrator of Anderson Harper, is merely a nominal party to the record; that the widow and children of Anderson Harper are the real parties in interest in this action; that the administrator is a mere instrument or conduit through whom the rights of the real plaintiffs are asserted. To sustain this position, counsel for the defendant rely chiefly on *Browne v. Strobe*, 5 Cranch, 303; and on *McNutt v. Bland*, 2 How. 9. *Browne v. Strobe* was an action in the name of the justices of the peace of a county in Virginia, on an executor's bond given to the justices, in accordance with the then statute, for the faithful performance of his duties, as an executor's bond is now given to the commonwealth. The action was for the benefit of an alien. *McNutt v. Bland* was an action in the name of the governor of Mississippi, on a sheriff's bond, given to the governor of Mississippi for the protection of any party who might be ag-

<sup>1</sup> Concerning the sufficiency of the averments in the pleadings, in actions for negligent injuries, see *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 857, and note; *Railroad Co. v. Mitchell*, (Ky.) 8 S. W. Rep. 706; *Railroad Co. v. Jones*, (Ala.) 3 South. Rep. 902; *Railway Co. v. Richardson*, (Ga.) 7 S. E. Rep. 119.

grieved by the conduct of the sheriff, and the action was for the benefit of a citizen of New York. The principle decided in these two cases is that a public officer, to whom an official bond is made payable, and whose name must be employed by the plaintiff in a controversy between citizens of different states, or an alien and a citizen, cannot be considered a party litigant. *McNutt v. Bland*, *supra*. Can it be said in the case at bar that the plaintiff, the administrator of Anderson Harper, is not a party litigant? He is in no sense a public officer. He is the actor in the controversy. The law compels him to be such. By statute the legal right to bring this action is vested in him. No other party can bring it, nor in any way be a party plaintiff to it. In *Bonnafée v. Williams*, 3 How. 574-577, the court says:

"Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue at law in federal courts, without reference to the citizenship of those who may have the equitable interest."

But apart from the legal right conferred by statute on the administrator to bring this action, is he in nowise a party in interest? Is he not liable, as the administrator, for the costs of this action, in the event of his failure to recover, and for attorney's fees to those he has employed to bring this suit? In the event of the death of the widow and children, the amount recovered would be assets in his hands, as administrator, for disposal according to law. If he succeeds in this action, and collects the money of the defendant, and fails to pay the same to the parties entitled thereto, clearly he will be liable on his official bond therefor. The distinction between the class of cases relied on by the defendant, such as *Browne v. Strode* and *McNutt v. Bland*, *supra*, and the case at bar, is very clearly drawn in *Coal Co. v. Blatchford*, 11 Wall. 172. It is scarcely necessary for the court to refer to the cases of *Chappedelaine v. Dechenaux*, 4 Cranch, 306, *Childress v. Emory*, 8 Wheat. 642; *Osborn v. Bank*, 9 Wheat. 738; *Rice v. Houston*, 13 Wall. 66, 67. In all of these cases it is clearly decided that "the jurisdiction depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record." In *Coal Co. v. Blatchford*, 11 Wall. 172, the court says:

"If the legal representatives are personally qualified by their citizenship to bring suits in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified."

The court is of opinion that the plaintiff, by virtue of his citizenship, has a right to resort to the jurisdiction of this court. This right is conferred by the constitution and laws of the United States. That he is not deprived of it by the Virginia statute, vesting in him, and in him alone, the legal right to bring this action. The demurrer to the plea must be sustained.

The defendant files a demurrer to the declaration, on the grounds—*First*. That the real beneficiaries in this action are not named in the declaration. It was decided in *Railroad Co. v. Wightman's Adm'r*, 29 Grat.

431, that this is not necessary. *Second.* That the allegation in the declaration that the defendant did not use its trains, provide servants, etc., so as to avoid extraordinary risk to its employes, is too general; that the means by which it failed to avoid extraordinary risk should be set out in detail. In the same count in which the allegation is made it is stated that by reason of the careless and negligent use of its cars, engines, etc., and by a failure to employ a sufficient number of servants, etc., the extraordinary risk was not avoided by the defendant. The demurrer to the declaration must be overruled.

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GEIS v. KIMBER.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. May 21, 1888.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—BREWING—WORT-MAKING STOCK.

Letters patent No. 249,332, granted November 8, 1881, to Francis J. Geis "for a new and improved mixture or grist for brewing purposes," describing "a mixture or grist for brewing malt liquors, composed of malt and cereals or grain, having the cellulose or integuments and germ or heart removed; the cereals and grain constituting from about 25 to 50 per centum, by weight, of said mixture,"—must be construed as and for "a composition of matter." "a wort-making stock," prepared by compounding a dry mixture of grain free from hulls, etc., and of malt, in the proportion stated.

2. SAME—CONSTRUCTION BY PATENT-OFFICE.

Where it is evident from the record in the patent-office that a certain construction of a patent was there contemplated, and that it would not otherwise have been granted, no objection can be made to the same construction of it by the court on the ground that such construction is narrow, and will render the patent practically useless.

3. SAME—INFRINGEMENT.

The above patent is not infringed by the sale of a manufactured material substantially the same as one of the ingredients in the above composition, with a recommendation to brewers to use it in the mash-tub with the other ingredients of the above composition.

In Equity. Suit for infringement of patent.

*George E. Buckley and Edwin M. Hunt*, for complainant.

The sale of an ingredient to persons who intend to use it in the combination claimed in the patent, and advertised and sold for that purpose, is an infringement on the patent. *Bowker v. Dows*, 14 O. G. —; *Wallace v. Holmes*, 9 Blatchf. 65; *Coolidge v. McCone*, 2 Sawy. 571; *Saxe v. Hammond*, 1 Holmes, 456; *Terrell v. Sparth*, 8 O. G. 986; *Renwick v. Pond*, 5 Fish. Pat. Cas. 569; *Richardson v. Noyes*, 10 O. G. 507.

*Rowland Cox and Samuel B. Huey*, for defendant.

The patent is invalid, because the mixture or grist described and claimed is a mere aggregation of known things. The grain remains grain, and the malt remains malt; each performing its own distinctive act and function. It is the same as mixing beans of different colors, or pebbles or stones of different appearance. This is made plain by the fact that neither the complainant nor

<sup>1</sup>Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

defendant have sold the patented "mixture." The malt of commerce is bought in one place, and the hominy, rice, or other cereal in another place, and the brewer uses them by putting them in his mash-tub, and boiling and mashing them. This is the extent of the alleged infringement. The rule as to aggregations is thus stated by the supreme court: "In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. To draw an illustration from another branch of the law, they must be joint tenants of the domain of invention, seized each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions." *Pickering v. McCullough*, 104 U. S. 318; *Reckendorfer v. Faber*, 92 U. S. 357; *Glue Co. v. Upton*, 97 U. S. 3; *King v. Gallun*, 109 U. S. 99, 3 Sup. Ct. Rep. 85.

BUTLER, J. The suit is for infringement of letters patent No. 249,-332, issued to Francis J. Geis, "for a new and improved mixture or grist for brewing purposes," dated November 8, 1881. The patent contains a single claim, which reads as follows:

"A mixture or grist for brewing malt liquors, composed of malt and cereals or grain, having the cellulose or integument and germ or heart removed; and the cereals or grain constituting from about twenty-five to fifty per centum, by weight, of the said mixture or grist, substantially as herein specified."

To determine the scope of this claim it is necessary to understand and consider the circumstances under which the patent was granted. The original application presented in December, 1880, was for "new and useful improvements in the process of brewing malt liquors." The alleged invention and its advantages were described, substantially, in most respects, as are set forth in the specifications accompanying the patent. The claim sought to be secured read as follows:

"The process of manufacturing malt liquors consisting in substituting for from twenty-five to fifty per centum of the weight of the malt usually employed a corresponding weight of cereals or grain having the cellulose or integument and germ or heart removed, but containing gluten and albuminoids, substantially as and for the purpose specified."

After consideration by the examiner, the application was rejected. Making slight amendment, the applicant renewed it. It was again considered, and rejected, in the following words:

"The use of cereals deprived of hull, kernel, and all nitrogenous and unfermented matters, in conjunction with malt to form beer, is shown in the English patents to Johnson, 2,082, of 1871, and Newton, 2,360, of 1882; and the use of corn deprived of hull and kernel, for the same purpose, pointed out in the United States patent to Hartshorn, March 5, 1879, No. 220,022, and that to Furbush, already cited."

After further amendment, the application was again renewed, and was again rejected, in the following terms:

"It is old in the processes of manufacturing malt liquors to substitute for malt, in varying proportions a corresponding weight of corn. See, for instance, English patent 94, of 1857, (mashing,) and Distillation, Brewing, and Malting, San Francisco, 1867, p. 30. The purpose of Hartshorn's in-

vention is to improve this old process by first removing from such grain the integument and germ. This seems to be the whole gist of applicant's invention, and, such being the case, it is deemed to be fully anticipated."

Further amending, the applicant again renewed and pressed his claim. It was again rejected, in the following terms:

"This application has been reconsidered and amended. The references of record show that it is old in the process of manufacturing malt liquor to substitute, in varying proportions, cereals for the malt usually employed. It is also shown to be old to use for the same purpose cereals having the cellulose, heart, and germs' removed. Instead of treating cereals thus prepared in the way preferred by Hartshorn, applicant merely adopts the older method followed in treating ordinary grain. To test the grain as prepared by Hartshorn in the old way, is not seen to require the exercise of invention. In other words, applicant has neither discovered that grain can be substituted for a portion of the malt in the ordinary brewing process, nor that such grain, with hulls and heart removed, will better answer as such substitute. The applicant is again and finally rejected."

These several decisions of the examiner were, we believe, clearly right; not only for the reasons stated by him, but for others as well, deducible from the proofs in this case. A brief review of the state of the art will show this, and afford additional aid in construing the claim. Cereals—rice, wheat, and corn—had been used in combination with malt in manufacturing malt liquors for many years. These grains contain qualities adapted to such use, and, being cheaper than malt, had long been thus used. The hulls and germs contain objectionable matter, which render it important to exclude them. This was universally understood by the trade. "Commercial" rice is virtually, if not absolutely, free of them; wheat and corn meal are measurably so. The subject of using these grains, and the importance of removing the hulls and germs, are referred to in various publications, and also in numerous letters patent, introduced into the case. The preparation of corn known as "hominy" contains less of these objectionable parts, probably, than any other preparation of that grain. It is not absolutely free; necessarily a small part remains, even with the greatest care in preparation. Notwithstanding some reference is made to hominy in this connection, in one or two publications, the importance of adopting it instead of corn-meal seems very generally to have been overlooked. There is evidence of its use, however, at St. Louis, as early as 1876. The complainant, (a practical and experienced brewer,) believing "hominy" to be the cleanest, and therefore the best, preparation of corn for brewing purposes, commenced its use shortly before his application for a patent. He had discovered nothing new in the art of manufacturing malt liquors. He admits this virtually in the following statement, taken from his application:

"I am aware that a grist composed of malt and grain in its natural state is not new, and I am also aware that it has been proposed to remove from corn the hulls and germs before applying it to this purpose."

This statement, however, falls far short of the entire truth relating to the subject, as we have seen. He doubtless believed himself the first to discover the especial adaptability of "hominy" to brewing purposes.

Others, however, knew as well as he that "hominy" is simply corn with the hulls and germs removed, and, knowing this, would necessarily as well understand its adaptability to this purpose. But he was mistaken, even in the belief that he was the first to suggest and apply this preparation. As we have seen, it was previously suggested by others, and previously applied at St. Louis. He was using it in certain proportions to the malt, as stated in his specifications; but this also was unimportant—*First*, because of the indefiniteness in the statement; and, *secondly*, because no invention was necessary to determine the proper proportions. The complainant ascertained them by experiment; he could do it in no other way. Any brewer could and would do it in the same way, and as readily. Besides, the proportions depend upon the quality of the malt, of the grain, and of the liquor desired. While the supposed discovery went no further, as the proofs show, than seeing and utilizing the special applicability of "hominy" to brewing purposes, the applicant claimed the use freed from hulls and germs.

The conclusions of the examiner, we repeat, were clearly right. After the final rejection by this officer the complainant appealed to the board of examiners in chief. They agreed with the examiner in rejecting the claim. They, however, made the important discovery that the applicant (an expert in the art to which his supposed invention relates) did not know what he had invented; that it was something quite different from what he supposed; not a "process for brewing malt liquors," as he claimed, but a "composition of matter." After thus classifying it, they say:

"Now, the applicant has conceived the idea of preparing a suitable wort-making stock, which will keep any length of time, and which may be sent to any distance, by compounding a dry mixture of unmaltable grain, decorticated and freed from the heart or germ, and of malt, in such proportions that the starch of the one and the diastase of the other will be relatively just sufficient; (25 to 50 per cent. of the unmaltered grain;) and he should therefore claim a mixture for purposes which should be named, consisting of malted and unmaltered dry grain, describing the kind and naming the proportions."

It is difficult to find any justification for this conclusion. It is not difficult, however, to understand the reasons which led to it. The formation of a mixture of corn (partially, if not wholly, cleansed) and malt, in the mash-tub or otherwise, in the act or process of manufacturing liquor, was old, and therefore the applicant's claim for a "process of manufacturing" could not be allowed. These terms (process of manufacturing) embrace all the acts or steps involved in the manufacture, including, of course, that of preparing or mixing the ingredients. The complainant so understood them; for, although he contemplated from the beginning (and subsequently bound himself to) the preparation of his mixture "before brewing," (another step, simply, in the process,) he called his invention a "process of manufacturing." The formation, however, of the mixture in a dry state—not in the act or process of manufacturing liquor—as an article of merchandise suited to keeping and to transportation, was supposed to be a new article of commerce; and, be-

lieving this to be what the complainant had actually invented, he was advised to alter his claim and specifications, and take a patent for it. The applicant adopted the advice, altered his specifications and claim, and took letters accordingly.

While it may be difficult to see the patentable invention in thus putting together in a dry condition the ingredients in common use for brewing purposes, instead of mixing them in the mash-tub, as was formerly practiced in the process of manufacturing malt liquors, we need not concern ourselves with this question. In view of the facts stated, the claim must be construed as for a "composition of matter," a "wort-making stock," prepared by compounding a mixture of grain, free from hulls and germs, and of malt, in the proportions stated. Thus construed, nothing done in the act or process of manufacturing liquor will infringe the claim. The preparation of a "wort-making stock," composed of the ingredients in the proportions claimed, alone, will constitute such infringement. If it be said this is a narrow construction, and that it will render the patent virtually useless, a sufficient answer may be found in the fact that the patent-office contemplated this construction, and would not otherwise have granted the letters. A broader construction, such as the complainant now seeks, would give him precisely what the office refused.

Has the respondent infringed? He sells an article called "Cerealine," prepared in the manner described in the evidence. We need not trouble ourselves with the question whether this preparation is similar to "hominy," or other cereals cleaned of hulls and germs. Granted that it is, the respondent may sell it to whom he will. Hominy, rice, corn, and wheat flour are among the most common articles of merchandise, and are principally consumed as food. The complaint urged against the respondent, however, is that he sold this preparation to brewers, accompanied by a recommendation of its use for brewing purposes. He did so recommend it. He issued circulars calling attention to it as the "best known material combined with malt, for manufacturing pale pure beer," superior to "malt meal," etc., and suggesting that it be used "in the mash-tub with malt," in the "proportions of twenty-five to thirty-three per ct. of the mash." If he had recommended its use in the preparation of a "dry wort-making stock" for malt liquors, as an article of merchandise, the sale and recommendation would have rendered him responsible for the use subsequently made if his advice had been followed. He, however, did not so recommend. His language, just quoted, would seem to leave no doubt of this. It was to be mixed with the malt in the mash-tub, in the act or process of manufacturing. As the proofs show, practical brewers would so understand the recommendation. It is difficult to see how it could be understood otherwise. A decree may be prepared dismissing the bill, with costs.



CELLULOID MANUF'G CO. *et al.* v. FREDERICK CRANE CHEMICAL CO.

(Circuit Court, D. New Jersey. June 26, 1888.)

## 1. PATENTS FOR INVENTIONS — PATENTABILITY — APPLICATION OF PRINCIPLE — PYROXYLINE.

The specifications of letters patent granted to John H. Stevens, December 19, 1882, for improvements in the manufacture of pyroxyline by the use of new solvents, recite that "my new group of active liquid solvents or converting agents comprises oil of spearmint, nitrate of methyl," etc., naming 22 substances, and that these *menstrua* may be used in connection with each other, or with camphor or alcohol, or singly by themselves. *Held*, on demurrer to a bill filed to restrain an infringement, that the patent did not cover a natural principle, but an application of a principle, and was valid, and that it was not void for want of ingenuity or invention in discovering it.

## 2. SAME — MULTIFARIOUSNESS.

Such patent is not void for multifariousness because it has adapted many substances or instrumentalities for effecting its object.

In Equity. On demurrer to plaintiffs' bill.

Bill filed by the Celluloid Manufacturing Company and the Celluloid Varnish Company against the Frederick Crane Chemical Company to restrain the infringement of a patent, and to recover damages and profits. Defendant demurred to plaintiffs' bill.

*Betts, Atterbury, Hyde & Betts*, for complainants.

*Whitehead, Gallagher & Richards* and *A. v. Briesen*, for defendant.

Argued before BRADLEY, Justice, and NIXON, J.

BRADLEY, Justice. This is a bill in equity to restrain the infringement of a patent, and to recover damages and profits. The patent sued on was granted to John H. Stevens, assignor of the complainant, (the Celluloid Manufacturing Company,) on the 19th day of December, 1882, and purported to be for certain new and useful improvements in the manufacture of pyroxyline, or nitro-cellulose. The principal improvement consists in the employment of certain substances as solvents or converting agents of pyroxyline or nitro-cellulose, in manufacturing compounds of that substance. The principal solvent heretofore used has been camphor, or a solution of camphor in alcohol. The patentee, in the specification, says:

"Heretofore the best compounds of pyroxyline, as well as the preferred solvents, have had camphor as an ingredient; and it was the object of my experiments to find new *menstrua* which are in themselves such active solvents of pyroxyline as to render the use of camphor unnecessary, and I have succeeded in this respect to the extent hereinafter set forth. My new group of active liquid solvents or converting agents comprises oil of spearmint, nitrate of methyl, butyric ether, valeric ether, benzoic ether," etc.; naming 22 different substances.

The specification then proceeds to give directions as to the quantity of these ingredients to be used, and the manner of using them, stating, among other things, that they may be used in connection with each other, or with camphor or alcohol, or singly by themselves. The claim of the patent is in these words:

"What I claim herein as new and desire to secure by letters patent is: As an improvement in the art of manufacturing compounds of pyroxyline or nitro-cellulose, the use of the hereinbefore specified new group of active liquid solvents or converting agents, substantially as described."

The patent being set forth in the bill by way of profert, the defendant demurred, and for cause of demurrer stated that the alleged invention in the patent set forth and claimed is not a patentable invention for which letters patent could lawfully issue. It is argued, among other things, that the thing patented is neither an art, machine, manufacture, or composition of matter, but only a principle of nature, namely, the quality or power which certain substances have of dissolving pyroxyline; that the patentee professes to have discovered this power in these substances, and claims the exclusive right to use it, which is contrary to the well-settled rule that a principle cannot be patented; that the claim is quite as objectional as that of Prof. Morse to the exclusive use of electro-magnetism for making or printing intelligible characters at a distance, which was rejected by the supreme court of the United States. To this it may be answered that natural principles and forces (so far as they are used) may form constituent elements of a process of manufacture which is clearly patentable. Morse discovered a certain method or process by which he could utilize the force of electro-magnetism in transmitting intelligible signs to a distance. Of this process he was entitled to a monopoly, even though the particular instrumentalities might be varied; but he was not entitled to a monopoly of the force itself applied by other processes essentially different from his. The application of this rule was illustrated in Neilson's patent for the use of the hot blast in smelting. The effect of a hot blast in smelting iron ore is due to a principle of nature; but the mode of employing it by heating it in a receptacle between the blowing apparatus and the furnace was held to be patentable. *Neilson v. Harford*, Webst. Pat. Cas. 275, 371, 8 Mees. & W. 806. The use of a new material in a process has been held patentable when a better or cheaper result is produced, as pit coal instead of charcoal in smelting iron, (*Dudley's Patent*, Webst. Pat. Cas. 14;) and anthracite instead of pit coal, (*Crane v. Price*, Id. 375, 5 Scott, N. R. 338, 4 Man. & G. 586; Curt. Pat. §§ 16, 18.) In certain cases, it is true, the substitution of one material for another in the same implement or machine has been held not to be patentable, where it was clear that the alteration required no invention, but merely the exercise of mechanical skill and judgment. Such was the case of *Hotchkiss v. Greenwood*, 11 How. 248, where porcelain doorknobs (which were old) were affixed to the shank or spindle in the same manner as metallic knobs, the court held that this substitution was not a patentable invention. So in another case, tried before Justice NELSON, a patent was granted for covering a wooden button with tin, when the same thing had been done to a horn button half a century before, the use of wood instead of horn was held not to be a patentable invention. *Anon.*, Id. 266. So in *Hicks v. Kelsey*, 18 Wall. 670, the court held that the substitution of an iron wagon-reach for a wooden one of the same shape and form was no invention; that the ma-

chine remained the same, and the adoption of a stronger material was a mere matter of mechanical judgment, and not of invention. These cases depended on their own circumstances. There is no rule of law that the substitution of one material for another is not patentable. In processes of manufacture, and in compositions of matter, such a substitution often effects material changes in the result, either as to the product or the expense.

Now, we are not willing to say that there was no ingenuity or invention on the part of Mr. Stevens in discovering that the substances named in his patents are solvents of pyroxyline, and good substitutes for camphor. On the contrary, from the language of the specification, we infer that it was the result of much experiment and investigation. It is true that the mere discovery of the qualities possessed by these substances is not patentable; in other words, the qualities themselves cannot be patented. But the patent in question is not granted for the discovery, nor for the solvent quality, of the substances; it is granted for the "use" of the substances "in the art of manufacturing compounds of pyroxyline, substantially as described," that is, as described and pointed out in the specification. The method there described is that, after the pyroxyline has been reduced to a fine pulp by grinding in some of the known machines, and freed from aqueous moisture in the usual way, and after the addition of any coloring matters or other ingredients desired, the solvents (which are liquid) are to be applied to the pyroxyline (preferably by sprinkling or spraying over the mass) in the proportion of about two or three parts of solvent to two parts of pyroxyline; then left in a tight vessel for 12 hours or thereabouts, in order that the solvents may thoroughly permeate the mass; then to be worked or masticated in heated rolls, and thus formed into a homogeneous compound, which compound is then pressed into blocks or sheets, and subjected to the seasoning or curing process, as is well understood. The product thus obtained will be susceptible of use in the manufacture of utensils and ornaments of different kinds, in the manner pointed out in the specification. This is the general process of manufacture with the new solvents discovered by the patentee, pointed out in the patent. Such a process is certainly susceptible of security by patent, if it be novel and useful, and if the process is patentable. The employment of the newly-discovered solvents as a part of the process (being a still narrower claim) is also patentable. And it would seem that the result of the process is a different substance from that produced when camphor is the solvent used. The specification, it is true, intimates and concedes that certain parts of the process were well known; but exactly what was well known, and what was not, does not appear. No former patents are exhibited in the bill. Perhaps, by the answer of the defendants and proofs taken in the case, it may be made to appear that every part of the process, as a process, was known and used before, and that the only originality on the part of the patentee was the discovery of the fact that oil of spearmint and the other substances named are solvents of pyroxyline. Should this be so, the question would then be fairly presented whether the mere discovery of

this fact was patentable, and whether the case would be governed by the rule laid down in *O'Reilly v. Morse*, 15 How. 62, and so beautifully and clearly illustrated by the opinion of Judge SHIPMAN in *Morton v. Infirm-ary*, 5 Blatchf. 116. As the case stands, we do not think that this question is fairly presented; but think that the patent on its face exhibits an art or process which may or may not be anticipated by prior patents, or by the previous state of the art.

The objection that the patent is multifarious, and for that reason void, we do not regard as tenable. We have never understood that the adaptability of many substances or instrumentalities, for effecting the object of an invention, vitiated a patent. The conversion of pyroxyline into a compound suitable for certain purposes by means of applied solvents, manipulated in a certain way, has a unity of purpose and effect sufficient to answer the objection.

We do not deem it necessary to follow the reasons assigned for the demurrer in greater detail. We are satisfied that the demurrer should be overruled, and that the defendants should be required to answer the bill of complaint, and it is so ordered.

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#### THE VERNON.

(District Court, E. D. Michigan. July 19, 1888.)

#### 1. ADMIRALTY—SALE OF VESSEL—LIMITED LIABILITY ACT—DISTRIBUTION—CLERK'S COMMISSIONS.

Where a vessel is sold by a trustee under the limited liability act, and the proceeds of sale are paid into court, the clerk's commission is payable from such proceeds, even though the owner appears and contests the liability of the vessel for her losses.

#### 2. SAME—COSTS—STIPULATION—LIABILITY OF CLAIMANT.

A claimant who desires to contest the liability of the vessel, and gives a stipulation for costs, under Gen. Adm. Rule 26, is liable only for the costs properly incident to such contest.

#### 3. SAME—MARSHAL'S COMMISSION.

Where a vessel is sold by a trustee under the limited liability act, the marshal is not entitled to a commission.

#### 4. SAME—WITNESS—NON-RESIDENT—MILEAGE.

Where a witness attends from out of the district, mileage can only be taxed to the extent of 100 miles.

#### 5. SAME—DOUBLE MILEAGE.

Where two libels were filed against the same vessel for two losses occasioned by the same disaster, but the two causes were never consolidated, *held*, that double mileage and attendance should be allowed, though the witnesses were sworn but once, and their testimony was read in both cases.

#### 6. SAME—COSTS—COLLISION—PREPARATIONS OF MAPS.

The charges of a person employed to make soundings, and prepare a map of the locality of a collision, cannot be taxed as disbursements.

In Admiralty. On appeal from taxation of costs.

The Vernon was arrested upon two libels for negligence in towing the schooners Senator and Watson upon the rocks at the mouth of Detour  
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river. Damages were claimed in the aggregate sum of \$35,000. The Vernon was released upon the usual stipulation to answer judgment, and subsequently her owners, the petitioners in this case, instituted proceedings for a limitation of their liability. Under the statute, section 4285, they elected to transfer the Vernon to Henry A. Harmon, as trustee, and thereafter the said trustee proceeded to take possession and sell the vessel. She brought \$23,150. The proceeds of the sale, less the trustee's costs and expenses, were paid into court, and petitioners thereupon proceeded to take issue with and to contest the claim of liability for the loss of the schooners; but a decree was finally rendered in favor of the owners of the Senator in the amount of \$12,000 and costs, for the damages suffered by the Senator and her cargo. To the owner of the Watson the court decreed \$22,156 and costs.

*H. C. Wisner*, for petitioners.

*H. H. Swan* and *F. H. Canfield*, for libelants.

BROWN, J. Petitioners appeal from the clerk's taxation of the following items:

1. *The clerk's commission upon the proceeds of sale.* By Rev. St. § 828, the clerk is entitled to a commission of 1 per cent. "for receiving, keeping, and paying out money in pursuance of any statute or order of court." As the proceeds of sale to the amount of \$23,150 were paid into the registry of the court by the trustee, no objection is made to the taxation of the commission. The only question is by whom it should be paid. Ordinarily, where money is collected upon an execution, it is the duty of the marshal to add the clerk's poundage as well as his own to the amount of the judgment, and collect it of the defendant, as the plaintiff is entitled to the whole amount of his judgment. *Fagan v. Cullen*, 28 Fed. Rep. 843; *In re Goodrich*, 4 Dill. 230; *Upton v. Tribblecock*, Id. 232; *Kitchen v. Woodfin*, 1 Hughes, (U. S.) 340, 342; *Blake v. Hawkins*, 19 Fed. Rep. 204. Such is undoubtedly the rule in admiralty, where an ordinary stipulation is given to answer the decree of the court, and execution is issued against the claimants and their stipulators. By the limited liability act, (Rev. St. § 4285,) a new right is given to the owner of the ship, viz., the right to transfer her to a trustee, "from and after which transfer all claims and proceedings against the owner shall cease." This transfer being effected, proof of all claims, (Gen. Adm. rule 55,) shall be made before a commissioner, and upon completion of the proofs the commissioner shall make report, and upon the confirmation of such report, the proceeds of the ship or vessel and freight, "after payment of costs and expenses," shall be divided *pro rata* among the several claimants. This, no doubt, contemplates the payment of all costs and expenses necessarily incident to the sale of the vessel and the proof of the claims, including the clerk's commission upon the money paid into court. If, however, the owner chooses to contest the liability of the ship for the losses, as he may do under rule 56, he is bound under rule 26 to give the usual stipulation for the costs incident to that contest, including the fees of the clerk, marshal, proctors, witnesses, etc.; but not, I think, including the clerk's

commission, which is payable whether he contests or not. Costs are within the discretion of a court of admiralty, and I think equity demands that where a party contests a claim for damages he ought to be mulcted only in the interest upon the fund, and in such costs as necessarily arise from that contest. Costs which, but for such contest, would be paid from the fund, ought, I think, to remain chargeable against the fund. If the petitioner had been successful in contesting his liability for the loss, he would undoubtedly be bound to pay this commission himself, when he withdrew the proceeds of the sale from the court, since it attaches to the fund itself, and not to the litigation out of which the fund arises.

2. *The marshal's commission upon the fund in court.* By section 829 the marshal is entitled to a commission in admiralty cases in two contingencies: *First*, where the debt or claim is settled by the parties without a sale of the property, he is entitled to a commission of 1 per cent. on the first \$500, and one-half of 1 per cent. on the excess. This contemplates a settlement of the case between the parties before trial, in which case the marshal is entitled to his commission upon the amount paid in settlement; but as the cases under consideration were never settled, but were contested through to a final decree, it is evident that the marshal is not entitled to a commission under this clause. *Second*, or the sale of vessels or other property under process in admiralty, or under the order of the court of admiralty, and for receiving and paying over the money, he is entitled to a larger commission. But as the vessel was never sold by him, it is clear that he is not entitled to a commission under this subdivision. That it would be inequitable to allow him this commission is apparent from the fact that the trustee who makes the sale, either receives a commission or compensation in the nature of a commission upon such sale. Indeed, I understand this item to be practically abandoned upon the argument.

3. *Mileage of witnesses from out of the district.* Libelants claim the right to charge the full mileage of witnesses from out of the district, though there is no doubt their depositions might have been taken. Petitioners, upon the other hand, claim that, under the construction given to this statute by this court, they are entitled to charge only for the distance of 100 miles. Probably there is no question connected with costs in the federal courts upon which there is a greater conflict of authority. In the First circuit it has been uniformly held from 1842 to the present day that the successful party was entitled to the mileage of his witnesses, regardless of the distance, or of the fact that they came from out of the district. The rule was first announced by Mr. Justice STORY in *Prouty v. Draper*, 2 Story, 199, was reiterated by the same judge in *Whipple v. Manufacturing Co.*, 3 Story, 84; was recognized and approved by Mr. Justice WOODBURY in *Hathaway v. Roach*, 2 Woodb. & M. 63, 73, and was finally again exhaustively considered and reaffirmed by Mr. Justice GRAY, in *U. S. v. Sanborn*, 28 Fed. Rep. 299. It was admitted, however, by Mr. Justice STORY that under the state practice in Massachusetts the travel of the witness could only be taxed from the line of the state. *Melvin v.*

*Whiting*, 13 Pick. 184; *White v. Judd*, 1 Metc. 293. In the Second circuit the rule is as well established the other way. In an anonymous case reported in 5 Blatchf. 134, Mr. Justice NELSON and Judge SHIPMAN held that the traveling fees to a witness were allowable to the extent the subpoena would run, that is, for any distance within the district, but for not exceeding 100 miles from the place of trial, unless the distance was wholly within the district. This ruling was affirmed by Judge BENEDICT in *Beckwith v. Easton*, 4 Ben. 357, and in *The Leo*, 5 Ben. 486, and by Judge COXE in *Insurance Co. v. Steam-Ship Co.*, 29 Fed. Rep. 237. The rule has been settled in the same way in the Ninth circuit by Judge SAWYER, in *Spaulding v. Tucker*, 2 Sawy. 50, and in *Haines v. McLaughlin*, 29 Fed. Rep. 70. I do not regard the cases of *Parker v. Bigler*, 1 Fish. Pat. Cas. 285; *Woodruff v. Barney*, 2 Fish. Pat. Cas. 244, or *Dreskill v. Parish*, 5 McLean, 241, as of any particular value in this discussion, as the last two of them, at least, put their decision upon the ground that a witness can in no case be entitled to his fees unless he is summoned by a regular subpoena issued from a court. The necessity of a subpoena was carefully considered by Judge WITHEY in *Anderson v. Moe*, 1 Abb. (U. S.) 299, and by Mr. Justice GRAY in *U. S. v. Sanborn*, 28 Fed. Rep. 299, and both of them came to the conclusion that a witness who, in good faith, comes to court to testify in a pending suit, whether he comes in obedience to a subpoena or at the mere request of one of the parties, attends "pursuant to law," and is entitled to his fees. I have no doubt, myself, of the correctness of these rulings, and have always followed them in this district. There is no settled rule in this circuit upon the subject of mileage, although in the case of *Anderson v. Moe*, 1 Abb. (U. S.) 299, Judge WITHEY held the fees of witnesses to be taxable, though they came from New York, and more than 100 miles from the place of trial. In determining this question, I think that considerable weight should be given to sections 863 and 876, the former of which permits the deposition of a witness to be taken when he lives at a greater distance from the place of trial than 100 miles; and the latter of which allows subpoenas to be served in other districts, with a proviso that in civil causes witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles from the place of holding the same. Construing these two sections together, the inference seems to me very strong that it was the intention of congress to limit the allowance of mileage to the distance of 100 miles, where the witness lives in another district. There is, no doubt, very considerable force in the argument of Mr. Justice STORY, that the act is not peremptory in requiring the depositions of witnesses to be taken, but only that they *may* be taken and used. "It is," says he, in *Prouty v. Draper*, 2 Story, 200, "a mere option given to the party who wishes to use the testimony of the witnesses. In many cases the presence of the witnesses in person, and their oral testimony on the stand, may be indispensable to the true exposition of the merits of the case. No deposition would or could meet all the exigencies which might arise from the varying character of the evidence, or the necessity of instant explanation of circumstances, not previously known or under-

stood." And his ruling appears to have been invariable to allow the mileage of witnesses when they were not brought for the purpose of oppression, or without necessity, for the purpose of swelling the costs of litigation. His opinion appears also to be supported by the English authorities at that day. Notwithstanding this argument, however, it seems to me to be putting in the hands of a litigant a very great power to permit him to summon witnesses from distant states to attend sessions of the court here, although their testimony may be very material and important. If he be able to procure the attendance of a witness from New York, and charge full mileage, I see no reason why he might not procure the attendance of an important witness from California, or even from Australia, or other remote quarter of the globe, and practically ruin the opposite party by the accumulation of costs. It is true, there is reserved to the court the power of declaring that the testimony of such witnesses is not so material as to require their attendance from out of the district; yet, if the testimony of a witness were shown to be important, it would be very difficult to say from what distance he might or might not be summoned. My own practice has been, in such cases, to limit the mileage to 100 miles, presuming that the testimony of witnesses who live at a greater distance could and should be taken by deposition. I would not say that, if a case were presented by affidavit showing the materiality of a witness who lived out of the district, and at a greater distance than 100 miles, that his deposition could not be satisfactorily taken, and that his presence were actually necessary at the trial, that I would not allow mileage for his attendance; but I regard this as a special case, and calling, perhaps, for an exception to the general rule. For the present I shall adhere to the practice that has heretofore prevailed, and decline to allow for more than 100 miles.

4. *Double mileage and attendance for the same witnesses.* The witnesses of both the libelants were the same upon the hearing. It is claimed that they are entitled to mileage and attendance in each case. Their right of recovery was dependent upon the same state of facts, yet the cases were distinct. By section 848, when a witness is subpoenaed in more than one cause between the same parties at the same court, only one travel fee and one per diem compensation shall be allowed for attendance; but in this case there were two distinct and separate causes, and the inference certainly is that they are entitled to mileage and attendance in both cases. This was the view taken by Mr. Justice BLATCHFORD in *Wooster v. Handy*, 23 Fed. Rep. 49, 64, by Mr. Justice GRIER in *Parker v. Bigler*, 1 Fish. Pat. Cas. 285, and by Judge HAMMOND in *Archer v. Insurance Co.*, 31 Fed. Rep. 660. I regard it as quite immaterial that the cases were tried together by consent, that the witnesses were sworn but once, that their testimony was but once written out, and used but once in the two cases. In the absence of an order consolidating the two causes, I think it clear that the witnesses are entitled to their mileage and attendance in both cases.

5. *Map and survey of the locality of the collision.* An expert was employed at an expense of \$70 to make soundings and prepare a map of that part



of the Detour river in which the collision occurred, with the land-marks upon the shore. I think it is clear this cannot be taxed as costs. *Tuck v. Olds*, 29 Fed. Rep. 883.

### HAMBLET v. CITY INS. CO.

(District Court, W. D. Pennsylvania. July 13, 1888.)

1. MARINE INSURANCE—WHEN CONTRACT EFFECTED—MAILING POLICY.

Where the correspondence between an applicant for insurance and the insurance company shows that the minds of the parties never met with respect to the terms of the proposed contract, the insurance company does not become bound by mailing to the applicant a policy of insurance which the applicant is not bound to accept.

2. SAME—APPLICATION—CONCEALMENT OF FACTS.

At the time of application to an insurance company at Pittsburgh, Pa., for insurance on a steam-boat, the boat was tied up in White river, Ark., for repairs, and was without master, officers, or crew, having been so seriously injured by a collision with a bridge pier as to be unable to run at all. Nearly the whole of one side of the boat, including the wheel, was torn away, and her upper works were badly damaged. While in this condition, and within a few hours after the alleged insurance was effected, she was destroyed by fire. *Held*, that the above facts materially affected the risk, and, having been concealed from the insurance company, there could be no recovery against the company.

3. SAME—CONCEALMENT BY INSURANCE BROKER.

A broker, employed to procure insurance, must be regarded in that matter as the agent of the person who so employed him; and his concealment from the underwriter of any material fact, whether the suppression be willful or unintentional, is the concealment of his principal.

In Admiralty.

*Knox & Reed*, for libellant.

*D. T. Watson*, for respondent.

ACHESON, J. This is a suit upon an alleged contract of insurance on the steam-boat *De Smett*. The libel presents the case in a twofold aspect; one of its paragraphs alleging that the contract was consummated by the issuing of a policy of insurance, and another paragraph stating the cause of action as resting upon an agreement to insure the vessel against marine risks upon the terms usually contained in the defendant's policies. The answer, while admitting that an application for insurance upon the *De Smett* was made to the defendant, and thereupon certain negotiations took place, denies that any contract of insurance, or any agreement to insure, was concluded or entered into; and, by way of further defense, the answer alleges that important and material facts were omitted from the application, and concealed from the defendant. The essential facts of the case are as follows: On the 15th of April, 1886, in consequence of a collision with one of the piers of the bridge spanning White river, three miles above Newport, Ark., the *De Smett* was very

seriously injured and disabled. Nearly the whole of one side of the boat, including the wheel, was torn off, and her upper works were badly damaged. Such was the extent of the damage that the boat could not run at all. She was taken to a point on the west bank of White river, opposite Newport, and tied up for repairs. Her crew was discharged, and she was left in the custody of two watchmen. There she remained in this disabled condition, without master, officers, or crew, until the evening of June 12, 1886, when she was destroyed by fire. At that time no repairs had yet been made to the boat, but carpenters had been at work getting her ready therefor. The evidence shows that with the force at work it would have taken at least one month to complete the repairs. The boat's engines and pumps were not in working order at the time of the fire, and, if they had been, there was no one on board to run them. Shortly before June 7, 1886, application in behalf of Mrs. Josephine Harry, the owner of the *De Smett*, for a line of insurance upon the boat, was made to Gilbert Raine, an insurance agent and broker at Memphis, Tenn. Raine, however, was not the agent of the defendant, the City Insurance Company of Pittsburgh. As an insurance broker, in a number of instances he had placed fire risks (but never a marine risk) in the defendant company. In no other respect or sense had he ever acted as agent for the defendant. In the several instances in which he had placed fire risks with the defendant, he deducted out of the premiums the usual broker's commissions. In the present case Raine's dealings, about to be mentioned, with the defendant, were altogether in the capacity of an insurance broker. At the time of the application to Raine for insurance on the *De Smett*, he knew that she had met with an accident, and was undergoing repairs, or was about to be repaired; but it is not clear that he was fully informed as to the extent of her disability, or knew exactly where she then was. On June 7, 1886, Raine mailed the following letter, which was received by the defendant in due course of the mail:

"MEMPHIS, TENN., June 7, 1886.

"*City Ins. Co., Pittsburgh, Pa.*—DEAR SIRS: Inclosed please find survey of Str. '*De Smett*,' on which I would like your line. She will run in White river, Ark.,—the best steamer in the West,—running to Memphis, of course. I will put my own Co.—Phoenix of Brooklyn—on at same rate. I can recommend your line. If acceptable, bind some, and advise me by wire, (day message,) & forms will be forwarded. Hull risk—fire and marine. Ruling rate on White river 10. Capt. Harvy is an excellent man, and has been running in White river for a great many years. Yours truly,

"GILBERT RAINE, per GLASS."

The survey, which was without date, transmitted in the above letter, purported to have been made upon an examination of the *De Smett* at Memphis, and contained a full and detailed description of the boat, her engines, hull, etc. It named her owner and master, and stated her value at \$10,000, and asked for \$5,000 insurance. It contained nothing whatever indicating that the boat was in a disabled condition, or laid up, or was undergoing repairs. The defendant had no information respecting

the boat other than what appeared in the above letter and the accompanying survey. On the back of Raine's original letter of June 7, 1886, which is an exhibit in this case, there is the following memorandum:

*"Gilbert Raine, Memphis, Tenn. Can bind five thousand on De Smett. Answer amount wanted here.*

*"JOHN R. GLONINGER, V. P., per W. G."*

W. M. Grace, an employe in the defendant's office, testifies that this memorandum is in his handwriting; but he remembers nothing whatever about it, and cannot state whether it is a copy of a telegram. Mr. Gloninger, who attended to this business for the defendant, died after this suit was brought, and before the libellant's evidence was closed. His testimony was never taken. Mr. Raine's attention was not called to this particular matter, and he did not testify that he received such message. There is no express evidence that such a message was sent. On June 9, 1886, Raine sent, and the defendant received, the following telegram:

*"MEMPHIS, TENN., June 9, 1886.*

*"To John R. Gloninger, Vice Prest. City Ins. Co., Pgh.: Write fifteen hundred on the De Smett in the City.*

*GILBERT RAINE."*

On June 12, 1886, Raine sent, and the defendant received, the following telegram:

*"MEMPHIS, TENN., June 12, 1886.*

*"To City Ins. Co.: What is the matter with De Smett hull policy. Has it been mailed. Wire answer at once.*

*GILBERT RAINE."*

This telegram was received at Pittsburgh at 1:44 o'clock P. M., but at what hour it was delivered to the defendant does not appear. On the same day, but at what hour does not appear, the defendant mailed at Pittsburgh the following letter, addressed to Gilbert Raine, at Memphis, Tenn.:

*"PITTSBURGH, June 12, 1886.*

*"Gilbert Raine, Esq., Memphits, Tenn.—DEAR SIR: We received your telegram to send policy of De Smett. As you stated you would send wording, we were waiting on it. We now send policy in response to your telegram. If it is incomplete or incorrect, return it for correction. Yours, Truly,*

*"JOHN R. GLONINGER, Vice Prest."*

Inclosed in this letter was the defendant's policy of insurance on the De Smett for \$1,500, dated and purporting to have been executed June 12, 1886, but running from June 9th for one year, giving the boat "permission to navigate the White river," only. The policy contains the following, which is one of the usual clauses of the defendant's marine policies:

*"And the assured also agrees that the vessel aforesaid is, and shall be, kept at all times during the continuance of this policy tight and sound, and her seams properly caulked, and sufficiently found in tackle and appurtenances thereto, and competently provided with master, officers, and crew, and in all other things and means necessary for the safe navigation thereof."*

On the same day (June 12th) Raine sent, and the defendant received, the following telegram:

"MEMPHIS, TENN., June 12, 1886.

"To City Ins. Co.: Make De Smett policy cover Mississippi river and tributaries below Cairo, excepting Arkansas and Red. Average ten per cent.  
GILBERT RAINE."

This telegram was received at Pittsburgh at 4:10 o'clock P. M., but at what hour it was delivered to the defendant does not appear. No answer to either of the above telegrams of June 12th has been produced. Raine, however, testifies that he is quite certain he received on that day a telegram from the defendant to the effect that a policy for \$1,500 had been written; but he is not able to state its precise contents. The De Smett took fire about 9 o'clock P. M., on June 12th, and was burned to the water's edge. The premium of insurance was not paid; but shortly after the fire it was tendered, accompanied with a demand for the policy, to Raine, who, acting under instructions from the defendant, refused to receive it, or to deliver the policy to Mrs. Harry.

Upon these facts two questions arise, viz.—*First*, whether there was any completed contract; and, *second*, whether there was concealment or withholding of such material facts as would avoid the risk.

1. I do not see how it can be claimed that the correspondence prior to June 12th imports a completed contract. If it be assumed (in the absence of direct proof) that the defendant sent to Raine a message corresponding with the memorandum found on the back of his letter, viz., "Can bind five thousand on De Smett. Answer amount wanted here,"—still, this merely signified that the defendant could place at Pittsburgh the entire line of insurance desired. It was not a definite proposal on the part of the company to issue its policy for \$5,000, and, if it could be so regarded, the offer was not accepted. The company, then, was not bound by Raine's order of June 9th, viz., "Write fifteen hundred on De Smett in the City," without express acceptance on its part, or some act implying its assent. Moreover, Raine's original communication did not furnish the entire basis for the proposed contract. He wrote, "And forms will be forwarded." By this, it is not to be doubted, he intended something more than any customary or formal provision of an insurance policy. The defendant understood (and rightly, too) that Raine meant that he would furnish some additional matter of substance to be incorporated into the contract. Hence, on June 12th, Mr. Gloninger wrote, "As you stated you would send wording, we were waiting on it." The sequel shows that the promised and expected "wording" was the provision as to the waters the policy should cover, which was one of the essential terms of the contract. This was not communicated to the defendant until the receipt of Raine's second telegram of June 12th. Did the defendant become bound when its policy of insurance was deposited in the post-office? In disposing of this question, it must be remembered that the burden of proof is upon the libellant to show that mutual assent of the parties without which there could be no contract. The correspondence which took place on June 12th affords, I think, internal evidence that the policy was executed in the brief interval between the re-

ceipt of Raine's two telegrams of that date. But whether the policy was actually deposited in the post-office before Raine's second telegram reached the defendant, cannot be determined with certainty under the proofs. Upon this point we can do little more than conjecture. Here, death has deprived us of Mr. Gloninger's testimony, which might have shown how the fact was. It is, however, undeniable that the policy mailed covered White river only, whereas the policy wanted and ordered was one covering the "Mississippi river and tributaries below Cairo, except Arkansas and Red" rivers. The policy written, be it observed, did not conform even to the incomplete information contained in Raine's letter of June 7th. He had therein stated, "She will run in White river, Ark., \* \* \* running to Memphis, of course." But the policy, as executed, confined the boat to White river, and thus precluded her from running to Memphis. Evidently Mr. Gloninger was uncertain whether the parties understood each other with respect to the scope of the proposed risk, for in his letter to Raine accompanying the policy, he wrote, "If it is incomplete or incorrect, return it for correction." It was thus forwarded, not as a concluded contract, but for acceptance by the applicant if its terms were satisfactory. That it would have been declined had not the loss occurred before the policy reached Memphis, there can be little doubt. Now, as the policy as executed was not conformable either to the requirements of Raine's letter of June 7th or the directions of his second telegram of June 12th, it is quite clear that it did not bind Mrs. Harry. But if there was no contract on her part, there was none on the part of the defendant. *Insurance Co. v. Young's Adm'r*, 23 Wall. 107. It is indispensable to the constitution of any contract that its terms should be settled by the concurrent assent of both parties. *Id.*; *Hamilton v. Insurance Co.*, 5 Pa. St. 342. I am, then, of the opinion that the risk never attached to the *De Smett*, because the minds of the parties had never met.

2. But if the evidence justified a different conclusion, could the libellant succeed in this suit? The applicant for insurance upon the steamer *De Smett* was certainly bound to disclose to the underwriter all matters within her knowledge material to the risk. *Kohne v. Insurance Co.*, 1 Wash. C. C. 158; 1 Phil. Ins. §§ 531, 537, 546. Under the proofs, Gilbert Raine must be treated as the representative of Mrs. Harry in effecting the insurance, and by his conduct in that behalf she is bound. Story, Ag. § 31. A broker employed to procure insurance must be regarded in that matter as the agent of the party who so employed him; and his concealment from the underwriter of any material fact, whether the suppression be unintentional or willful, is the concealment of his principal. Whart. Ag. § 708; May, Ins. §§ 122, 123. Now, I have no hesitation in holding that the damaged and broken condition of the *De Smett*, and her situation generally, as hereinbefore described, were facts materially affecting the risk, and should have been disclosed to the defendant. This conclusion I have reached without regard to the opinions to that effect of the underwriters who were examined as experts. This

was not the case of a vessel undergoing ordinary repairs. The injury which the *De Smett* had sustained was unusual, and most serious; and all the circumstances of the case were peculiar and extraordinary. So disabled was the boat that she was absolutely incapable of running. The dealings of the parties here, even in the absence of express stipulation, could be fairly referred only to a steam-boat at least reasonably fit to be navigated. But in view of the clause of the policy hereinbefore quoted, the case need not be rested upon a mere implication; for if insurance was effected here, it must be regarded as having been made upon the terms and conditions expressed in said clause, whether the libellant stands on an executed policy or upon an agreement for insurance. *Insurance Co. v. Robinson*, 56 Pa. St. 256. That clause stipulated that the steam-boat was "tight and sound," and that she was "competently provided with master, officers, and crew, and in all other things and means necessary for the safe navigation thereof." But as the boat did not fulfill any of these terms and conditions, and the real facts were concealed from the defendant, the libellant's case must fail, even were it otherwise good. Let a decree be drawn dismissing the libel, with costs.

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GOODRICH TRANSPORTATION CO. v. GAGNON *et al.*

(Circuit Court, E. D. Wisconsin. August 18, 1888.)

SHIPPING—LIABILITY OF OWNER FOR TORT—LIMITATION—REV. ST. U. S. § 4283.

Act Cong. March 3, 1851, (Rev. St. U. S. § 4283,) limits the liability of ship-owners to their interest in the vessel and its pending freight, "for any embezzlement, loss, or destruction by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners." *Held*, that the words, "for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred," must be construed with regard to the subject-matter of the statute, and refer only to such acts, things, losses, and damages as to which relief can be had in a court of admiralty, and do not include liability for the destruction of buildings and goods on the land by fire alleged to have been communicated by a vessel, though duly licensed and engaged in the coast trade.

In Equity. On motion to dissolve injunction.

*Chas. W. Bunn and Robert Rue*, for plaintiff.

*Geo. G. Greene and J. G. Jenkins*, for defendants.

Before HARLAN, Justice, and DYER, J.

Mr. Justice HARLAN delivered the opinion of the court.

On and prior to the 20th day of September, 1880, the Goodrich Transportation Company, a corporation organized under the laws of Wisconsin, was engaged in interstate commerce upon Lake Michigan, as well as upon

navigable waters immediately connected therewith; employing, in that business, a number of propellers and steam-boats, of which it was the owner. Among such steam-boats was the Oconto, a vessel of upwards of 20 tons burden, duly enrolled and licensed, under the laws of the United States, for the coasting trade, and not being, it is alleged, a canal-boat, barge, or lighter, nor used in river or inland navigation. On the day above named, and while prosecuting one of its regular voyages from Chicago, it entered the port of Green Bay, a city in the state of Wisconsin, at the head of Green Bay, where the Fox river, a large, navigable stream, flows into it. After it had passed a certain planing-mill, located within the limits of that city, a fire broke out therein, which was communicated—from the vessel, as was contended—to a large number of buildings near the shore, causing damage to their owners in the sum of not less than \$125,000, and destroying goods and other property contained therein of not less than \$50,000. A part of the property so destroyed was insured against fire in the Phoenix Insurance Company. The value of the Oconto, at the time of the fire, was about \$12,000. The amount of its freight then pending was only about \$400. Some of the sufferers by the fire, claiming that the damage to their property was the result of negligence upon the part of those managing the Oconto, instituted suits against the Goodrich Transportation Company in the courts of Wisconsin. Suits of like character being threatened by others, that company sought, by libel filed in the district court of the United States for the Eastern district of Wisconsin, sitting in admiralty, not only to contest its liability for the damage done, but to have its liability, if any existed, limited as provided in those sections of the Revised Statutes of the United States which contain, substantially, the provisions of the act of congress approved March 3, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes." 9 St. 635; Rev. St. §§ 4282-4289, inclusive. The district court of the United States having denied a motion to dismiss the proceedings instituted therein by the transportation company, (26 Fed. Rep. 713,) and having made an order designating appraisers to value the Oconto at the time of the fire, as well as its freight earned on the voyage, the insurance company and the plaintiffs who brought the suits for damages in the state court united in an application to the supreme court of the United States for a writ of prohibition to the judge of the former court, to prevent it from entertaining jurisdiction of the suit brought by the transportation company for limitation of its liability. The writ was awarded, the supreme court holding that the district court was without jurisdiction in the premises. It was held, in conformity with the decision in *The Plymouth*, 3 Wall. 20, that "the true meaning of the rule of locality in cases of marine torts was that the wrong complained of must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters, to be within the admiralty jurisdiction;" that, although the vessel which communicated the fire was a maritime instrument, the jurisdiction of the admiralty court depended

upon the wrong having been committed on navigable waters and that "the substantial cause of action, arising out of the wrong, must be complete within the locality on which the jurisdiction depended;" that the remedy for wrongs not committed on navigable waters was in the courts of common law; and since, for these reasons, a court of admiralty would have no jurisdiction of a suit either *in rem* or *in personam*, brought by a sufferer from the fire in question to recover damages from the owner of the vessel, that court could not acquire jurisdiction to determine the question of the owner's liability, or to ascertain and award damages, by a proceeding such as the transportation company instituted. But the court said:

"Our decision against the jurisdiction of the district court is made without deciding whether or not the statutory limitation of liability extends to the damages sustained by the fire in question, so as to be enforceable in an appropriate court of competent jurisdiction. The decision of that question is unnecessary for the disposition of this case." *Ex parte Insurance Co.*, 118 U. S. 610, 618, 625, 7 Sup. Ct. Rep. 25.

The question thus reserved is supposed to be raised by the present suit in equity, brought originally in the circuit court of Milwaukee county, Wisconsin. The plaintiff is the Goodrich Transportation Company. The defendants, except the insurance company, are sufferers by the above-mentioned fire, and have suits pending in the courts of Wisconsin, in which they seek to recover damages for the destruction of their buildings and goods by such fire. The bill also proceeds generally against "all persons interested, who may come in under the decree herein, and take the benefit thereof." It sets out, in substance, the above facts, and prays that the liability of the plaintiff for the damages in said several suits claimed may be adjudged to be limited to the value of the vessel at the time of the fire, increased by the value of its then pending freight; that the demands of the several claimants be investigated, and their respective amounts ordered to be paid out of the value of the vessel and freight, which amount the plaintiff offered to bring into court, or give bond therefor; that, if such value be inadequate for their payment in full, the claimants be satisfied *pro rata* out of such fund; that upon such payment the plaintiff be adjudged to be discharged from all further liability to the defendants, and to each of them, on account of said fire; that the defendants be enjoined from the further prosecution of their suits at law in the courts of Wisconsin; and that the plaintiff have such other relief as may be proper. The state court, upon bond being given to pay the value of the vessel and pending freight into court for distribution, awarded the injunction asked. The defendants having answered, the suit was removed into this court upon the general ground that it is one arising under the laws of the United States.

The case is now before the court upon a motion to dissolve that injunction. This motion suggests several questions of importance, which have been discussed by the counsel of the respective parties with marked ability. But the fundamental inquiry is whether the statutory limita-



tion of liability extends at all to the fire in question,—a liability which, according to the principles announced in *Ex parte Insurance Co.*, cannot be ascertained and limited by any proceedings had in the admiralty courts. The contention of the plaintiff is that the statute embraces all liability for damage done by a vessel without the knowledge or privity of the owner, whether the injury is consummated on land or water, and without regard to the nature of the property injured, or the uses to which it was devoted when destroyed, or its connection with the general business in which the vessel is engaged. It is argued that the object of the rule of limited liability is to promote and encourage shipping, and that the authority of congress to prescribe such a rule, in place of the absolute one of *respondent superior*, to be enforced in all courts, state and federal, is found in its power, under the constitution, to regulate commerce with foreign nations and between the several states,—a power which, it is insisted, includes not only authority to regulate navigation and traffic generally, and the ships and vessels employed as instruments of commerce, but the liability of their owners arising from the use of such instruments in commerce. In behalf of the defendants it is contended that regulations as to liability for the destruction of property not in its nature maritime, nor in its use connected with commerce, constitute an essential part of the police power of the state, the proper exercise of which is vital to the protection of the lives and property of its people; and that, even if it be competent for congress, under its general power to regulate commerce, to supersede or annul state laws upon the same general subject, so far as the latter apply to injuries done by vessels while navigating public waters, there is nothing in the statutes invoked by the plaintiff clearly indicating that congress intended to go that far, or to prescribe any rule of liability, except for the special cases which, under the statute, are cognizable in a court of admiralty.

It was conceded in argument that, if the property of the defendants had been destroyed by a fire caused by the negligence of individual or corporate persons not engaged in navigating the waters in question, the latter would have been liable, under the settled law of Wisconsin, to respond in damages for the value of the property destroyed. So that, if the present proceeding to ascertain and limit the liability of the plaintiff to the actual value of the vessel Oconto and her pending freight is sustained, it can only be upon the broad grounds suggested by the learned counsel of the plaintiff. Section 4282 exempts the owner of any vessel from liability for damage done by fire—not caused by his design or neglect—"to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel." Section 4283 makes the value of the owner's interest in any vessel, and of its pending freight, the limit of his liability "for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners."

As to section 4289, declaring that the foregoing and other provisions in the title of "Commerce and Navigation" shall not apply to the owners of canal-boats, barges, or lighters, nor to vessels of any description used "in rivers or inland navigation," it has no bearing upon the present case; for the Oconto was not a canal-boat, barge, or lighter, nor was the navigation in which it was engaged "inland" within the meaning of the statute. *Moore v. Transportation Co.*, 24 How. 1; *The War Eagle*, 6 Biss. 364. See, also, *The Mamie*, 5 Fed. Rep. 813; *The Sears*, 8 Fed. Rep. 365; *The Garden City*, 26 Fed. Rep. 766.

Recurring to the sections of the Revised Statutes which must control our decision, it is clear that the plaintiff's case requires the court to hold that congress intended the words, "for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred," to include all damage to, or destruction of, property of every kind on land, although unconnected with navigation or commerce, provided only that such damage or destruction was caused by the neglect of those in control of the vessel while it is actually employed in navigating the public waters of the United States. It does not seem to the court that the statutory provisions in question ought to be so construed. The general words above quoted should be interpreted in the light of the subject-matter of the statute, and must be restricted by the special words previously used in the same and preceding sections. The enumeration of acts, things, losses, damages done or occasioned, are those of admiralty jurisdiction, according to the maritime law of the United States. The specific provision made for the distribution of the proceeds of the value of the offending vessel and its freight among the owners of property embezzled, lost, or destroyed, on the voyage of the offending vessel, has reference to such persons or owners only as can maintain an action, civil and maritime, in the admiralty courts, on account of such embezzlement, loss, or destruction of property. In other words, the losses, with respect to which congress designed, in the interest of commerce, to extend the privilege of limited liability, are maritime losses. The acts, matters, things, losses, damages, and forfeitures referred to in section 4283 are those belonging to the classes specifically described in the context; that is, they must be acts, matters, things, losses, damages, or forfeitures done, occasioned, or incurred in such manner that it may be said that the substance and consummation of the particular wrong or wrongs complained of took place and became complete on the waters navigated by the offending vessel. That cannot be said in reference to the losses here in dispute. We do not believe that it was within the mind of congress to establish a rule of limited liability to be applied by all courts, federal and state, for injuries done without the privity or knowledge of its owner, by those in charge of a vessel, to property on land, and in respect to which injuries the courts of admiralty could not take cognizance.

Although this precise point has not been determined by the supreme court of the United States, the conclusion reached is in harmony with what that court has said in reference to the general scope and purpose

of the statutes under examination. In *Norwich Co. v. Wright*, 13 Wall. 104, 123, the court, after observing that no tribunal was better adapted than a court of admiralty to administer the relief given by the statute, and that it was every-day practice for such courts to distribute the proceeds of a vessel or other fund, according to the respective liens and rights of the parties, said:

"Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution."

So in *Steam-Ship Co. v. Manufacturing Co.*, 109 U. S. 578, 593, 3 Sup. Ct. Rep. 379, 617, the court, after referring to the acts of 1792, (1 St. 276,) 1828, (4 St. 280,) and 1842, (5 St. 518,) as giving power to make the supplementary rules of practice in admiralty, promulgated May 6, 1872, (13 Wall. xii., xiii.,) said that the subject of those rules "is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and, if this were not so, the subject-matter itself is one that belongs to the department of maritime law."

Upon the whole case, the court is of opinion that the act of congress prescribing the rule of limited liability for the benefit of the owners of ships and vessels has reference only to maritime losses in respect to which relief can be given in a court of admiralty. In this view, it is immaterial to inquire whether an act having the scope and effect attributed by the plaintiff to that of 1851 would be constitutional.

The present motion to dissolve the injunction having been heard before Judge DYER and myself, this opinion has been submitted to him, since his retirement from the bench, for examination. He authorizes me to say that it meets his approval. The injunction is dissolved.

## AMES v. HAGER.

(Circuit Court, N. D. California. September 17, 1888.)

## NATIONAL COURTS—CASES ARISING UNDER REVENUE LAWS—JURISDICTIONAL AMOUNT.

Clause 4, § 629, Rev. St., was not repealed by the act of March 3, 1875, (18 St. 470,) or by the act of March 3, 1887, (24 St. 552,) defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, although the amount in dispute is less than \$2,000.

(Syllabus by the Court.)

A. P. Van Duzer, for plaintiff.

J. T. Carey, U. S. Atty., for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J. This is a suit to recover from the collector of the port of San Francisco the sum of \$375.75 drawback on grain-bags claimed to be illegally withheld. Defendant demurs on the ground that, the sum sought to be recovered being less than \$2,000, the court has no jurisdiction under the act of March 3, 1887. In *U. S. v. Huffmaster*, 35 Fed. Rep. 81, (No. 3,704,) we held that under the act of March 3, 1875, the court had no jurisdiction over a suit to recover \$250, the value of a quantity of wood illegally cut on the public lands. And in a similar suit, brought under the act of March 3, 1887, that there is no jurisdiction where the amount claimed is less than \$2,000. *U. S. v. Huffmaster*, 35 Fed. Rep. 81, 83. We held that the first, second, and third clauses of section 629, Rev. St., were repealed by the subsequent acts of 1875 and 1887. The question now is, whether the fourth paragraph is also repealed—this being a suit arising under the revenue laws, in regard to which there is no limitation in that clause. Although this clause speaks of "suits at law or in equity, arising under any act providing for revenue from imports or tonnage," the supreme court has held that a suit of this character is not a common-law suit on a promise, but a suit under a statute. *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. Rep. 184. It seems manifest that the acts of 1875 and 1887 cover the whole subject-matter of the first three clauses of section 629, Rev. St., but the intention as to the remainder of the section is not so clear. The subject-matter of the first three clauses is substantially the same as that of section 11 of the act of 1789, and embraces the *general* jurisdiction of the court. That of the fourth claim is covered by, and taken from, the act of 1833, (4 St. 632,) and the subsequent clauses from various other statutes conferring *special* jurisdiction. Before the consolidation in the Revised Statutes all these provisions stood and were in force together, and, as to many of them, at least, there was no limitation as to the amount necessary to confer jurisdiction. In the Revised Statutes, they were collected into one section, a clause having been given to each class. The language of the statute was changed, in order to collate and condense, without intending to change the law. In the acts of 1875 and 1887, congress re-

turns substantially to the language of the act of 1789, conferring *general* jurisdiction, and, doing so, is it not reasonable to suppose, that by this return to the language of that act it was intended to embrace the subject-matter only, of that act, with respect to limiting the jurisdiction by the amount in dispute? If not so intended, then no suit could be brought under the act of 1875, under either of the clauses subsequent to the third, including suits upon patents for inventions, unless the amount in dispute exceeds \$500, and none can now be brought under the act of 1887, unless the amount involved exceeds \$2,000. Although in some doubt on the point, I shall hold, that only the first three clauses are covered, and therefore repealed, by the acts of 1875 and 1887, and that under the fourth clause it is not necessary that the amount in dispute should exceed \$2,000 in order to give the court jurisdiction. Let the demurrer be overruled.

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YEARIAN *v.* HORNER *et al.*

(Circuit Court, E. D. Missouri, E. D. September 26, 1886.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—PARTNERSHIP—ACCOUNTING.

A bill by one partner against others, praying an account of the proceeds of partnership property sold by some of the partners to a corporation also a defendant, upon which sale it averred that part of the purchase money is still due, and praying that defendant partners be enjoined from selling, and the defendant corporation from permitting the transfer on its books of, certain stocks of the corporation belonging to the firm, and the appointment of a receiver, does not present a separable controversy between the corporation and any of the parties, and is not, therefore, under the third clause of act Cong. March 3, 1887, § 2, removable to the federal court at the instance of the non-resident corporation.

Motion to Remand to State Court.

Bill by W. H. Yearian against A. T. Horner and others to compel an account of partnership transactions, and for an injunction. On the petition of the Montrose Placer Mining Company, the cause was removed from the state court into this court.

Before BREWER, Circuit Judge, and THAYER, District Judge.

Boyle, Adams & McKeighan, for plaintiff.

Reynolds & Rolfe, for defendant.

THAYER, J. This is a motion to remand the case to the state court. The record was removed to this court by the Montrose Placer Mining Company, one of the five defendants, upon the theory that there is involved in the suit a separable controversy which is wholly between citizens of different states, and is therefore removable under the third clause of the second section of the act of March 3, 1887, regulating the jurisdiction of the federal courts. The petition for removal asserts that plaintiff is a citizen of California; that one of the individual defendants is a citizen of Missouri; that another is a citizen of Colorado; that the mining company is an Illinois corporation; and that the citizenship of the

two remaining defendants is unknown; but that neither are citizens of the state of Illinois.

We think the theory on which a removal is sought is erroneous, and that the cause is not removable, for the following reason: It does not appear to us that there are several controversies involved in the suit, one of which is wholly between citizens of different states, and may be fully determined as between them without the presence of the other defendants. In our view of the case, there is but a single controversy; and, that being so, the case is clearly not removable under the third clause of section 2 of the act of March 3, 1887. *Barney v. Latham*, 103 U. S. 205; *Hyde v. Ruble*, 104 U. S. 407; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90; *Railroad v. Wilson*, 114 U. S. 60, 5 Sup. Ct. Rep. 738; *Telegraph Co. v. Brown*, 32 Fed. Rep. 337. The bill in this case charges, in substance, that the plaintiff and the four individual defendants were copartners, and as such owned certain mining property; that two of the partners (Messrs. Horner and Cornell) were deputed to sell the property, and succeeded in making a sale to the Montrose Placer Mining Company. The bill alleges that defendant Horner, on the consummation of the sale, received for the property certain money, and also 125,000 shares of stock in the purchasing company, but that he has failed to account to plaintiff and one of the other partners, who is made a defendant, for their just proportion of the money and stock so received. The bill also alleges that the Montrose Mining Company still owes about \$10,000 of the purchase price. The bill thereupon prays that Horner may be compelled to account for what was received for the mine, and for a general accounting as between the partners; that the stock which Horner received on the sale of the mine may be decreed to belong to the partnership, and may be sold, and the proceeds divided; and that, inasmuch as Horner is insolvent, and has no property besides the stock, and is threatening to sell and dispose of the same, that he be enjoined from so doing, and that the Montrose Mining Company be enjoined from permitting transfers of the stock on its books pending this suit. There is also a prayer that a receiver be appointed to take possession of the stock in controversy, and all other partnership assets, including the \$10,000 said to be due to the partnership from the Montrose Mining Company. We think that in all of these averments there is but a single controversy or cause of action disclosed; that it is substantially a bill to have certain property adjudged to be partnership property, and to obtain a decree liquidating the affairs of the partnership. It does not appear that, in addition to the suit to discover firm assets and wind up the partnership affairs, there is another and separate controversy involved between the mining company on the one hand and the plaintiff and his copartners on the other. The mining company may or may not admit that it owes the firm a balance of \$10,000 on account of its purchase of the mine. The bill does not aver that there is any controversy on that point; but, whether there is or is not such a controversy, it cannot properly be tried and determined in this action. In the nature of things, that is an issue when it arises, that must be settled by a

suit at law, brought by a receiver of the firm, or by the partners themselves, and such suit may or may not be removable, according to the citizenship of the parties litigant as it may then appear. It is sufficient to say that a controversy of that nature is not involved in this action, and that the only apparent object of making the mining company a party defendant to this bill was to obtain an injunction against it, restraining it from permitting transfers of the stock in dispute, during the pendency of the litigation between the plaintiff and his copartners as to its ownership.

We think it clear that the mere fact that the bill shows that in a certain event the plaintiff and his copartners may have a right of action at law against the mining company, (which right of action, however, is not properly cognizable in this suit,) does not entitle the corporation to remove the cause to this court as one involving a separable controversy. The motion to remand is accordingly sustained.

BREWER, J., concurs.

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ROBB *et al.* v. VOS *et al.*

(Circuit Court, S. D. Ohio, W. D. August 28, 1888.)

1. EQUITY—JURISDICTION—INADEQUATE REMEDY AT LAW.

In an action against life-tenants, to subject their interest to the claims of creditors, an unauthorized and fraudulent appearance was entered for the reversioners, and, without their knowledge or consent, a decree was filed that the land be sold divested of their interest. The attorney fraudulently appearing for them converted the proceeds. *Held*, that the reversioners had no adequate remedy at law, and that equity had jurisdiction to relieve against the fraud.

2. FEDERAL COURTS—JURISDICTION—JUDGMENT OF STATE COURTS.

Federal courts have jurisdiction to relieve against a title fraudulently obtained by proceedings in a state court by enjoining the assertion of the fraudulent title.

In Equity.

This was a bill in equity by James Hampton Robb and Charles E. Strong against August Vos, William Stix, and Moritz Loth to enjoin the defendants from asserting a fraudulent title to real estate.

*Harmon, Colston, Goldsmith & Hoadly*, for plaintiffs.

*A. B. Huston and Wilby & Wald*, for defendants.

HAMMOND, J. The demurrer in this case must be overruled. As to the jurisdiction of the court, it is very clear that it cannot be defeated on the ground that the purpose of the bill is to set aside, as if upon error or appeal or some such review, the decrees of a state court for irregularities or the like, nor upon any equitable consideration for which a court of competent jurisdiction might grant a new trial as at law for some fraud, accident, or mistake entitling a party to such relief. It is not that kind

of a bill, but is one attacking the title of the defendants to certain real estate, which it is alleged they have procured by a fraudulent judicial proceeding. The relief asked would leave the proceedings of the state court intact as judicial proceedings, and it is not necessary in granting effective relief to interfere with them in the sense of setting aside the decrees by directing that they should be vacated or corrected in whole or in part, as under some circumstances a state court of equity might do, if essential to be done, but as to which this court could not act upon the records of a state court. All that need be done is to enjoin the defendants from asserting their alleged fraudulent title against the paramount title of the plaintiffs, because of the alleged frauds in procuring that title. This is just as effective as vacating the decree could be, but yet it is not, technically, vacating the decree in the sense already mentioned. That this jurisdiction exists to prevent the parties from relying on a fraudulent title procured by judicial proceedings, in whatever court they may have been taken, is beyond question. A state court of equity could so act as to titles procured through fraudulent proceedings in a federal court, and so may the federal courts as to those acquired in the state courts. If the parties and property were in a foreign court, the relief would also be available. Says Mr. Justice BRADLEY, in *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. Rep. 619:

"The court of chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court, but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

Nor is the ground of demurrer well taken that the court has no jurisdiction, because the plaintiffs have an adequate remedy at law. Briefly, the bill alleges that the plaintiffs were the owners of certain valuable real estate which was in possession of certain tenants under a lease for the life of two persons for whom the plaintiffs are trustees, with peculiar covenants, not necessary to here mention. Those tenants for the life of another being involved, their judgment creditors sought by the judicial proceedings aforesaid to subject their interest in the lands to their debts, and had the right to do this. But one Kebbler, an attorney at law, conceived the scheme of using those proceedings to divest the plaintiffs (the trustees) of their interest in the land by its sale, he embezzling the proceeds, which he did. These trustees were parties to the record; and Kebbler, without their knowledge or consent, made an unauthorized and fraudulent appearance, filed a cross-bill for them, and consented to the sale of the real estate, divested of their interest; he pocketing the money. He had no authority, express or implied, to appear for them, and they never heard of the transaction until after the sale. The defendants were the purchasers, and this bill seeks to avoid the title so acquired.

It is suggested that the transaction was really a mortgage for investment of funds, and not a lease, but this is immaterial here. Whatever the rela-



tion, there is no adequate remedy at law. A suit for the rent not paid, and the right to which is denied, if available at law by proof of the facts constituting the fraud, would leave the muniment of title still outstanding, and always threatening; and the process of collecting the rent by suit might be, and would probably have to be, repeated at every rent-day, while witnesses might die and proof be destroyed. So of ejectment, if that be possible in the complications of the case. The muniments of title would still be outstanding and uncanceled. Moreover, the purchasers, being entitled to the interest of the original tenants for life of the *cestuis que vie*, it may be doubtful if ejectment would lie as a trial of title. But if it did, no such action would afford the adequate and plenary relief asked by this bill. It is not sufficient that there is a remedy at law,—that remedy must be full, complete, and adequate; and, under the peculiarities of this case, it clearly is not. It is not necessary to consider whether on the allegation of the bill it appears that the defendants are innocent purchasers, or have any other defense which may be available; such, for example, as that the action of Kebbler was binding on the plaintiffs, and that their remedy is against him. If the defendants had such knowledge, actual or constructive, of this fraud as would protect the plaintiffs from their title, they might recover on this bill, possibly, notwithstanding Kebbler's authority to bind them. All these matters are more properly cognizable on the issues made by answer or plea. The bill is good on its face, substantially. Demurrer overruled.

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FARGUSON *et al.* v. JOHNSTON *et al.*

(District Court, N. D. Mississippi. June Term, 1888.)

FRAUDULENT CONVEYANCES — MORTGAGE DEED ABSOLUTE — WITHHOLDING AGREEMENT TO RECONVEY FROM RECORD.

A deed to land, absolute on its face, duly acknowledged and recorded, for the consideration of \$2,000 in cash paid, expressed in the deed, when it was really a security for a past indebtedness of \$400, and future advances, in all to the amount of \$2,000, and the grantee at the same time gave to the grantor his obligation to reconvey the land upon the payment of the amount, with the understanding that the obligation to reconvey was not to be recorded or made known for the purpose of preventing injury to the credit of the grantor, and to prevent his property from being attached, *held* fraudulent and void as to the then existing creditors of the grantor.

(Syllabus by the Court.)

In Equity. Hearing on pleadings and proofs.

*E. Mayes*, for complainant.

*Sullivan & Whitfield*, for defendants.

HILL, J. This cause is submitted upon bill, amended bill, answers, exhibits, and proofs, from which the following facts appear: Complainants were commission merchants, in the city of Memphis, Tenn.; and

defendant H. M. Johnston was a country merchant, doing a small retail business in the town of Courtland, Miss., in the early part of 1885, and was indebted to complainants for advances theretofore made in the sum of four to five hundred dollars, and applied to complainants for further advances to enable him to continue his business for that year, which complainants declined to furnish unless secured, when, after negotiations had commenced between them, it was agreed that Johnston should, to secure the payment of that already due, and for further advances to be made, execute to said Farguson a deed in fee-simple, absolute on its face, to the tract of land described in the bill, and to receive from said Farguson his obligation to reconvey the land to Johnston upon the payment of the amount that might thereafter remain due, upon six-months' notice of a demand of payment. The business was done, and the transactions were had, by Johnston under the name and style of H. M. Johnston & Co., though he was the only party interested. To carry out this agreement, Johnston and his wife, Emma O. Johnston, on the 10th day of March, 1885, or bearing that date, executed a deed of conveyance to said land to said Farguson for the expressed consideration of \$2,000 cash in hand then paid, which deed was acknowledged on the 14th day of the same month, and filed for record in the proper office on the 16th of March, 1885. From a letter bearing date the 5th of March, 1885, written by Johnston to complainants, and received by them, as appears from a letter written by complainants bearing date March 7th, the deed and note were inclosed by Johnston at Courtland, Miss., to complainants in Memphis. How the deed was sent before the date of its execution is not explained. To carry out the arrangement, H. M. Johnston, in the name and style of H. M. Johnston & Co., signed and sent or delivered to complainants his note, which is as follows:

"COURTLAND, MISS., Feby. 19th, 1885.

"On 1st Jan., 1886, we promise to pay to J. T. Farguson & Co. two thousand dollars, for value received, bearing interest at ten per cent. per annum from maturity, and payable at their office in Memphis, Tenn.

[Signed]

"H. M. JOHNSTON & Co."

The presumption is that the note was written on the day it bears date; but at what particular time it was signed and delivered, does not satisfactorily appear. In further carrying out the agreement entered into, said Farguson executed and delivered to H. M. Johnston the written agreement as follows:

"MEMPHIS, TENN., March 28, '86.

"H. M. Johnston, and wife, Emma O. Johnston, conveyed to me by deed dated March 10, 1885, the north-east quarter of section nine, township ten, range seven, in the Second court district of Panola county, Miss., for the stated consideration of two thousand dollars. This deed was made to secure the firm of J. T. Farguson & Co., of Memphis, Tenn., in any amounts that are now or may hereafter be due the said firm of J. T. Farguson & Co. by H. M. Johnston, or by H. M. Johnston & Co.; and I now agree and bind myself to reconvey to said H. M. Johnston, and his wife, Emma O. Johnston, the above-described lands whenever requested by them to do so, provided all of the indebtedness of the said H. M. Johnston & Co. has been paid, with in-

terest accrued; and provided said indebtedness is paid within six months after demand has been made upon them to make such payments by said J. T. Farguson & Co. I only agree to convey by quitclaim deed.

[Signed]

"JNO. T. FARGUSON."

This paper or defeasance was not acknowledged or recorded, and it was understood by both parties that it would not be made public, and for the reason that, if known, it might affect the credit of Johnston, and might cause his property to be attached. It appears from the account exhibited by complainants with their bill, that Johnston was, on the 9th day of March, 1885, credited with the amount of the note, \$2,000, and charged with the discount thereon, \$131.56; and that the business was continued until the 16th of January, 1886. The last item seems to have been advanced by complainants, and the last credit appears to have been given, on August 14, 1886, when the account was balanced, and a credit for \$386.63 was entered upon the note for \$2,000. About the 1st of February, 1886, as it seems from the correspondence, some propositions passed between the parties relative to a settlement of the indebtedness by a surrender of the land, which was not consummated; when, on the 4th day of February, 1886, complainants served a written notice on Johnston, demanding the payment of the amount due them on or before the 10th day of August thereafter, or that possession of the land should then be surrendered to them. On the 5th day of February, 1886, Hill, Standish & Co. sued out their writ of attachment in the circuit court of Panola county, in this state, against said H. M. Johnston, or H. M. Johnston & Co., and on the next day caused the same to be levied upon the interest which said Johnston had in the lands described in the bill, which cause was removed to this court, and upon which judgment was rendered against said Johnston in favor of plaintiffs on the 9th day of June, 1886, for the sum of \$1,150.50, and an execution was issued upon the same, and a sale thereof made by the marshal of this court on the ——— day of ———, when the same was struck off to W. V. Sullivan at the sum of \$25, and a deed made by the marshal, conveying to him all the title to said land held by said Johnston, who holds the same for Hill, Standish & Co. On the 16th day of January, 1886, Merderson & Co. sued out their writ of attachment in this court against said H. M. Johnston, and on the 13th day of February, 1886, caused the same to be levied upon the interest which said Johnston had in and to the land described in the bill, and on the 9th day of June, 1886, obtained judgment in said suit against said Johnston for the sum of \$776.22, and upon which a *venditioni exponas* was issued and executed by the marshal, when the interest of Johnston so levied upon was sold and struck off to W. V. Sullivan, and a deed made to him; he holding the same as trustee for the plaintiffs in said suit. Sullivan is made a defendant to the cross-bill, and represents the interest of his clients in both of said attachment suits. These are all the facts that need be stated to an understanding of the questions to be decided.

There is no dispute as to the character and purpose of the deed and defeasance. It was intended to operate as a security for the payment

of the amount then due by Johnston to complainants, and advances thereafter to be made during that year, not to exceed \$2,000, and, as between the parties themselves, was a valid and binding contract. The execution of the note, its discount, etc., was only a form of keeping their accounts, and is not approved by the courts, and especially by the supreme court of this state, by whom it has been characterized as a trick of book-keeping. The transaction will be considered, as between the parties, as it really was intended to be, and the note be will disregarded, further than it provided a limit to the amount to be secured. The indebtedness is only the amount due upon the account, with interest. It is clear that this contract was intended to be executed in Memphis, Tenn., and I am of opinion that, under the proof, only 6 per cent. can be allowed upon the balance of said indebtedness; the note being disregarded only as to the limit of the amount intended to be secured. If the note was held to be the indebtedness, instead of the balance due on the account, then there would be some trouble in determining whether or not the note bearing 10 per cent. interest could be allowed 6 per cent., or relief denied altogether. It is well settled that, in the absence of a valid contract to pay, a different rate of interest—the rate at the place of performance—must govern; but it is also settled that the parties may contract in writing for the rate of interest allowed by law in the place where the contract is made. Ten per cent. per annum may be contracted, in writing, in this state, to be paid for the loan of money or forbearance in payment. In Tennessee, where usurious interest is embraced in a written contract, and it appears on the face of it, and the party claiming it goes into a court of law or equity to enforce the payment, the court refuses a judgment or decree for any part of the debt claimed; but, unless the usurious interest appears upon the face of the obligation, and it is established by proof *abundante*, then the amount due, with legal interest, is allowed. The proof in this case leaves it uncertain where the note was actually executed; so that, in any point of view, I cannot agree with counsel for the defense that no relief can be given on account of usury.

This brings us to the question as to whether or not the execution of the deed and defeasance, with the understanding that the defeasance was not to be put on record, but to be kept secret, to prevent injury to the credit of Johnston, and to prevent the liability of his property to attachments on behalf of his creditors, rendered the same void, and the land liable to the debts of the judgment creditors, under which Sullivan claims title to these lands, or, rather, to the debts of these creditors, as it is admitted that Sullivan holds only as trustee for them, and, if liable, is the liability to that portion of the indebtedness accrued before, or both after and before, its execution. It is clear that, if the account of the transaction given by Johnston in his testimony is correct, then the transaction was fraudulent and void as to the existing creditors of Johnston; being designed to hinder and delay them in the collection of their debts. No matter which party proposed that the conveyance should be made in the way it was done, the proposition being made on the one side and accepted on the other with the avowed purpose of keeping the

true transaction a secret to prevent its injuring the credit of Johnston, and to prevent the land from being attached by his creditors, involved both parties alike in the fraudulent purpose. Johnston testifies that the proposition came first from Parker, one of the partners, and Parker testifies that it came first from Johnston, so that it is difficult to determine which one of the witnesses gives the true statement of the transaction. But I am satisfied from all the proof and circumstances surrounding the transaction, as shown from the proof, that it was understood between both parties that the deed was to be absolute upon its face, and that the defeasance was to be kept secret, and that this was for the purpose of avoiding prejudice to Johnston's credit, and further to prevent Johnston's interest in the land from being subject to attachment for his debts he was then owing; and for the reason that subsequent creditors could not be presumed to give credit upon the faith of his owning the lands, the title to which was absolutely in Farguson, as the same appeared of record. The fact that he remained in possession the balance of the year in which the deed was made, could not affect the apparent title of Farguson; so that it is difficult to perceive how the title, being absolute in Farguson, could add anything to Johnston's credit, or that his subsequent creditors could be deceived and defrauded thereby. But it is apparent that the making the deed absolute on its face, with the defeasance intended not to be recorded, but to be kept secret, was calculated to deceive existing creditors, and to hinder and delay them in the collection of their debts, and therefore fraudulent and void as to such existing debts. It not satisfactorily appearing how much, if any, of the debts for which judgment was rendered in these attachment suits was contracted before the execution of this deed, the cause must be referred to a master, to take proof, and state the amount that was contracted prior to that time. All others matters will be reserved until the coming in of that report.

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BOWMAN *v.* PATRICK *et al.*

(Circuit Court, E. D. Missouri, E. D. September 17, 1888.)

1. VENDOR AND VENDEE—WHEN CONTRACT COMPLETE—ESTOPPEL.

Where, after negotiations by mail and telegraph for the sale by complainant to defendant of an interest in mining property, which, if consummated, would relieve complainant of liability for certain expenses of boring for minerals, an agreement is signed and mailed by defendant to complainant for his signature, which he does not sign, but signs and returns another, materially different in its terms, of which defendant does not indicate his acceptance by signing or otherwise, and afterwards draws on complainant for his part of said expenses, defendant cannot claim the transaction to be a completed sale.

2. EQUITY—RESCISSION—CONFIDENTIAL RELATIONS—MANAGING PARTNER.

The managing partner in a mine having actively concealed from his co-partner the fact that valuable ore had been found, the latter being absent, and having misled him as to its true condition by letters, a sale by the latter to the former at a grossly inadequate price will be set aside as fraudulent.<sup>1</sup>

<sup>1</sup>That equity will set aside a conveyance or sale obtained by failure to disclose material circumstances on the part of a vendee who stands in a confidential or fiduciary relation

## 8. SAME—LACHES.

Although complainant knew shortly thereafter that mining property which he had sold to his managing partner for a small price was very valuable, yet, as he did not know that the ore which enhanced its value was discovered before the sale until shortly before bringing suit to set the same aside for fraud, a delay of four years in attacking such sale would not bar complainant from relief.<sup>1</sup>

## In Equity.

Bill by Frank J. Bowman against William F. Patrick and James M. Patrick, to set aside a conveyance alleged to be obtained by fraud.

*Erasmus McGinnis*, for complainant.

*Cunningham & Eliot*, for defendants.

BREWER, J. This is an action brought by complainant to set aside a sale of his interest in certain mining property known as the "Col. Sellers" and "Accident" mines, situated near the town of Leadville, in the state of Colorado, and to compel the defendants to account for all moneys received by them as proceeds of the interest so sold. The case is submitted on pleadings and proofs. The facts undisputed are these: In February, 1882, T. C. Stebbins and others owned the Col. Sellers and Accidents mining locations. In that month a contract was made between these owners on one side and the complainant and defendant William F. Patrick on the other, by the terms of which contract complainant and Patrick were to sink a good and substantial shaft down to limestone in place or bed-rock, unless pay mineral was sooner found; also to make application for patent title to said mining claims, and in consideration thereof were to receive a deed to an undivided one-half of the property. A deed in pursuance of this contract was executed and placed in escrow. Complainant and his partner, Patrick, entered upon the performance of this contract, the shaft was sunk, mineral was discovered, the deed placed in escrow was delivered, and the mine became a very profitable one. On October 19, 1882, complainant conveyed to said defendant Patrick his interest in the property, and this is the sale which is challenged. Complainant and defendant Patrick were partners in this contract, and the first question to be considered is the law which controls in sales by one partner to another.

The rule for the federal courts is laid down in *Brooks v. Martin*, 2 Wall. 70. In that case the court, after noticing the fact that some authorities hold generally that the relation between partners is a fiduciary one, and, declining to express an opinion whether that rule is one of universal application, notices these features in that special partnership: *First*, that one partner was present, and in the sole charge and management of the business, while the other was at a distance; *secondly*, that this was by arrangement between the partners, and, therefore, that the managing part-

to the vendor, or raise a trust in favor of the party defrauded, see *Keith v. Kellam*, 35 Fed. Rep. 243, and note; *Hunt v. Patchin*, Id. 816, and note; *Miller v. Railroad Co.*, (Ala.) 4 South. Rep. 842, and note.

<sup>1</sup>As to what circumstances are sufficient to rebut the imputation of laches, see *McC Campbell v. McFaddin*, (Tex.) 9 S. W. Rep. 138; *Culver v. Pierson*, (N. J.) 15 Atl. Rep. 269, and note.

ner was really an agent in charge. Upon such a state of facts, in case of a sale by the managing partner to the other, the court thus states the rule:

"We lay down this as applicable to the case before us, and to all others of like character, that, in order to sustain such a sale, it must be made to appear—*First*, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, *second*, that all the information in the possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

The supreme court of the state of Missouri, the state in which complainant resided, and the supreme court of Colorado, the state in which the defendant lived, and where the property was situate, seem inclined to go even beyond the supreme court of the United States in asserting the fiduciary nature of the relations between partners. *Pomeroy v. Benton*, 57 Mo. 531; *Caldwell v. Davis*, (Colo.) 15 Pac. Rep. 696. In this case it is conceded that complainant lived in St. Louis, and was only once in Colorado between February and October; that said defendant Patrick lived in Leadville, and had the active management of the business, and this by arrangement between the partners; so that the case comes squarely under the rule laid down in *Brooks v. Martin*. That rule must therefore be regarded as controlling in this case.

The second question is, when did complainant make the sale to defendant? Unquestionably the conveyance was not made until October 19th; but defendant insists that a binding contract of sale had been entered into theretofore, and that from the moment it was entered into the fiduciary obligations arising from the partnership ceased. Fortunately the negotiations of the partners leading up to the sale were in writing, so that we do not have to depend upon the uncertain memory of witnesses. On June 19th the parties met in St. Louis,—the shaft having been sunk a hundred feet or more,—and made a settlement. Patrick was indebted to complainant for moneys paid out for him by complainant in some business transactions outside of this, which were allowed in this settlement, and a balance of \$288.69 found due from the complainant to defendant on account of the moneys expended in sinking the shaft. For that sum complainant gave his note, due in three months. Up to this time nothing had been said in reference to a sale. Patrick returned to Colorado, and complainant started to spend the summer in the woods in the northern part of Wisconsin, his post-office address being Bayfield, Wis. On the 22d of June Patrick wrote from Colorado to complainant a letter containing this proposition:

"In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, \$288.69, and take your interest off your hands, and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately, and I will try to make the arrangement."

On June 27th he wrote another letter, containing this language:

"I would like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it."

And on June 28th a third letter, containing this:

"Please let me know what we are to do in this new complication, and also about the Col. Sellers, as I am anxious to continue work on that property, and see what is there."

These letters were forwarded to complainant in Wisconsin. On the 13th of July complainant came out of the woods to Ashland, where was a telegraph station, and sent this telegram to Patrick:

"Yours of June 22d received yesterday; proposition accepted; send note."

On July 15th Patrick answered by this telegram:

"Acceptance too late. Proposition was dependent on immediate acceptance in St. Louis. See my letter of fifth."

On July 16th, from St. Paul, complainant wrote this letter:

"When I came out of the woods I found your letter of June 22d waiting my answer, and I telegraphed you on same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on you surrendering my note; and on a perusal of your subsequent letters, received here at St. Paul to-day, I learn that is your wish. I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way, and will not. If you wish any papers signed, send, and I will sign them. My address is Bayfield, Wis."

According to his testimony he had received the letter of 22d June at Ashland, and the letters of the 27th and 28th after reaching St. Paul. On August 2d, defendant wrote complainant this letter:

"LEADVILLE, COLO., August 2, 1882.

"*Mr. F. J. Bowman*—DEAR SIR: Yours of the 16th ult. received. In accordance with your request therein I send the within paper for your signature. I sold the note in St. Louis, before getting your reply, so will have to wait until it matures, which will be Sept. 19th."

The paper inclosed in the letters of August 2d is, in full, as follows:

"*Memoranda of agreement, made and entered into this ——— day of ———, A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, state of Missouri, and William F. Patrick, of the city of Leadville, state of Colorado, witnesseth: That whereas, said above-named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Saml. J. Glover, and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others, above named, of the undivided one-half right, title, and interest in and to the 'Col. Sellers Lode' and the 'Accident' lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place; and whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof has been borne principally by said Patrick, and said Bowman is unwilling to continue said work or pay any of the costs thereof; and whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due 90 days after date, and bearing interest at the rate of eight per cent. per annum, which*



note was for said Bowman's proportionate share of the cost and expenses of working said Col. Seller's lode, and which had theretofore been paid by said Patrick; and whereas, said Patrick has negotiated and sold said note: Now, therefore, it is hereby agreed by the parties hereto, that if said Patrick will pay said note when the same becomes due, and save the said Bowman from the payment of the same, or any portion thereof, the said Bowman will release and surrender to said Patrick all his right, title, and interest in and to the above-described contract so made with said Stebbins and others to the property described therein. The said Bowman further agrees, on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract, and known as the 'Col. Sellers' and 'Accident' lode mining claims, situated in California mining district, Lake county, Colorado, and the said Patrick agrees on his part, upon such conveyance to him, to release said Bowman from any and all liability under said contract so made with said Stebbins *et al.*, and to save said Bowman from all such liability.

"In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written.

"W. F. PATRICK. [Seal.]

"Witness as to Patrick: E. A. REYNOLDS."

In reply, and on August 28th, complainant sent this letter:

"CAMP NEAR BRULE RIVER, August 28, 1882.

"*Mr. Wm. F. Patrick*—MY DEAR SIR: I send you the contract you desire, and trust this will settle our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul, until Sept. 10th; then I shall return to St. Louis and business. Yours truly,

FRANK J. BOWMAN.

"P. S. Mails are slow here."

"Memorandum of agreement made and entered into this ——— day of ———, A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, state of Missouri, and Wm. F. Patrick, of the city of Leadville, state of Colorado, witnesseth: That whereas said above-named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover, and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others above named of the undivided one-half right, title, and interest in and to the 'Col. Sellers' lode and the 'Accident' lode mining claims to pay mineral or limestone in place; and whereas, considerable work and development has been done and performed on said 'Col. Sellers' lode, and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed; and whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due ninety days after date, and bearing interest at the rate of eight per cent. per annum, which note was for the full amount of said Bowman's proportionate share of the costs and expenses of working said 'Col. Sellers' lode, which then remained due and unpaid, all previous amounts having been fully paid by him; and whereas, said Patrick has negotiated and sold said note: Now, therefore, it is hereby agreed by the parties hereto that said Patrick will pay said note

when the same becomes due and payable, and save the said Bowman from the payment of the same or any portion thereof, and in consideration thereof the said Bowman will release and surrender to said Patrick all his remaining interest in and to the above-described contract, so made with said Stebbins and others, and to the property described therein (reserving and excepting, for the use of the brother of said Patrick, a one-sixth interest in said contract, if he shall elect to pay his assessments thereon.) The said Bowman further agrees that, on the payment of said note, and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract, and known as the 'Col. Sellers' and 'Accident' lode mining claims, situated in California mining district, Lake county, Colorado; and the said Patrick agrees on his part, upon such conveyance to him, to release said Bowman from any and all liability under said contract so made with said Stebbins *et al.*, and to save said Bowman from any and all such liability.

"Witness our hands and seals, this 28th day of August, 1882.

"FRANK J. BOWMAN."

These letters and telegrams are produced in evidence, their sending and receipt admitted. Beyond that defendant claims that on July 5th he wrote to complainant at St. Paul a letter, of which this is a copy:

"LEADVILLE, July 5, 1882.

"*Mr. Frank J. Bowman, Merchants Hotel, St. Paul, Minn.*—DEAR SIR: I send you a statement on all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you thereon is \$952.32, for which amount I will draw on you to-morrow. I wish to notify you, and hereby do so, that if the draft is not paid, that I will apply to Stebbins and Robinson and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract, and the loss of the amount we have spent in sinking the first 100 feet. The same attorney also tells me that, under our contract, if you do not pay your proportion when called upon, you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that in my opinion the shaft, which is now 165 feet deep, is looking very promising; and I think we are not very far from the contact. My reasons for thinking so are that porphyry is now heavily iron-stained. Hope that you will pay the draft, and that we may continue to work together; but if you do not, I will have to protect myself, and will do so by taking the new contract as I have said. I withdraw my offer to return your note for \$288.70, dated June 19, 1882, in case you assign your interest in the contract to me. Yours truly.

W. F. PATRICK."

—And at the same time he drew a draft for the amount named in the letter upon complainant at the Merchants Hotel at St. Paul. This draft was not paid, and, according to complainant's testimony, was never presented to him, and it was sent by defendant indorsed, "without protest." This letter was not offered in evidence, and whether any such letter was received by complainant, and whether the copy offered is a correct copy of the letter sent, are both matters of dispute. There confessedly were no other communications, written or oral, save one to be hereafter noticed, between the parties until they met on October 19th, in St. Louis, when the deed was executed. Now, upon these facts it is clear that no

binding contract was entered into between the parties until that time. The letters in June from defendant contain no proposition of his own, but simply communicate the proposition of another party; while on July 13th complainant telegraphed accepting; yet, according to defendant's testimony,—and he cannot now be heard to deny it,—he had eight days before withdrawn the proposition, and two days after the telegram of July 13th he notifies complainant that his acceptance was too late. Of course he cannot now say that any contract was created by these communications. He himself had never made a proposition, and the party for whom he assumed to act had withdrawn his offer. While it is true that on July 16th complainant by his letter indicated a willingness to sell upon the same terms, yet the letter and agreement sent by defendant on August 2d was no acceptance of complainant's proposition. The agreement as prepared did not purport to bind defendant, but only to bind complainant. It was an attempt on the part of defendant to obtain an option on the property. The contract provides that if defendant shall pay the note of complainant, which had been theretofore negotiated by defendant, and which did not become due until September 19th, then complainant should deed; but no binding obligation is assumed by defendant. If he should fail to pay the note, the contract would become nugatory. Complainant, evidently unwilling to sign a contract which bound only one of the parties, on August 28th prepared a new contract, binding both parties, which he himself signed and forwarded. Defendant never signed or accepted this; for, although he now testifies that he considered the matter closed, yet no such unexpressed intention completes a contract. Up to October 19th nothing had been done by which either party was bound. Complainant might have withdrawn the proposed agreement of August 28th, and insisted upon retaining his share in the property, because his proposition had not been accepted; and defendant could have compelled complainant to pay his share of the expenses thus far incurred, because nothing had been done to release complainant from his obligations. As I said before, unexpressed intentions to accept constitute no acceptance. It would be strange indeed, if a party could avoid the obligations which spring from such confidential relations by saying that he intended to terminate them; for he was in a position—not bound by anything that had been done or said—to decline accepting, if before the 19th of October the absolute worthlessness of the mine had been disclosed. Until defendant had bound himself to purchase, complainant had the right to rely upon him for full information, and the obligation of full disclosure remained until there was some binding contract between the parties. It is not plaintiff's offer to sell, but defendant's promise to buy, which cancels the obligations. While the relation of partners continues, their duties and obligations remain. But defendant insists that the obligations of partners are mutual, and that his obligation to disclose fully was released by complainant's failure to pay his share of the expenses, and the case of *McLure v. Ripley*, 2 Macn. & G. 274, is cited. Conceding the full authority of that case, I think it not in point. On June 19th the parties had settled, and complainant had

made satisfactory arrangements for his share. He never received the draft of July 5th. The circumstances under which it was sent indicate that payment was not expected, and it was sent simply for the purpose of crowding complainant out, and getting a new contract in defendant's separate name; for, in addition to what appears in the letter of July 5th, there is also a letter of the same date, written by defendant to his brother, in which this language is found:

"The shaft in the Col. Sellers is looking very promising. For several feet the porphyry has been heavily iron stained, and I have good reasons for thinking we are near the contact. Acting on Col. Bissell's advice, I to-day wrote to Bowman, telling him that if he did not pay up I would apply to the owners of the ground for a new contract in my own name, and leave him out. I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old."

Obviously defendant was then intending to get rid of his partner, and resorted to this strategy of sending a draft to one whom he knew to be absent on a hunting expedition, from whom he could not at the time reasonably, and did not in fact, expect payment, and whom, possibly, he thought the draft would not reach. Such strategy does not commend itself to the conscience of a chancellor, and does not relieve the party from the pressure of fiduciary obligations.

The third question is this: Did defendant, prior to his purchase, disclose all the information in his possession which was necessary to enable complainant to form a sound judgment of the value of what he sold? In respect to this matter, also, the testimony speaks with no uncertain sound. On the 31st of August a large body of ore was discovered. This was before defendant left Leadville, and before he had received the contract of August 28th. He seems to have left immediately thereafter, in search of complainant. It is true, there was quite a flow of water at the same time, which prevented further work in the mine; but of the discovery of the ore, and that it was a large body of ore, there can be no doubt; nor that the defendant was fully aware of it. As to the exact nature of the discoveries prior to that in the mine, the testimony is not altogether clear. There is testimony tending to show that about the middle of August a vein of mineral was discovered, and on August 16th a contract was signed by defendant and the original owners of the mine in which it is recited that "a lode or vein is now by all believed to have been struck," and which provided for the delivery of the deed theretofore placed in escrow as soon as the shaft should have been sunk to the depth of 250 feet, 10 feet below the depth then reached. In fact the shaft was sunk to 265 feet, and the deed delivered by August 31st, so that long prior to the conveyance from complainant to defendant,—prior to the time he received from complainant the contract of August 28th,—the parties in Colorado had transferred the title, recognized full performance of the contract, and, in fact, it had been performed and mineral discovered. None of these facts were communicated to complainant. On the contrary, on September 2d defendant reached St. Louis, and, not finding complainant, sent him this letter, the obvious intimation of

which was against the completion of the contract, receipt of the deed, or the discovery of mineral:

"I reached here this morning, and hoped to find you. I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, \$288.70, and you relinquished all rights under the agreement. The shaft is still going down. The note will be due about September 19th, so please sign the agreement, if you have not already done so, and send to me as soon as possible, so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tenn."

Beyond that, in the early part of August, indications of nearness of mineral were disclosed, and defendant admits that during that month he cautioned his relatives not to disclose the information he had furnished them concerning the mine, for fear it might reach the complainant. As indicating the dates of these communications to his relatives, and as tending to show the nature of the communications he made to them, a letter of August 17, 1882, written by his mother to her son, and one of August 24th, written by his father to his son, were offered in evidence. They contain these statements:

"On last Tuesday Eddie and self went to K., to bring out Mrs. Dickinson. We stopped to see Annie, of course. Found Mrs. Hale feeling better, but very weak. Annie was jubilant over a letter received the day before from Willie. He wrote her that they had found mineral in the Sellers, but, conservative as ever, thought it was only a small pocket in the porphyry. While we were there the evening mail brought another letter from W., which E. carried over to A., in order that we might have the very latest news before going home. In this letter he said that a clearly defined mineral vein extended entirely across the shaft, and he was more than pleased with the outlook of the mine."

"Annie was up to see us on Tuesday. She just got a letter from Will. He writes her the mine is all right. He is now going through a body of mineral that pays, and hopes to strike carbonates soon; and has resolved not to sell, but hold on to the mine. You must not write anything to St. Louis about it, as William has not got Bowman's deed yet,—only has a written promise for it. If you have written to any person, caution them to say nothing about it."

Again, shortly after October 19th, the time he received his deed from complainant, although the flow of water since the last of August had been such as to prevent further developments of the mine, his brother made a bet that within a year the Patricks would take from their interest in the mine more than \$8,000 from sales of ore, and wrote to the defendant in respect to the bet, who, on October 29th, replied that he had refused \$3,000 for a one-sixteenth interest, and that there was no question but that, if they could get the water under control, he could take out \$3,000 or \$80,000 within the year. I lay out of consideration the testimony given by complainant as to statements made to him on October 19th by James Patrick, for the reason that such statements are denied by James Patrick, and the testimony of complainant is not altogether satisfactory. Putting this one side, and resting solely upon that which is disclosed by the letters and contracts and the undisputed testimony of parties in no way interested, there can be no doubt that many, many facts affecting the value of the property were known to defendant

long before his purchase from complainant, and some time before he received the contract of August 28th, which he did not disclose to complainant. The case comes clearly within the rule of *Brooks v. Martin*, *supra*.

But it is further insisted by defendant that the claim is stale; that these transactions were in 1882, while this suit was not commenced until 1886; that in 1883 it became generally known that large bodies of ore were being taken out of the mine, and therefore complainant should have commenced this action earlier. It is enough to say in reply that there is not a syllable of testimony tending to show that complainant knew of the fraud practiced upon him until just before the commencement of this suit, and then only through some family trouble of the Patricks, in consequence of which certain letters were brought to his knowledge. He himself positively testifies that he had no suspicion of anything wrong. I do not understand that the mere fact that property which has been sold for a small sum a few months thereafter is found to be of exceeding value creates any suspicion of bad faith on the part of the purchaser, or casts any duty upon the seller to institute immediate inquiries to see if he has not been defrauded. On the contrary, he who acts in good faith generally presumes that the party with whom he has been dealing has acted in like good faith, and may safely rest upon that presumption until facts are called to his attention which indicate the contrary.

I think that that is about all I need to say. My conclusions rest but slightly upon the testimony of the complainant, but are reached almost entirely from the testimony of defendant, and those written matters of letter and contract which suffer nothing from failure of memory, but speak with the same language so long as they endure. My conclusion is that the sale made in October, 1882, cannot be sustained; that the complainant is entitled to a decree setting aside that sale, declaring him the owner of five forty-eighths of the property, and ordering a conveyance thereof by defendant, and an accounting. I see no reason for any decree as to James Patrick, and the bill as to him will be dismissed.

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SHANNON v. BRUNER.

(Circuit Court, E. D. Missouri, E. D. September 18, 1883.)

ASSIGNMENT—OF UNEARNED FEES—BY MASTER IN CHANCERY.

An assignment of his fees, made by a master before they are earned, is void as against the successful party to the suit, who had advanced the amount to the master.

On Motion of J. B. Johnson.

U. M. Young and Albert Blair, for complainant.

Martin, Laughlin & Kern, for motion.

*Hough, Overall & Judson and Geo. H. Knight, for defendant.*

BREWER, J., (*orally.*) In the case of *Shannon v. Bruner* these facts appear: The master was allowed \$400 for his services, and the costs were taxed against the complainant. Thereafter one J. B. Johnson filed a motion, asking that the complainant be required to pay those costs into court, and that the \$400 allowed to the master be turned over to him; he claiming that he had an assignment thereof from the master. That assignment is attached to his motion, and appears to have been made before the fees were earned. The defendant in the case resists this motion, claiming that the fees belong to him, as he himself had already advanced them to the master. Now the petitioner insists that, as the master is not resisting his motion, it is purely a question between him and the defendant, and therefore the equities are to be considered, and not the validity of the assignment under which he (the petitioner) claims. We think not. This petitioner has no standing in this court, except by virtue of that assignment. If that assignment gives him no right to the fees, then his motion ought not to be sustained. Like any other plaintiff, he stands upon the strength of his own title, and it is nothing to him whether the adversary has title or not. Now, can an officer make an assignment in advance of his fees or his salary? The law is very clear that he cannot. Public policy has affirmed the necessity of securing to every public officer, when earned, his fees or his salary, unhindered by any present legal attack or any previous voluntary assignment. There are many cases, both in England and in this country, affirming the necessity of upholding such public policy. It is familiar law that you cannot garnish an officer's salary; and the same public policy which forbids that, prevents him, before he has earned his salary or done the work which entitles him to the fees, from making a voluntary transfer of them. The case of *Bliss v. Lawrence*, 58 N. Y. 442, contains a quite lengthy discussion upon this question, and a citation of many authorities. There is, a single dissenting opinion in this country,—in Wisconsin,—and one or two cases from Massachusetts, which, perhaps, tend in the other direction. But the general voice of the authorities, both across the water and here, is that no voluntary assignment can be sustained, by a public officer, of fees or salary yet to be earned. That being the case, we hold that this assignment is void. The transfer being void, the petitioner has no standing in this court, and the motion will be denied.

## LOAGUE v. TAXING DISTRICT OF BROWNSVILLE.

(Circuit Court, W. D. Tennessee. July 28, 1888.)

## MANDAMUS—TO MUNICIPAL BOARDS—JUDGMENT—RES ADJUDICATA.

No defense can be made to a writ of *mandamus* issued upon a judgment by default against a municipal corporation which might have been made to the original suit upon the coupons. *Held*, therefore, where bonds, issued without legislative authority, were invalid, that the defendant corporation was bound by a judgment by default upon the coupons, and could not set up as a defense to the *mandamus* that there was no act commanding the tax to be levied, this being the same defense as the other, when it depends upon the want of authority to issue the bonds, as in this case.

Application for *Mandamus*.

The intestate recovered judgment in this court against the defendant corporation by default. This is an application for a *mandamus* against the officials charged with the duty of levying taxes to enforce a sufficient levy to pay those judgments. To the writ return is made that there is no act of the legislature commanding the levy; that the act of February 8, 1870, c. 55, authorizing the bonds, upon coupons from which the judgments were rendered, was abrogated by the new constitution of Tennessee, going into effect May 5, 1870; and that by the same act so abrogated, and not by any other act whatever, were the defendants to this writ authorized to levy the taxes claimed by the writ. The plaintiff moved to quash this return upon the ground that it was not a sufficient defense, since by the judgments themselves the defense was precluded as already adjudicated between the parties.

*Craft & Cooper*, for plaintiff.

*Smith & Collier* and *Bond & Rutledge*, for defendant.

HAMMOND, J., (after stating the facts as above.) After the decision in *Devereaux v. Brownsville*, 29 Fed. Rep. 742, the alternative writ issued in this case, and the defendants make return that the act under which the bonds were issued was abrogated by the new constitution of this state of 1870, and this before the election was ordered, or the bonds issued, whereby they are void; and that by this act only were they ever charged with any duty to levy taxes to pay said bonds. Thus the same questions are presented as in the other case of *Norton v. Brownsville*, ante, 99, (just determined by this court.) It is not necessary to repeat the facts of that case, which was heard with this for convenience, and both upon the same agreed state of facts, filed in the record. We there held that the bonds were invalid, and directed a verdict and judgment for the defendant corporation upon the ground that the new constitution, which went into effect before the bonds were issued, abrogated the act of the legislature authorizing them. *Norton v. Brownsville*, supra. But in this case the plaintiff contends that this defense was settled against the defendant by the judgment by default; that these questions are in this case *res judicata*, and can be no longer open to the defendant. To this an-



swer is made that the individuals made defendants to this writ of *mandamus* are required to levy the tax demanded only by the statutes of the state of Tennessee imposing that duty upon them; that the object of this *mandamus* is to enforce the performance of that duty; that the judgment, whether by default or upon issue pleaded, adds nothing to the force of that duty, nor to the effect of the statutes under which it is commanded; that, although their predecessors in municipal authority may have neglected to defend the case, the judgment is none the less a mere debt in another form, about which these defendants have no duty to perform unless the act of the legislature authorizing the debt, whether it be in the form of bonds or of judgment, is a valid law, binding on these defendants, and therefore they cannot be compelled to levy taxes to pay an invalid debt.

They further urge that the *feri facias* is the execution writ for a judgment, and they admit that if such a writ should find property of defendant, payment could be coerced, and no defense like this could be set up to that writ. But the writ of *mandamus* is of a different nature, and, inherently, must be always open to the defense that there is no law requiring the alleged duty to be performed, and that no duty is in fact imposed; that each defendant may in turn make this defense who is supposed to be charged with that duty; that to pay a judgment by paying taxes is not to pay it under a *feri facias*, but independently of any judgment whatever; that the duty to levy or the writ which commands a levy issues not out of the judgment, like the *feri facias*, but wholly aside from it, as a new and independent proceeding, and therefore that the judgment concludes nothing as to that writ; that in Tennessee in the state courts, as elsewhere may be done, the *mandamus* may issue without any judgment at all, and the court may command the levy upon the bare application of the creditor; and this defense, being available in such a proceeding, must be just as available if the creditor be required to have a judgment and *nulla bona* return of the *feri facias* as a preliminary step to qualify him to make the application for a *mandamus*; and that these preliminary qualifications can give him no better standing with the judgment than without, so far as this defense to the *mandamus* is concerned. And this argument is supported by the suggestion of two acts of assembly,—one authorizing the bonds, and another authorizing a tax to be levied to pay them, and imposing on defendants that duty; all under a state of administration that would devolve the duty of issuing the bonds on one official, and the duty of levying the tax on another, and the duty of defending the municipality when sued upon the bonds upon one official, and that of defending against a levy of taxes upon the application for the *mandamus* upon another. "Would a judgment by default upon the bonds under such circumstances conclude the taxing officials upon an application for the *mandamus*? and, if not, why should it, if both these duties be prescribed by one act of the legislature instead of two?"

This argument is very strongly maintained and seems plausible enough, but the court doubts its soundness, unless it goes to the extent of abrogat-

ing the whole force of the judgment in such cases, and reducing it to a mere calculation of the amount due. Because, if the defense is open on the *mandamus* proceedings to enforce the judgment, it is always open until the money be paid, and, perhaps, even that would not preclude it if a judgment at law does not conclude the defenses that may be set up; and it surely comes to this: that while a judgment would bind all the property of the municipality, and conclude every defense as to its execution in that direction, if the property is in the shape of tax funds to be levied and collected for its payment, the creditor must establish the validity of his bonds, not only in a suit at law against the municipality, but in innumerable other suits, as against any of its officials charged with the duty of levying the tax or collecting it; for these duties may be, and generally are, performed by different officials, any of whom may require a *mandamus* before discharging the duty, respectively. The municipality is an entire thing, and when it is sued properly it comes before the court as an entirety; and whoever may be charged with that duty must make its defenses, like other defendants make them, once, for all its agents and agencies, all of whom should be bound by a judgment against the municipality itself to the full extent that it has effect; otherwise a judgment against a municipality would not be very effective. And I do not well see why there should be, in this regard, any peculiar sacredness extending to tax funds and the process of reaching them in satisfaction of a judgment that does not attach to other property leviable upon *feri facias*. It is quite true that the authorities speak of the *mandamus* as a new suit, and as an independent proceeding, etc., and, technically, it does not issue upon the judgment as a matter of course as a *fi. fa.*; but even the *fi. fa.* is a judicial writ, and originally required an order of court to authorize it, and only by legislation does it issue ministerially, so to speak, from the clerk without an order of court. That writ belongs to the judgment as a kind of inherent and attendant incident of it, undoubtedly, and a *mandamus* does not; but still the difference in this regard is exaggerated, it seems to me, when we are asked to hold that because of that difference the judgment debtor may go behind the judgment and reopen defenses which it is admitted are closed as against a *feri facias*. The reason for the estoppel applies to one as well as to the other, and, independently of either, rests upon the sure foundation that one brought into a court to answer another must be concluded by the judgment as to all defenses that he made or should properly have made to the suit, or the judgment is a vain and useless thing. And whatever the law allows in the way of procedure after judgment to enforce it should be protected by this principle, and is. A suit upon this judgment, for example, would be a new and independent suit in every sense that the proceeding by *mandamus* is new and independent, and, if need be, it could be said to be more independent, indeed; and yet the defendant upon such a suit could not go behind this judgment and set up these defenses that were available when it had its first day in court. Hence the newness or independency of the *mandamus* proceeding, so much urged in argument, should not affect the question of the estoppel, it seems to me.

It is declared in *U. S. v. Macon Co.*, 99 U. S. 582, 591, that the judgment gives no additional right to a levy of taxes than the creditor had before, and the application of that principle is well illustrated by the facts of that case; nor, here, could the judgment creditor ask to enlarge his right to a levy because of the judgment. He does not do this. He only asks that the question of the validity of the legislation giving him the remedy by a levy for the payment of the bonds shall be concluded by a judgment upon the bonds, which establishes, not only that they were valid obligations, but that the given remedy shall be allowed to him. How this might be if the remedial legislation were wholly separate and independent of the legislation authorizing the bonds, we need not, perhaps, inquire; for here the remedy was given by the same act, and became a part of the contract, and a security for it. Any invalidity, therefore, that attached to the act as a whole, should have been set up as a defense, it would seem to me. But I do not wish thus to evade the force of the argument and illustration, and place the ruling on the broader ground that when the municipality was sued upon the bonds it could not delay the defense against the levy of taxes to pay them upon any theory that it would be time enough to make that defense upon the application for *mandamus*. Under some facts and circumstances, perhaps, this might be done, but here the identical defense set up against the levy of taxes is that the act authorizing the bonds was abrogated or repealed before they were issued, and that therefore they were unauthorized. If the bonds are valid, the power to levy taxes is plain, and the duty to do so established. The judgment conclusively declares the validity of the bonds, and that is the end of it. Neither the character of the legislation nor the facts of the case segregate the defense against a levy of taxes from that against the validity of the bonds, but, on the contrary, both show that they are the same, and indivisible, except upon the theory that the tax-levying agency of the municipality is not bound by a judgment against the municipality generally, but may, when called to discharge the duty, show that the judgment should not have been rendered upon the bonds, because they were unauthorized by law, or, what is the same thing so far as this case is concerned, that there is no law imposing the tax they are asked to levy. It is said that the duty to levy taxes is not established by law, to be sure, but this is said only because the bonds have been held in another suit to be invalid, and not for any other reason affecting distinctly and only the duty called in question. Defendants admit that if the bonds are valid the duty exists, and so the real distinction is that, if the bonds may be valid, and still the duty to levy taxes does not arise, then the defense against the levy might, perhaps, be made notwithstanding a judgment. But that is clearly not this case. The defendants' counsel admits that the bonds have been adjudged to be valid by this judgment, but only for the purpose of one writ that may be used in execution, called a "*feri facias*," while as to that called a "*mandamus*," which may likewise be so used if the bonds be valid, the adjudication is denied; but this is a limitation upon the principle that is as destructive of it as if it were wholly denied.

It is not conceived that the case of *Boyd v. Alabama*, 94 U. S. 645, affects this question. It is not pretended here that this adjudication by default as to the validity of these bonds precludes further inquiry as to the merits of the defense against them in other suits, even between the same parties, the authority of the legislative act alleged to have been abrogated not having been, in fact, called in question in this case and settled by the court. But it is this very judgment itself that we are asked now to enforce, and certainly that is binding on the parties until it is fully executed, if binding at all. Even the judgment we have just given in the first of these cases, *Norton v. Brownsville*, *supra*, upon other coupons, does not proceed upon any theory of *res judicata*, as between those parties by the former judgment of the circuit judge, which has been there mentioned. The court follows that judgment as a precedent, and rules in the same way as formerly was ruled in another case; but it does not proceed on the ground that the question is closed as by an adjudication. There are cases holding that a judgment upon the same series of bonds or coupons is binding, as upon the principle of *res judicata*, but it is not necessary here to go into the perplexities of that subject. The whole of it is that this return to the *mandamus* is really, though not confessedly, a collateral attack upon a judgment which has become conclusive by a failure to defend the suit originally, or to reverse the judgment upon writ of error. The remedy against the neglect of those officials or agents who failed to do their duty in that regard is by a suit against them for their neglect.

Counsel say on both sides that they find no direct case, unless *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. Rep. 1132, be a case in point. The defendant distinguishes that case from this in its facts, and the distinction is obvious. That was a neglect to traverse an averment that might have been traversed, and it was held that the defense was no longer open. It also was a dispute about a fact as to whether the bonds were issued under one act of the legislature or another. Here the entire absence of all legislative authority constitutes the defense, and we have held in other cases that it was a good one. Perhaps, in this case, the defense need not have been pleaded as a fact, since we take judicial notice of the constitution and statutes of a state, and a demurrer to the declaration might have been as effective as any plea. But, after all, that is only a difference in the mode of bringing the evidence before the court of the fact that no legislative authority did exist. The suit and its pleadings averred the existence of that authority as a fact, and the default admitted it, in the face of a judicial knowledge that would have overthrown it, no doubt, if the averment had been challenged in any proper way, but, that not having been done, it passed into judgment that such legislative authority did exist, and that is conclusive. In principle *Harshman v. Knox Co.*, *supra*, is, I think, identical with this case, notwithstanding the distinctions pointed out between the two cases.

The motion to quash the return of the defendant to the alternative writ of *mandamus* is granted, and the peremptory writ will issue.

## WILSON v. SELIGMAN.

(Circuit Court, E. D. Missouri, E. D. September 17, 1888.)

## CORPORATIONS — STOCKHOLDERS — PERSONAL LIABILITY — NOTICE — PERSONAL SERVICE WITHOUT STATE.

A notice of an application under Rev. St. Mo. § 736, for an execution against a stockholder on a judgment against a corporation confers no jurisdiction of the person, if served personally without the state.

At Law.

*James S. Bottsford*, for plaintiff.

*James O. Broadhead* and *John O'Day*, for defendant.

BREWER, J. The facts in this case are these: Plaintiff, in the circuit court of the city of St. Louis, on April 2, 1883, recovered a judgment against the Memphis, Carthage & Northwestern Railroad Company, a corporation created under the laws of the state of Missouri, for \$72,799.38. Execution was issued on such judgment, and returned unsatisfied. On the 9th day of July, 1883, a motion in writing was filed in the said court for an order directing the issue of an execution against this defendant as an alleged stockholder in such corporation, under the provisions of section 736 of the Revised Statutes. The defendant being a non-resident, and not found within the state, notice of this motion was served upon him personally in the state of New York, the place of his residence. Notice was also published by posting in the clerk's office in St. Louis. On the 3d day of December, 1883, defendant not appearing, the motion was sustained, and execution ordered in favor of the plaintiff against the defendant. Thereafter, on the 9th day of May, 1887, a suit was commenced in the circuit court of St. Louis by this plaintiff against this defendant upon such judgment and order; defendant, being within the state, was served personally. Thereupon the case was transferred to this court, and the single question now presented is whether the state court had jurisdiction of the person of the defendant, a non-resident of and not found within the state, and served by personal notice in the state of New York. The effect of this proceeding, if sustained, is to subject a non-resident having no property within this state to a personal judgment when he is not served within the state, and only served by process going out of the courts in this state into the territorial jurisdiction of another. But for the fact that the defendant is alleged to have been at the time a stockholder in the corporation against which judgment was rendered, there would be no room for question. The case of *Pennoyer v. Neff*, 95 U. S. 714, would be decisive. In that case the court says:

"But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within

the state wherein the tribunal sits cannot create any greater obligation upon a non-resident to appear. Process sent to him out of the state, and process published within it, are equally ineffectual in proceedings to establish his personal liability."

But the argument is that a corporation derives all its franchises and powers from the state of Missouri, and that in creating such corporation the state has prescribed the liability of all its stockholders, and the methods of enforcing such liabilities; that whoever takes stock in such corporation takes it subject to such conditions, and assents to the enforcement of liability in the manner prescribed; that the circuit courts of the state of Missouri are courts of general original jurisdiction, and their findings upon the jurisdictional fact that the defendant was a stockholder cannot be collaterally questioned.

Elaborate briefs have been filed *pro* and *con*. If I do not enter into any extended discussion it is not because the field is not ample, and authorities abundant, but because from the amount in controversy, and the past history of similar litigation, I know the case will go to the supreme court, and extended discussion here would be superfluous. I am content to simply state my views. In the light of *Pennoyer v. Neff*, process issued from the courts in this state has no potency outside of its territorial limits. Before any adjudication can be made against a party that party must be subject to the jurisdiction of the court. Before the court has any authority to inquire whether defendant is a stockholder, it must have him in court. No adjudication, even of the matter of jurisdiction, can affect a party who is not before the court. There is no presumption here from the silence of the record in favor of the judgment of a court of general jurisdiction, for the manner of service is disclosed. It may be as a matter of fact defendant was a stockholder, though that fact is denied; but the same argument which would sustain this judgment against defendant would sustain a similar judgment against any man, living wheresoever he might, upon whom plaintiff might see fit to serve notice, and against whom he might make some *prima facie* showing. So far as all interests which any stockholder may have in a Missouri corporation are concerned, they may be reached by process against the corporation, served in any manner or at any place that the state may authorize; but, so far as any personal liability is concerned, it cannot be adjudged against any individual until the fact that he is a stockholder is determined by some competent tribunal having previously thereto acquired jurisdiction of his person. With these views, judgment must be entered for the defendant.

**McCONVILLE v. GILMOUR et al., (two cases.)***Circuit Court, S. D. Ohio, W. D. August 25, 1888.)***NEGOTIABLE INSTRUMENTS—ACTIONS—PLEADING—DENIAL OF PARTNERSHIP.**

An answer to a petition on partnership promissory notes, which sets out that, "not having access to the notes," defendants deny "all allegations thereabouts," does not put in issue the partnership. The denial must be, whether general or specific, so certain that a prosecution for perjury would lie upon it, if untrue.

**At Law.**

This is a suit upon notes aggregating \$36,160, by the agent of the insolvent Metropolitan National Bank of Cincinnati against H. C. Gilmour & Co., composed of H. C. Gilmour and Louisa Gilmour. The petition is as follows:

**UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.**

*James McConville, Receiver of the Metropolitan National Bank of Cincinnati, Ohio, Plaintiff, vs. Henry C. Gilmour and Louisa Gilmour, doing business under the firm name of Henry C. Gilmour & Co., Defendants.*

**PETITION.**

Now comes the plaintiff, James McConville, and says that he is the duly-appointed and qualified receiver of the Metropolitan National Bank of Cincinnati, Ohio, which was a corporation organized under the banking laws of the United States, and that as such receiver he is now engaged in winding up the affairs of said bank, and for which purpose this suit is brought. And he further says that he is a citizen and resident of the Southern district of Ohio. Plaintiff says that the said defendants, Henry C. Gilmour and Louisa Gilmour, doing business under the firm name of Henry C. Gilmour & Co., are citizens and residents of the Southern district of Ohio, and of the Western division thereof. Plaintiff further says that he is the holder and owner for value of a certain note of which the defendants, Henry C. Gilmour and Louisa Gilmour, doing business under the firm name of Henry C. Gilmour & Co., are the makers and indorsers. [Here follows a description of the note.]

*Second.* And for second cause of action plaintiff says that he is the holder and owner for value of a certain note, of which the defendants, Henry C. Gilmour and Louisa Gilmour, doing business under the firm name of Henry C. Gilmour & Co., are the makers and indorsers. [Here follows a description of the note.] Wherefore plaintiff prays judgment against the said defendants, Henry C. Gilmour and Louisa Gilmour, doing business under the firm name of Henry C. Gilmour & Co., in the sum of \$36,160, with interest, etc., and for his costs. **W. B. BURNET & J. E. BRUCE, Attys. for Plff.**

The answer is as follows:

**UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.**

*James McConville, of the Metropolitan National Bank of Cincinnati, Ohio, Plaintiff, vs. Henry C. Gilmour and Louisa Gilmour et al., Defendants.*

**ANSWER.**

And now come the defendants, and for answer to plaintiff's petition say: (1) They deny that said plaintiff is the duly-appointed and qualified receiver of the Metropolitan National Bank of Cincinnati, Ohio; that as such receiver

he is now engaged in winding up the affairs of said bank; and that plaintiff is a citizen of the Southern district of Ohio; and they demand strict proof thereof. (2) They deny that said plaintiff is the holder or owner of any one of the notes in plaintiff's petition described. (3) They say that, not having access to the notes in said plaintiff's petition described, they deny all the allegations in said petition contained thereabouts. (4) And, further answering, they say that it is true that they at several times executed and delivered to the Metropolitan National Bank their certain promissory notes, and that at that time it was agreed between said bank and these defendants that when said notes matured they would be extended upon demand made by these defendants; that such demand was made at that time; that the time at which the debt represented by said notes becomes due has not yet arrived, and, if the notes set forth in said plaintiff's petition are those executed by these defendants to said bank, they are, each and all, subject to said agreement, and said debt is not yet due, and no recovery should be had upon any of the same. Wherefore, having fully answered, defendants ask to be hence dismissed with costs.

CHAMPION and WILLIAMS, Attorneys for Defendants.

*State of Ohio, Hamilton County, ss.:* Henry C. Gilmour, being first duly sworn, says that he is one of the defendants in the above-entitled action, and that the facts set forth, and the allegations contained in the foregoing answer are true, as he verily believes.

HENRY C. GILMOUR.

Sworn to before me, and subscribed in my presence, this 26th day of June, in the year 1888.

JAS. J. MUIR,

Notary Public, Hamilton County, Ohio. [Seal.]

By stipulation the case was tried without a jury, and the plaintiff offered in evidence the notes, to which objection was made as not being proved to be the notes of the defendants. Without any ruling on the objection, the plaintiff offered a witness,—the cashier of the bank,—who testified that the notes were signed by Henry C. Gilmour in the form of the firm signature, "H. C. GILMOUR & Co.;" and thereupon the plaintiff rested. The defendants moved for judgment upon the ground that the alleged partnership was not proven by the plaintiff, and that, at least, there could be no judgment against Louisa Gilmour, who did not sign the notes, nor was any authority shown to bind her, by a partnership signature or otherwise.

*W. B. Burnet and John E. Bruce, for plaintiff.*

*Champion & Williams and Logan & Slattery, for defendants.*

HAMMOND, J., (*after stating the facts as above.*) The modern rule of the codes and statutes, unlike the common law, does not require proof of the execution of the notes, except upon some sworn denial of that execution by a plea of *non est factum*, or that which is equivalent to it. Such a plea, by one alleged to be a member of a partnership, puts in issue the partnership itself, because denying the authority of him who signed the note to bind him who denies the execution of it, as one partner may bind another. This is conceded, as I understand it, to be the law of Ohio. But it is said that this answer, by its paragraph 3, is such a denial, and sufficient in Ohio to put the plaintiff to the proof of each and every allegation of the petition. But it is to be observed that the paragraph does not deny each and every allegation of the petition in so many words, as is usual where such an effect is intended by the pleader; nor does it



specifically deny the execution of the notes, as would a technical plea of *non est factum*; nor yet does it specifically deny the averment of a partnership, as is customary where the practice of petition and answer prevails, and assimilates the forms more to those used in equity than to those used at law, as in Ohio. It denies "all allegations in said petition contained thereabouts," which is a very unique and peculiar form of denial within itself, to say the least of it. It is neither like the general denial of a plea at law, nor the specific denial of an answer or plea in equity. It is a qualified denial in its form, and is, upon the face of it, less in some degree than the general issue at law, or the general denials in use in equity pleadings. When we search for the limitations of the qualifying words "all allegations thereabouts," we find them as we may and must in the immediately preceding context, and in the general scope of the answer. In the first place, the answer itself, as a whole, is, in form, not one contented with a general denial, however inartificial or indefinite, but contains not less than four specific denials in two separate paragraphs preceding the paragraph in question, and in one succeeding paragraph an admission that is accompanied by allegations of matter in avoidance that are couched in the language of specific and definite averment; the pleading altogether showing an intention to deny specifically, and not generally. Coming then to the third paragraph, the pleader sets out that, "not having access to the notes," the defendants deny "all allegations thereabouts,"—discarding all mere formal words, this is the substance of it. Every allegation in the petition relates to the notes in the sense that they are the subject of the demand of the petition for judgment upon them, the averment of the partnership of the defendants being neither more nor less "thereabouts" than the others, which are specifically denied, every one of them. Why, then, should that be reserved for a general denial, indefinite and ambiguous, while all other are specifically treated? At least such a method militates against any indulgence of implications in favor of the pleading as one of general denial, and precludes the notion of making it more elastic than it actually is by implications of an intention to include within it the denial of a fact not clearly within its natural scope of meaning.

Again, the averment of partnership, or rather the defendants' knowledge of the fact of partnership, in no way connects itself with access to the notes. It was not necessary to have access to the notes to know whether the averment of partnership was true or not, nor to determine whether the defendants would deny that allegation of the petition or not; wherefore the language used naturally limits itself to all allegations about the notes which were dependent upon access to them as a means of specific knowledge concerning the fact intended to be denied, and this, in the nature of the thing, must be confined to a lack of knowledge of the genuineness of the partnership signature, and not to any lack of information as to the fact of the partnership itself. Not having seen the signatures to the notes, the defendants might well say we do not know that they are the genuine signatures of our firm; but because of that they need not say that we deny that we were partners, nor do the

two depend at all upon each other. This is made more plain by the next paragraph, which admits the execution of certain notes, and avers that, if these are those notes, we had a promise of extension. That paragraph was stricken out on motion of plaintiffs, as not being a sufficient defense, but it may be looked to in construing the pleading as a whole, or the language of any particular part of it. The court is aware of the force of the position that the plea of *non est factum*, or a denial of the genuineness of a firm signature, may be made in such shape as to place on the plaintiff the burden of proving not only the execution of the note as to the genuineness of its signature, but as to the authority of one assuming to bind another as a partner; and under common-law procedure, the technical form for a plea of *non est factum* being used, such would be the result; but under Code pleading it is within the option of the pleader to plead generally or specifically, and whether he has, outside of the common law-forms or their equivalents in Code pleading, by the use of language, done one or the other, is always open to inquiry, and he will be held to the common rules of construction in the use of the language used in determining the inquiry. A denial in pleading should be so specific and unequivocal that an indictment for perjury would lie upon the denial. Bliss, Code Pl. § 331; *Lewis v. Coulter*, 10 Ohio St. 451. Could the defendants here be indicted for perjury if the partnership exists in fact, because of this alleged denial of it? Manifestly the pleader intended to escape that calamity, if the averment at all contemplated a denial of the partnership; and if successfully he has escaped it, it is on the theory that the partnership is not, in fact, denied by the pleading. The defendants cannot be permitted to use language as and for a general denial of the partnership, which, upon an indictment for perjury, would protect them because of its ambiguity. If not good on an indictment for perjury, it is not good here in this case for the purpose of a denial of the partnership. The entire language of a pleading must be taken together to ascertain the meaning. *Trimble v. Doty*, 16 Ohio St. 130. We cannot, therefore, strike out as surplusage the qualifying words, and pick out only such as would give the pleader the benefit of a general denial upon verified pleadings for the purposes of issue, and yet leave him to escape a prosecution for perjury by relying on the surplus words to qualify his oath. Judgment for plaintiff.

UNITED STATES *v.* PEACHY *et al.*

(District Court, S. D. Ohio, W. D. August 28, 1888.)

## 1. ADJOINING LAND-OWNERS—LATERAL SUPPORT—INJURY TO ALLEY.

An owner of land abutting on an alley, who, in excavating, constructs a retaining wall inadequate to support the alley, which gives way and injures the sidewalk of the opposite owner, is not liable for the injury, in the absence of negligence. And the employment of a competent architect and skillful workman negatives the charge of negligence, on the facts of this case.

## 2. PLEADING AND PROOF—DEPARTURE.

The petition alleged that the injury was caused by defendant negligently, carelessly, and unskillfully digging an excavation. *Held*, that evidence that the injury was caused by the inadequate strength of a retaining wall of the excavation was not a departure.

At Law. Action for damages.

Action by the United States against Henry Peachy and Charles Robson, administrators of George A. Smith, deceased, for an injury to the sidewalk of the federal building at Cincinnati, caused by the caving in of an alley which defendants' intestate had neglected to support by a sufficient retaining wall.

*James Harlan Cleveland*, Asst. Dist. Atty., for plaintiff.

*Simeon M. Johnson* and *Albert Boettinger*, for defendants.

HAMMOND, J. The federal building at Cincinnati is bounded on one side by Patterson alley, one of the public ways of that city, and immediately opposite the defendant's intestate owned a lot upon which he erected an extensive building, used for business purposes. The area wall of the intestate's building along his side of the alley, as at first constructed, was inadequate, by reason of which the structures of the alley gave way by caving, and the stone sidewalk of the government building, along its side of the alley, was injured to the extent of some \$416, the cost of repairing it, as is agreed by the parties, so far as concerns the amount of damages. This is a suit to recover that damage from the defendants. The petition alleges that the said George H. Smith "did negligently, carelessly, and unskillfully dig, or cause to be dug, a cellar or excavation on his said lot to a depth of twenty-two feet below the curb, etc., by reason of which the bank of said excavation caved in," etc. Both upon demurrer and by objections to testimony reserved until now the defendants insist that proof of inadequacy of strength in the retaining wall is a departure from this allegation of the petition, and is a different act of negligence from that alleged in the pleading. Undoubtedly the best pleading required, I should think, that the precise act of negligence should be stated, if possible, although the law does not require one to put his evidence in his pleading. Still, the building of the retaining wall is in every sense only a part of the excavation which was made. It is not one of the walls of the building, and has no connection with it as a part of its own structure, but is simply made to maintain an open

area in which to place the building, for purposes of ventilation and light, and fairly falls within the process of excavation, as is shown by the fact that it was done under a separate contract for the excavation.

It is not necessary to consider the niceties of the authorities upon this subject of pleading that have been so ably urged in arguments which, on all the points of this case, on both sides, have been instructive to the court, and entertaining as well, for, when everything is conceded to the learned counsel for the defendants that they can ask in that direction, the fact remains that the process of lining an excavation with walls, either **temporary or permanent**, is only a part of the work of excavation, and is so considered in the art of architecture as well as in the common comprehension of the subject. The objection, therefore, is not well founded, either to the pleading or the proof. Nor do I think it necessary to consider in any detail the elaborate arguments that have been made concerning the basis of the plaintiff's right of recovery, if there be such a right, or concerning the absence of any such basis for the claim of right, because, in my judgment, no case has been cited which is a precedent for this, or which considers facts sufficiently like those we have here in their relation to the subject. This may be said of all the cases, with the possible exception of *Keating v. Cincinnati*, 38 Ohio St. 141. But the arguments have developed the necessary legal considerations upon which the court can safely proceed to judgment, notwithstanding the want of any direct precedent, and without any search for cases outside of these cited by counsel. If these parties were the owners of contiguous lots or parcels of land, with no intervening strips or parcels belonging to others along the boundary line, or if they were owners of only adjacent or adjoining lands, with no streets or alleys to intervene, I should be unable to determine, without further reflection, precisely what an injury like this would impose in the way of liability for damages, if anything, particularly in view of the Ohio statute, so much commented upon in the argument, and the cases which have been cited that consider that statute. The law of lateral or subjacent support by way of easement is very delicate and complicated in its application to such situations as have been mentioned; and the Ohio statutes and cases have not, in my judgment, very much relieved those complications. It may be useful here to state that the statute does not seem to me to have destroyed the principle contained in the maxim, *sic utere tuo ut alienum non lædas*, whatever changes it may have made in the law of easements. Broom, Leg. Max. 328. It may, and probably does, impose new or modified standards of judgment in the matter of determining what is or is not negligence, either upon the one hand or the other, as between the neighboring owners, when they come to build either superficial or deep-laid structures upon their respective holdings, so that the law of easements as to lateral or subjacent supports has become regulated by this statute, and not by the general law of the subject, under circumstances which do not exist, in my judgment, in this case. Rev. St. Ohio, §§ 2676, 2677; *Burkhardt v. Hanley*, 23 Ohio St. 558; *McMillen v. Watt*, 27 Ohio St. 306; *Keating v. Cincinnati*, 38 Ohio St. 141; *Railroad Co. v. Pfau*, MSS. Op. AVERY, J., in v.36f.no.3—11

Hamilton Co. Dist. Ct.; Washb. Easem. 429, 444, 449, *et seq.*; Bigelow, Torts, 220.

But we have here the case of two abutting owners upon opposite sides of a street or alley in a city, and this action grows out of that situation in relation to the rights of the respective parties to the structures of the street, be they what they may, natural or artificial, as a means of support for their respective sidewalks or pavements, be they laid upon the street itself, or there be such extension of them as may come of laying the pavement upon one's own abutting land, which latter is this case. Now, when neighboring owners aggregate themselves into a city, and lay off streets and alleys, courts and parks, and the like, for their mutual use in building that city, can it be said that there is no right of mutual support or easement in the street or other such place for those walks and ways appurtenant to the abutting lots, without which the lots would be quite valueless, and the city itself an impossibility, almost? The principle is familiar that the derivation of ownership of only adjacent proprietors, from a common source, with specific intentions as to buildings for certain purposes, or with implied privileges in regard to certain uses, may create especial easements, not included in that strict and limited right of lateral support known to the common law as belonging to independent adjoining or adjacent owners of land. They are sometimes called "equitable easements," and are analogous to the easements that abutting owners on a street may have as a property implied from the nature of city building itself, and originating not in a common grant, perhaps, but in a common compact, express or implied, concerning the streets and their uses. Washb. Easem. 91, 106, 194, and *passim*. The right of every abutting owner, as well as the public, to the maintenance of a street intact, necessarily implies the right of the public and the abutting owner to whatever support is necessary, whether lateral or subjacent, for the street, from all the land that abuts upon it, and this whether the structures of the street be natural or artificial. That is the primary significance of the word "street" itself, considered with relation to its structure and its uses. It needs no citation of authority to establish that plain doctrine. Therefore, if the intestate, in the use of his land, whether proceeding on the notion of the general law as to his rights to dig and remove the soil therefrom, or on the notion of the Ohio statute, injures the street by destroying or displacing its structures, he is liable, not only to the public, but to his neighbors abutting on the street, for any injury peculiar to them growing out of their especial easements or rights to the street. And if by destroying the street the injury extends beyond its line on the opposite side, and impairs or destroys a sidewalk laid by the opposite owner upon his own land as a part of the public way, as this was, I do not see that the principle is affected; that is only the peculiarity of the damage done. Any other damage to the opposite property by the removal or destruction of the structure of the street, *qua* street, to the support of which that property was entitled mutually with the property of the wrong-doer, would be likewise actionable. But it is said that the allegations of the petition are not framed with reference to such a cause

of action, and that such damages as have been here described are not sued for by the plaintiff. But that is a mistake. The petition does not describe, and need not, the nature of the right injured; but it states the facts very plainly, and asks to recover, because of the injury, the proper measure of damages,—the cost of repairs, namely.

Nevertheless, I do not find that, on the facts of this case, the defendant's intestate was guilty of any negligence in the premises. It is an exaggeration of the principle just stated to suppose that by reason of it the defendant became the insurer or guarantor of his opposite neighbor, the United States, against all injury by his building operations. He was only bound to proceed with due caution, as a reasonable man proceeds under like circumstances, to do the work in a skillful and workman-like manner, and that is all his neighbors can demand. He did this in every respect, employing skillful workmen, architects, and contractors. We may lay aside the most of the proof, and particularly that of the experts, engineers, architects, and contractors as to the precise cause of the disaster that befell the retaining wall. Like other experts in other departments of skilled knowledge, there is not much agreement among them in matters of opinion, or, rather, of the inferences of fact they draw from the given conditions. But this is immaterial, and we may take the testimony of the intestate's architect, who impressed me most favorably with his intelligence, fairness, and impartiality, in giving his testimony. He is as satisfactory a witness in these regards as it would be possible to have. He says it did not occur to him to examine critically or closely the peculiarities of the structures of the alley, and the government building opposite, when he first projected the wall that gave way; that he gave the best judgment he could form upon inquiry as to usual dimensions of similar walls in use in Cincinnati, and by consultation with other architects, contractors, and the recognized authorities in the art, and that he had not any doubt as to the sufficiency of the projected wall; that he has found that the area wall of this same lot on the Walnut-street front, a street very much wider, and with far more extensive traffic than is done upon the alley, has been sufficient, with precisely the same dimensions as those of the wall which gave way; that the subsequent caving of the alley has convinced him that it was insufficient, but that he does not know that, if that were not a demonstration of the weakness of the wall, that he would have changed his opinion, even if he had known more accurately that the government building had been constructed with the "batters" of its walls on the outside, instead of the inside, as is usual, and as he assumed the fact to be; that the substructure of the government sidewalk was of the character shown by the proof, consisting in part of a filling taken from the *debris*, with a curb foundation laid upon that filling, or through it, to the more substantial filling below it, and that the government excavation had cut into the alley structures some 18 inches beyond the curbing of the walk; and that the center of the alley had been perforated with a sewer. He thinks these peculiarities probably aggravated or increased the pressure on his wall, but that, whether they did or not, and whatever the conditions were, whether arising from greater

length of wall or all combined, that set in motion the forces of destruction, the facts show that the alley wall was not strong enough, although the Walnut-street wall was; and he has since projected and had placed one that is sufficient, of larger dimensions. This was, at the most, a defective judgment, for which, under the circumstances, no negligence can be imputed to the architect, although there might have been a difference of opinion about it. Nor do I think it can be said to be the result of any unskillfulness. It is easy enough to say, after the fact of destruction, that the wall was inadequate, and it is surely true that greater strength would have been found in a larger wall, but every builder of a wall may and should consult economy in building, and it is not unreasonable to seek it within the bounds of ordinary prudence, as was done here. So, treating the architect as a servant of the intestate, for whose negligence, under the law of master and servant, he would be liable, and there is no negligence in fact, except upon the theory that he is an absolute guarantor of safety to his neighbors, which is not the law. And as to the intestate himself, having employed a competent architect of repute, he cannot be said to have proceeded negligently. All that could have been required of him, if not an insurer of safety, was ordinary and reasonable prudence in the selection of his architect or other agents. Washb. Easem. 444, § 15, citing *Charless v. Rankin*, 22 Mo. 566, 574; *Panton v. Holland*, 17 Johns. 92, 100, 101. No other negligence being imputed to the intestate, it is not necessary to consider the subject of contributory negligence in the alleged defective construction of the government sidewalk. Judgment for defendants.

### SHEFFIELD v. CENTRAL UNION TELEPHONE Co.

(Circuit Court, N. D. Ohio, E. D. April Term, 1888.)

#### 1. TELEPHONE COMPANIES—POLES IN HIGHWAY—NEGLIGENT OBSTRUCTION.

Under the statutes of Ohio providing that a telephone company may occupy for its poles a part of the public highway, but not so as to incommode the public in its use, the company must exercise reasonable care in the location of its poles, so as not to incommode public travel, but is not required to so locate them as to provide against all possible injuries that might happen under extraordinary circumstances.

#### 2. NEGLIGENCE—IMPUTED—HUSBAND AND WIFE.

Plaintiff was injured by the buggy in which she was riding, and which was driven by her husband, running against a pole located in the highway by the defendant telephone company. *Held* that, if the injury was occasioned solely by the driver's negligence, defendant was not liable, but if the driver's negligence only contributed to the injury his negligence could not be imputed to plaintiff, so as to defeat her action, where defendant's negligence directly contributed to the injury.<sup>1</sup>

<sup>1</sup>As to when the contributory negligence of a driver will be imputed to a passenger, see *Railroad Co. v. Hogeland*, (Md.) 7 Atl. Rep. 105, and note; *Nisbet v. Town of Garner*, (Iowa,) 39 N. W. Rep. 516, and note.

**At Law.**

Action for damages for personal injuries. The plaintiff sues the defendant for an injury occasioned by the defendant placing in a public road its poles to operate its telephone, thereby wrongfully and negligently obstructing the highway. She says that she was going along the highway in a buggy drawn by one horse, driven by her husband, and the horse, without any fault or negligence of her husband, ran upon and against a pole so located in the highway by the defendant, and was thereby injured and greatly damaged. The defendant denied the allegations of the petition.

*Boydton & Hale and E. G. Johnston, for plaintiff.*

*D. J. Nye and Henderson, Kline & Tolles, for defendant.*

WELKER, J., (*orally charging jury.*) To maintain this action the plaintiff must establish substantially the negligence charged against the defendant, and that such negligence produced the injury. It must also be shown in the whole evidence that the plaintiff did not by her own carelessness and negligence contribute to the injury; and if it appear that the defendant was guilty of the negligence charged against it, yet, if the plaintiff was herself guilty of such negligence as that the injury would not have occurred without that carelessness and negligence on her part, then the plaintiff is not entitled to recover.

The first question is as to the negligence of the defendant. That depends upon the rights given to the defendant to use, jointly with the public, a part of the highway. The statutes of Ohio provide that the telephone company might occupy for its poles a part of the public highway, but must not do it so as to incommode the public in the use of the highway. In the location of its poles in the highway the defendant was required to exercise reasonable care, so as not to incommode persons having a right to use the road for all purposes of travel. This use means the ordinary and reasonable use of the highway for all purposes for which highways are usually used by the public. It was not required to so locate its post or pole as to provide against all possible injuries that might be incurred or happen under extraordinary circumstances. Then ascertain the location of the pole, and find whether it did so inconvenience the public, and make such location careless and negligent. The plaintiff had a right to the use of the highway for purposes of travel without being incommoded by the pole of the defendant, located in the public highway. She was required to use ordinary care and diligence, in passing along the road, to avoid collision with the pole located therein. Ordinary care means such care as a person of ordinary prudence would or should exercise to avoid injury. What is ordinary care depends upon the circumstances surrounding the parties at the time, and upon the situation and location and the place of injury, whether the obstruction complained of was within the observation of the parties at the time, and the character of the vehicle and the team being driven. In determining the care of the plaintiff, you will consider all the circumstances of her being in the buggy, and what she could or ought to have done at the time to prevent



the injury. The horse and wagon being driven by the husband of the plaintiff at the time of the injury, it is claimed by the defendant that his carelessness in driving, if guilty of any such, is to be imputed to the plaintiff, and, if it contributed to her injury, she cannot recover. On that point I direct you that, if you find the injury was occasioned solely by the carelessness of the driver, her husband, the defendant cannot be held liable for the injury thus produced. If her husband's negligence only contributed to the injury, his negligence cannot be attributed to the plaintiff, and must not be regarded as her negligence, so as to defeat her action, where the negligence of the defendant directly contributed to the injury. If you find that the defendant was not guilty of carelessness or negligence as charged, your verdict should be for the defendant, or if the injury was produced wholly by fault of the driver, or if plaintiff contributed to the injury. If you find it was guilty of negligence in the location of the pole in the road, and such negligence produced the injury without the fault of the plaintiff, then you will find for the plaintiff, and assess such damages as will compensate her for the injury.

Verdict for plaintiff. Motion for new trial overruled.

JACKSON, J., sitting with the District Judge to hear the motion, concurred.

### SORENSEN *v.* NORTHERN PAC. R. CO.

(*Circuit Court, D. Minnesota.* September 10, 1888.)

#### 1. TRIAL.—INSTRUCTION.—EXPRESSION OF OPINION ON EVIDENCE.

A trial judge may express an opinion in a charge upon a question of fact, providing the jury are clearly informed that such opinion is not binding upon them, and that they are to decide according to their own judgment.

#### 2. SAME.—OBJECTION TO EVIDENCE.—SUBSEQUENT IMMATERIALITY.—EXPERT TESTIMONY.

It is no ground for the exclusion of medical expert testimony given at the close of plaintiff's evidence that defendant's witnesses developed other facts, and the medical witness was not recalled for further examination.

#### 8. DEATH BY WRONGFUL ACT.—CAUSE OF DEATH.—EVIDENCE.—SUFFICIENCY.

In an action by a personal representative against a railroad company for causing decedent's death by negligence, it appeared that directly after the injury complained of decedent began to fail, and so continued, with but a slight change for the better, until about one year thereafter, when he died. Some two or three years previous to the injury decedent was hurt by the fall of a derrick and had some ribs broken, but he fully recovered, and was a hearty man until the railroad accident. The expert testimony differed as to the cause of the death. *Held*, that the evidence sustained the finding that the injury complained of was the cause.

At Law. Motion for new trial.

Action by Hanna Sorenson, administratrix of the estate of Christopher Sorenson, deceased, against the Northern Pacific Railroad Company, for

negligently causing the death of the intestate. Verdict for plaintiff, and motion for a new trial, which was overruled.

*John W. Arctander*, for plaintiff.

*W. P. Clough* and *John C. Bullitt*, for defendant.

BREWER, J. In this case, since the argument of a motion for a new trial, I have read carefully the testimony as well as the briefs of counsel, and will now state my conclusions. Extended comment is unnecessary. In September, 1883, Sorenson, the plaintiff's intestate, jumped from one of defendant's trains, and suffered thereby severe bruises. His jump was at the instance of the conductor, justified by the threatening peril of a collision, and without imputation of blame or negligence on his part. The peril was caused by the culpable negligence of defendant's employees. Soon thereafter Sorenson began to droop and fail, and in September, 1884, he died. That for all injuries directly and proximately caused by the jump from the train defendant is liable is beyond dispute; is indeed not denied by counsel for the company. The contention is that death resulted from heart and aortic troubles existing prior to September, 1883. Physicians were called in on both sides. They differed in opinion. Much of their testimony was purely speculative,—a discussion of possibilities and probabilities. Upon the whole case, and the various matters discussed by counsel with great thoroughness and ability, I remark briefly:

1. Expression of opinion upon questions of fact by the trial judge is permissible, providing the jury are clearly informed that such expression is not binding upon them, and that they are to exercise their own judgment.

2. There is no objection to a plaintiff's closing his case with medical and expert testimony based upon the facts as then presented, and no rule recognizing the exclusion of such testimony, if, other facts being developed by defendant's witnesses, the medical witness is not recalled for further examination.

3. Where medical witnesses disagree in opinion and theory, the undisputed history of the case is often the most satisfactory and controlling fact. In this case such history fully justified the verdict. While some two or three years before this injury Sorenson had been injured by the fall of a derrick, and had two or three ribs broken, yet he soon recovered therefrom, and was a strong, hearty, and hard-working man until this time. Soon after this accident he began to droop and fail, and so continued failing, with a short and slight change for the better in the spring of 1884, until his death in September, 1884. Such a fact is significant, and upholds the verdict. I know that *post hoc* is not always *propter hoc*, but where the *propter hoc* is uncertain, the *post hoc* may often be decisive.

I cannot think that another trial upon similar testimony would result differently. Hence, passing all minor questions, I think the motion for a new trial must be overruled; and it is so ordered.

## HERSHEY v. O'NEILL.

*Circuit Court, S. D. New York. September 5, 1888.)*

**1. MALICIOUS PROSECUTION—PLEADING—NEGATIVE PREGNANT.**

The complaint, in an action for malicious prosecution and false imprisonment, alleged that defendant, by his agents, arrested plaintiff on a false charge, without authority or reasonable cause. The answer denied that defendant or his agents falsely or maliciously or without reasonable cause did any of the acts alleged. *Held* that, while the answer contained a negative pregnant, yet, as a subsequent paragraph alleged that one of defendant's clerks, having reasonable cause to believe that plaintiff had committed larceny, caused her to be arrested by a police officer, it did not admit that the arrest was made by defendant, and deny only the allegation of malice. Especially should this view be taken as the objection was not made until the trial, and plaintiff had not been misled.

**2. SAME—PROBABLE CAUSE—ARREST BY PRIVATE PERSON.**

Plaintiff testified on the trial that she went to defendant's store, where she was unacquainted, took an umbrella from the counter, and, to enable her to examine it more closely, carried it a short distance to the light near the door, when she was roughly seized by defendant's salesman, and pushed through the store into the basement. After an examination there, in presence of a policeman and others, she was arrested, taken to the station-house, and, after another examination, locked up until bail was given. She was subsequently tried and acquitted. Defendant proved that the umbrella counter was 40 or 50 feet from the door, and was in the lightest part of the store. Several witnesses testified that plaintiff took the umbrella, walked out of the store, and was proceeding down the street, having pulled off the tag, when the salesman politely touched her, and requested her to return into the store, and the two walked quietly to the ladies' lunch-room, in the basement; that she confessed her guilt then, and afterwards to the captain of police. *Held*, that a verdict for defendant would not be disturbed, as the salesman had used no force, and as, upon defendant's testimony, a larceny had been committed, justifying an arrest by a private person.

**3. SAME—PRINCIPAL AND AGENT—SPECIAL PATROLMEN.**

Under Laws N. Y. 1884, c. 180, § 269, providing that special patrolmen shall be subject to the orders of the superintendent of police, etc., and shall possess all the powers and discharge all the duties applicable to regular patrolmen, a special patrolman is not the mere servant of a person on whose premises he is appointed for duty, and by whom his salary is paid, and such person is not responsible for his official acts.

**4. SAME.**

A person is not liable for an arrest made by a policeman on information furnished by such person's clerk without his knowledge or authority.

**On Motion for New Trial.**

This is an action for false imprisonment and malicious prosecution. On the 4th of August, 1887, the plaintiff, a resident of Philadelphia, came to the store of the defendant, on Sixth avenue, New York, in company with a female friend. She had never been there before, and was a total stranger to the defendant and his employees. Her version of the subsequent occurrences is as follows: She says she went to the umbrella counter, took up an umbrella, and, to enable her to examine more closely the quality of the silk, carried it a short distance to the light near the door. While she was adjusting her eye-glasses for this purpose, she was roughly seized by the arm by Saunders, a salesman of the defendant, and pushed through the store, and into the basement. After an examination there,

in the presence of a policeman and two or three of the defendant's employes, she was arrested, and taken to the station-house, and, after being examined by the officer in charge, she was locked up for two or three hours, until bail was given by a friend. She was subsequently tried at a court of special sessions, and acquitted. This is, in brief, the testimony of the plaintiff. It is uncorroborated, except in a few unimportant details. On the other hand, the defendant proved that the umbrella counter was between 40 and 50 feet from the door in question, and that it was in the lightest part of the store. Several witnesses testified that the plaintiff took the umbrella, walked with it through the store out upon the sidewalk, and was proceeding down Sixth avenue, having in the mean time pulled off the tag, when the salesman, Saunders, followed her, touched her politely on the shoulder, and requested her to return into the store. No physical restraint was used, and the two walked quietly through the store to the ladies' lunch-room in the basement. The special police officer stationed on the premises was then summoned, and the plaintiff, having in substance admitted her guilt, was taken to the Twenty-Ninth precinct police station. She was there examined by the captain of police in charge, and again confessed the larceny. Thereupon she was locked up until bail was furnished, some two or three hours afterwards. The following morning she appeared in court, and was held for trial. Upon these facts the jury found a verdict for the defendant. The plaintiff now moves for a new trial upon the following grounds: *First*, the answer admits that the acts complained of were the acts of defendant's servants, and he should not, therefore, have been permitted to dispute their authority; *second*, it was error to instruct the jury that if they believed the defendant's witnesses their verdict should be for the defendant, for the reason that, even upon the defendant's testimony, there was a technical arrest by an unauthorized person; *third*, it was error to instruct the jury that the defendant was not liable, in an action of false imprisonment, for the acts of Officer Kenney.

*Henry G. Ward*, for plaintiff.

*Edward C. James*, for defendant.

COXE, J., (*after stating the facts as above.*) Being more than ever convinced, after a re-examination of the evidence, that the verdict was right, and in accordance with the great preponderance of testimony, the court is not disposed to grant a new trial upon any ground which is merely technical and formal in character. Where the court can see that a proper result has been reached, that the party has succeeded who ought to succeed, the endeavor should be to preserve the fruits of the trial. Every doubt should be resolved in favor of affirmance; every exception not affecting the merits should be disregarded. Where a controversy has terminated in a correct and honest verdict, it is for the advantage of both parties that litigation should cease.

The question arising on the pleadings is this: The complaint alleges, in substance, that the defendant, by his agents, servants, and employes, arrested the plaintiff on a false charge, without right, authority, or rea-

sonable cause. The answer denies that the defendant, or his agents, servants, or employes, falsely or maliciously, or without reasonable cause, did any of the acts alleged against him or them in said complaint. It is asserted by the plaintiff that here is an admission that the arrest was made by the defendant's agents, and a denial only of the allegation that they acted maliciously and without probable cause. In other words, the defendant admits that his agents did the acts in question, when he denies that they did those acts maliciously. It is true that the answer contains a negative pregnant, that it is not an artistic piece of pleading, and that a motion to make it more definite and certain would, in all probability, have prevailed. There certainly is plausibility in the contention that the authority of the defendant's servants to act as they did is admitted; and yet it is quite clear, taking the answer in its entirety, that it was not the intention of the pleader to place the defendant in this attitude. The plaintiff could hardly have been misled by this denial. In a subsequent paragraph the answer sets out fully the facts as they were understood by the defendant. It alleges that one of his clerks, having reasonable cause to suspect the plaintiff of the commission of the crime of larceny, took the umbrella from her and caused her to be arrested. This was true. The defendant could not, truthfully, have denied it. The answer further alleges that the person who made the arrest was a police officer appointed pursuant to law. All this is inconsistent with the theory that the defendant admits that the plaintiff was apprehended and arrested by his agents, acting under his authority. It is not the spirit of modern jurisprudence to defeat a party, or deprive him of a substantial right, by a nice and overstrained construction of his pleading. On the contrary, where, as in this case, the objection is not made until the trial, it should not be heeded, unless the other party has been misled to his injury; and, in all cases where it can properly be done, ample opportunity for amendment should be permitted. It is thought, therefore, that the answer, taken as a whole, is susceptible of a more liberal interpretation than that placed upon it by the plaintiff, and that within the authority of *Wall v. Water Co.*, 18 N. Y. 118, it may be held to put all the corresponding allegations of the complaint in issue. But, if this were otherwise, no reason is suggested why an amendment may not, even now, be made. *Railroad Co. v. McHenry*, 17 Fed. Rep. 414, and cases cited.

There was no mistake in instructing the jury that they should find for the defendant if they believed his witnesses. To say that the acts of Saunders, as related by him, amounted to an arrest, is surely to view them in a light superlatively harsh. No force was used. There were no threats. The plaintiff returned voluntarily; she was not compelled to do so by anything which Saunders did. The sidewalk on Sixth avenue was not a proper place to transact business, and his request, or demand even, that she should return, was not inconsistent with a satisfactory arrangement of the difficulty inside the store. That the plaintiff so understood it is quite evident, for she testifies: "I supposed that he was going to take me to the proprietor of the store, and I turned around and

walked with him, back." And again, upon the defendant's testimony, a larceny had actually been committed justifying an arrest by a private individual. *Burns v. Erben*, 40 N. Y. 463.

The third and last assignment of error raises an interesting and novel question: Was the court right in holding that the defendant is not responsible for the acts of Kenney, because he was a police officer? Notwithstanding the able and ingenious argument of plaintiff's counsel, it is thought that the ruling made at the trial should remain unchanged. Kenney, under the terms of the act, (Laws 1884, c. 180, § 269,) was subject to the orders of the superintendent of police; was required to obey the rules and regulations, general and special, of the police board; to conform to its discipline, and wear its dress or emblem. The act further provides that a patrolman so appointed shall be subject to removal by the board without cause assigned, and "shall possess all the powers and discharge all the duties of the police force applicable to regular patrolmen." Kenney, therefore, possessed all the common-law and statutory powers of constables, except for the service of civil process. It was made his duty by law at all times of day and night to prevent crime, detect and arrest offenders, protect the rights of persons and property, and, with or without warrant, to arrest all persons guilty of violating the law. He was, it is true, appointed for duty in the defendant's store, and was paid by the defendant. In all other respects, so far as this controversy is concerned, he was as much a member of the metropolitan force as any patrolman. It was the intent and purpose of the law to invest him with all the rights, powers, privileges, and immunities of a regular policeman. If this were not the object, if the *status* of the person so appointed remains unchanged, if the relations of master and servant still exist, it is not easy to see why the act was passed. The provision that the person particularly benefited shall pay the salary does not render nugatory the other provisions of the act, and deprive the policeman of the broad authority expressly delegated. He is not, in other words, the mere servant of the person who pays him. It is understood that this construction has been placed upon the law by the state courts, and it would seem to be more in accordance with reason and common sense than the opposing theory.

There can be no force in the contention that the defendant is liable for a false imprisonment because the arrest by Kenney was instigated by Saunders. To hold a merchant liable for the acts of a police officer because one of the merchant's clerks, with no authority from him, in his absence, and without his knowledge, gives information to the officer which induces him to arrest a person who, apparently, has committed a crime in the informant's presence, would be going far beyond any reported case. *Teal v. Fissel*, 28 Fed. Rep. 351; *Von Latham v. Libby*, 38 Barb. 339; *Brown v. Chadsey*, 39 Barb. 253.

The cause was presented as fairly for the plaintiff as she had a right to expect. Had the trial taken place in a state tribunal, it is altogether probable that it would have been terminated by the court, and not the jury. *Mali v. Lord*, 39 N. Y. 381; *Burns v. Erben*, 40 N. Y. 463.

The plaintiff was a total stranger to all in the store. Necessarily she was judged, not by what she was, but by what she seemed to be. It was a most natural inference from her conduct that she intended to take the defendant's property. The testimony is overwhelming that she took the umbrella without asking permission, and with no word of explanation carried it 40 feet through the store, and was actually walking with it down Sixth avenue when she was requested to return. It would seem that a clerk who hesitated to protect his employer's property in such circumstances would be most derelict in his duty. The plaintiff's conduct, to state it mildly, was exceedingly suspicious, and for the unfortunate occurrences which followed she has herself alone to thank. It would seem that no impartial person can read this record and reach a conclusion different from that reached by the jury. The motion is denied.

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PEOPLE *ex rel.* LANE *v.* HILTON *et al.*

(Circuit Court, E. D. Michigan. September 10, 1888.)

SHERIFF—LIABILITY OF SURETIES—EMBEZZLEMENT—UNAUTHORIZED RECEIPT OF MONEY IN LIEU OF BOND

A sheriff holding a writ of replevin for execution received from the plaintiff in replevin a deposit of money in lieu of the bond required by statute for the diligent prosecution of the suit, and subsequently embezzled the money. *Held*, that the receipt of the money, not being authorized by law, was an extraofficial act, and that the sureties upon the bond of the sheriff were not liable for the amount.

At Law.

This was a demurrer to a declaration against a sheriff and his bondsmen for failure to pay over certain moneys alleged to have been received by him in his official capacity. The condition of the sheriff's bond was that, "if said Hilton shall well and faithfully in all things perform and execute the duties of the office of sheriff of said county of St. Clair during his continuance in said office, by virtue of said election, without fraud, deceit, or oppression, and shall pay over all moneys that shall or may come into his hands as such sheriff, then said obligation to be void; otherwise to be and remain in full force." The facts relied upon as a breach of the condition of the bond were substantially as follows: In September, 1880, one John L. Smith brought an action of replevin in the circuit court for the county of St. Clair against John McKay *et al.*, to recover a lot of cedar posts and poles. The writ was placed in the hands of the defendant Hilton for execution. The sheriff took possession of the property named in the writ, and made the usual demand upon the plaintiff for a bond in replevin, as required by the statutes of Michigan, conditioned upon the prosecution of the suit, and payment of any judgment recovered by the defendant. Smith, being unable to furnish the bond, suggested that he procure a friend to deposit with the sheriff \$1,500 in

money as a substitute for a bond, to which the sheriff assented, and stated the money would answer every purpose, and that he would accept it in lieu of a bond. In pursuance of this arrangement the relator, Charles R. Lane, deposited in the Fort Plain Bank at Fort Plain, N. Y., the sum of \$1,500 to the credit of John Hilton, sheriff. Hilton subsequently drew the money from the bank at Fort Plain, and deposited the same, as sheriff, in the First National Bank of Port Huron, and subsequently withdrew it from the bank and embezzled it. In 1884 the replevin suit was terminated by a decision in favor of the plaintiff. Lane thereupon became entitled to his money, and demanded a return of it, and, upon the failure of Hilton to account, brought this suit upon his official bond. Defendants, the sureties upon the bond, demurred to the declaration upon the ground that the money was not received by the sheriff in his official capacity, and that his failure to pay it over was not a breach of his bond as sheriff.

*M. E. Dowling*, for plaintiff.

*Messrs. O'Brien, J. Atkinson, and N. E. Thomas*, for defendants.

BROWN, J., (*after stating the facts as above.*) There is no doubt of the general proposition that the obligation of a surety is *strictissimi juris*, and cannot be extended by construction. He is liable only where there is a breach of the letter of his contract. The sureties upon an official bond, as a rule, are only liable for such sums of money as their principal may lawfully receive by virtue of his office. Brandt, Sur. § 451. The only question in this case is whether the money received by the sheriff was received in his official capacity as sheriff, or as the agent of the plaintiff in the replevin case. The fact that he deposited the money in the bank "as sheriff," and that he drew it from the bank by checks signed by him in his official capacity, does not establish the official character of the transaction, unless the act were one which he in fact was authorized to do by virtue of his office. Nor does the fact that, if defendant had recovered judgment against the plaintiff in the case, he might have used this money in payment of such judgment, tend to show that he acted in his official capacity, because the plaintiff himself or any agent of the plaintiff might have done likewise with any money in his hands belonging to the plaintiff. We are therefore constrained to examine the statute to ascertain the powers and duties of a sheriff in the execution of a writ of replevin. By How. St. § 8324, before the sheriff shall deliver property replevied to the plaintiff, "such plaintiff, or some one in his behalf, shall execute a bond to such officer and his assigns, with the addition of his name of office," in at least double the appraised value of the property, "conditioned that the plaintiff will prosecute the suit to effect; and, if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in the said action." And by section 8325, "if the plaintiff shall fail to cause such bond to be executed and delivered to the officer within 24 hours after the appraisal of such property, the officer



shall return the same to the person from whom he took it." This is the extent of the officer's power in the premises. However convenient it may be to receive a deposit of money in lieu of a bond, it is not a proceeding authorized by the statute, or contemplated by law, and the sureties upon the official bond of the officer cannot be held for any dereliction of duty in connection with such deposit. We are not without authority upon this point. In the case of *State v. Long*, 8 Ired. 415, where a sheriff, instead of taking bail, received money on deposit from a defendant, who afterwards wished to surrender himself, and demanded a return of the money, it was held that the deposit of money with the sheriff under such circumstances was not an official act, and that his sureties were not liable for such funds. So in *Schloss v. White*, 16 Cal. 66, the sheriff agreed to sell property taken upon a writ of attachment, and keep the proceeds instead of the property to await the result of an action of replevin against him, and it was held that his sureties were not liable. So in *Cressey v. Gierman*, 7 Minn. 398, (Gil. 316,) a justice received money from a defendant, instead of a recognizance, to secure defendant's appearance before him for examination on a criminal charge. This money he refused to return, and suit was brought upon his bond; but the court held that his sureties were not liable, upon the ground that his receipt of the money, instead of a recognizance, was an extraofficial act. A number of cases to the same purport are contained in Brandt, Sur. §§ 481, 483, 484. An order will be entered sustaining the demurrer.

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### UNITED STATES *v.* ALLEN *et al.*

(Circuit Court, E. D. Missouri, E. D. September 6, 1888.)

#### 1. INDIANS—INDIAN AGENT—ACCOUNTING—EVIDENCE—TRANSCRIPT OF TREASURY DEPARTMENT.

An Indian agent of the United States, a part of whose duties is to receive and disburse public moneys, is a "person accountable for public money," within the meaning of Rev. St. U. S. § 886, providing that when suit is brought in case of delinquency of a revenue officer, or other "person accountable for public money," a transcript from the books and proceedings of the treasury department shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment accordingly; and under this section the treasury transcript is sufficient to establish an indebtedness of such agent to the government.

#### 2. STATUTES—ENACTMENT—VETO—EVIDENCE OF DATE OF RECEIPT BY HOUSE.

An act of congress discharging certain sureties became a law, unless the president's veto was sent to the house by the 24th of February, 1837. Held, that a memorandum in the minute-book of the journal clerk of the house, to the effect that a message in writing was received from the president on the 24th, and laid on the speaker's table, together with testimony by such clerk that such memorandum could refer to no other message than the one in question, and that it undoubtedly did refer to such one, and that, under house rule 24, a message received in the afternoon of the 24th would, according to the usual practice, be laid before the house by the speaker on the succeeding morning, is sufficient proof that the message was received on the 24th, although the journal of the house shows that it was not laid before the house till the following day.

At Law.

Thomas P. Bashaw, U. S. Dist. Atty., for plaintiff.

C. H. Krum, for defendants.

THAYER, J. The objection noted at the trial to the introduction of the treasury transcript is now overruled. The action is on the official bond of Mr. John How as Indian agent, and charges certain delinquencies. It was a part of his duty as Indian agent to receive and disburse public moneys. He was therefore a "person accountable for public money," within the meaning of section 886, Rev. St. U. S. Such being the case, "a transcript of the books and proceedings of the treasury department," duly certified, is admissible in evidence, and is sufficient, in the absence of countervailing proof, to authorize the court to grant judgment. Section 886, *supra*. I accordingly hold, as in the case of *U. S. v. Smith*, 35 Fed. Rep. 490, that the treasury transcript is sufficient to establish an indebtedness on the part of Mr. How to the government for moneys claimed to have been received by him, and not properly disbursed or accounted for. The balance charged against him on the books of the treasury department, as shown by the transcript, is *prima facie* the amount due to the government. In the present case the transcript shows a balance against the agent, on account of money transactions, exceeding the penalty of the bond, omitting any consideration of the alleged indebtedness of Mr. How to the government on account of public property (other than money) said to have been received and not properly accounted for. As no attempt was made at the trial to show that Mr. How was lawfully entitled to other credits than have been allowed by the accounting officers of the treasury, the defense to the action rests wholly upon the plea that the sureties on his bond have been discharged by an act of congress originating in the house of representatives, and passed by that body on December 15, 1886. The act in question in terms released the sureties from all liability. It was transmitted to the senate, and passed by that body on February 7, 1887. Subsequently, on February 12, 1887, it was laid before the president of the United States for his approval, and was returned to the house of representatives disapproved, either on February 24 or 25, 1887. If returned on February 24, 1887, the act failed to become a law; but if not returned until February 25, 1887, the executive veto came too late to defeat the legislative will. *Vide* section 7, art. 1, Const. U. S.

The sole question, therefore, is whether the bill was returned to the house of representatives, with the president's objections thereto, on February 24 or February 25, 1887. This is purely a question of fact, and is to be determined by a "resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer." *Gardner v. Collector*, 6 Wall. 499. The journal of the house of representatives, under date of February 25, 1887, contains an entry showing that the president's message containing his objections to the bill in question was on that day "laid before the house by the speaker." There is no other entry, however, in the house journal tending to show the date of

the return of the bill, but from this entry alone it is argued that February 25, 1887, should be accepted as the true date of its return. On the other hand, a minute-book kept by the journal clerk of the house of representatives, under date of February 24, 1887, contains the following memorandum: "A message in writing was received from the president of the United States, which was laid on the speaker's table." Concerning this entry, the journal clerk testifies that such memorandums are usually made by him in his minute-book on receipt of messages from the president, for the purpose of identification in case of several messages being received on the same day; and that a careful search of the journal of the house, as well as the clerk's minutes, shows that no message was received from the president on that day to which the memorandum could relate, unless it was the message in relation to the relief of the sureties of Mr. How, which was laid before the house by the speaker on the following morning, February 25, 1887, and is referred to by the journal entry of that day. The journal clerk further testifies that the message to which the entry in his minute-book under date of February 24, 1887, relates, was undoubtedly the message containing the president's objections to the bill for the relief of the sureties of John How; that it was received during the session of the house, between 4 and 5 p. m., on February 24, 1887, and, according to his recollection, was opened for identification, and laid on the speaker's table; and that, in conformity with the usual practice of the house, under clause 2 of rule 24 of the house of representatives, a message received at the hour named would be laid before the house by the speaker on the following morning, after the reading and approval of the house journal. As the entry contained in the house journal of February 25, 1887, to the effect that the speaker on that day laid the president's message before the house, does not state when the message was received, and is in no respect inconsistent with the explanation furnished by the journal clerk, the evidence before the court shows almost to the point of demonstration that the bill in question was returned in time to prevent its becoming law; that is, on February 24, 1887. I so find, and accordingly direct judgment to be entered for the penalty of the bond.

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UNITED STATES *v.* TRAINOR.

(*District Court, D. Oregon. August 4, 1888.*)

ELECTIONS AND VOTERS—ATTEMPTING UNLAWFUL VOTING—REV. ST. U. S. § 5511.

Section 5511 of the Revised Statutes, for the prevention and punishment of corruption and misconduct at a congressional election, does not include an "attempt" to do or commit any of the acts therein specified and prohibited, except that of voting in the name of another person, and the act of aiding, counseling, procuring, or advising any person, voter, or officer, to do or omit to do any act, the commission or omission of which is thereby made a crime, and therefore an indictment will not lie thereon against one for attempting to vote at such election a second time.

(*Syllabus by the Court.*)

**Indictment for Attempting to Vote a Second Time.***Lewis L. McArthur*, for plaintiff.*Robert G. Morrow*, for defendant.

DEADY, J. The indictment in this case charges that the defendant, on June 4, 1888, at an election then being held in the state of Oregon for a representative in the congress of the United States, did knowingly "attempt and offer to vote a second time" for such representative, at polling place numbered 1, in South Portland precinct, in the state aforesaid; he having already voted once for such representative at said polling place, on said day.

The defendant demurs to the indictment, for that the facts stated therein do not constitute a crime.

The indictment is found under section 5511 of the Revised Statutes.

The section is a very long one, over-crowded with particulars. It is a crude, bungling piece of composition, and, considering the importance of the subject, shamefully obscure and uncertain. Although intended to punish and prevent bribery and corruption at congressional elections, it does not make the reception of a bribe a crime, and only includes the case of a briber by the obscure indirection of making it a crime to prevent "by force, threat, intimidation, bribery, reward, or offer thereof," any qualified voter "from freely exercising the right of suffrage."

The section contains nine clauses, separated by the conjunction "or" and a semi-colon, specifying a great number of acts and omissions relating to elections for representatives in congress, which are thereby made criminal and punishable by fine and imprisonment.

The first four relate to unlawful voting by any person; as voting or attempting to vote in the name of another person, voting more than once, or at a place where the party is not entitled to vote, or without having a lawful right to vote, or doing any unlawful act to secure an opportunity to vote. But nothing is said concerning an attempt to do any of these acts except the first. The next four clauses relate to the preventing of any person "from freely exercising the right of suffrage by force, threats," etc., or compelling, or inducing by any such means any officer of election to act unlawfully, or interfering in any manner with him in the discharge of his duty.

The eighth and ninth clauses read as follows:

"Or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote; or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so," shall be punished, etc.

The "person" or "officer" who is the subject of these two sentences or clauses, is not expressed; but from the nature of the acts prohibited in the first of them—the receiving or refusing a vote illegally—it must be an officer at a congressional election, and in the case of the second one it may be "any person" who gives the "aid, counsel," etc., therein prohibited. And the "such voter, person, or officer," mentioned in the lat-

ter clause, and who may be the object of such "aid, counsel," etc., must be the "qualified voter," the "any person" or "officer of such election," mentioned in the preceding part of the section.

On this analysis of the statute, the eighth and ninth clauses, when expressed in full, should read: Any officer at a congressional election who "knowingly receives the vote of any person not entitled to vote," or knowingly "refuses to receive the vote of any person entitled to vote," or "any person" who "aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so," shall be punished, etc.

The use of this form of the verb "attempt," in this connection, is a blunder. It should have been in the form of the third person singular,—attempts,—or it might have been in the future tense,—shall attempt,—so as to read: Any person who aids, counsels, etc., or "attempts" to aid, counsel, etc., or "shall" attempt to aid, counsel, etc. However, the phrase "attempt to do so," or attempts to do so, cannot be construed to apply to any acts other than those mentioned in the clause in which it is contained; and those are "aids, counsels, procures, or advises any such voter, person, or officer" to do or omit to do an act, the commission or omission of which is by the statute made a crime. Disregarding the grammatical error in the use of the word "attempt" in legal effect, the clause reads: "Any person who aids, counsels, procures, or advises, or attempts (or shall attempt) to aid, counsel, advise, or procure any such voter, person, or officer," etc., shall be punished, etc. The act of attempting to vote illegally, except in the case of attempting to vote in the name of another person, appears to have been overlooked in the preparation of the statute, and no provision is made therein for its punishment.

Therefore, the act with which the defendant is charged in the indictment—an attempt to vote illegally, because he had already voted once at said election—is not a legal crime, and the demurrer is well taken.

This is to be regretted. The defendant has incurred the moral guilt of attempting to pollute the ballot-box, the sacred depository of the public will, with an illegal vote, and deserves legal punishment therefor.

But the remedy for the omission is with congress, and not the courts.

If the defendant, in his attempt to vote, did any unlawful act to accomplish his purpose, he may be proceeded against for a violation of the fourth clause of the section, which provides that if any person "does any unlawful act to secure an opportunity to vote for himself or any other person," he shall be punished, etc. Thus, if the defendant was sworn, on his offer to vote a second time, and thereupon stated that he had not voted at that election, he would be guilty of an unlawful act—perjury—"to secure an opportunity to vote for himself," and could be prosecuted therefor.

The demurrer is sustained.

KEYES *et al.* v. PUEBLO SMELTING & REFINING CO.*(Circuit Court, D. Colorado. June 7, 1888.)*

## PATENTS FOR INVENTIONS—ANTICIPATION—SMELTING ORES.

Keyes & Arents' patent, relating to the art of smelting metallic ores, consisting of a tube inserted at the base of the furnace, through which the pure metal, being heaviest, runs out, and is conducted into a basin, leaving the matte and slag behind, is not anticipated by the device described in volume 5, p. 135, of Karsten's work on Smelting and Mines, by means of which the pure metal at the bottom of the furnace is permitted to empty itself into a "fore-hearth," or little projection from the bottom of the furnace out into the open air; as it is not pretended that by his device the matte is separated at this fore-hearth from the pure metal.

In Equity. Bill for infringement of patent. On final hearing.

*R. E. Foot*, for complainants.

*C. E. Gast* and *Thomas Macon*, for defendant.

Before MILLER, Justice.

MILLER, Justice. Two questions are made in the case by the defendants in opposition to the claim of the plaintiffs, and the first is that they deny that they have infringed the patent of the plaintiffs. The patent itself has relation to the art of smelting metallic ores, and is a very clear statement of a mode of withdrawing the pure metal after it has been separated by heat and the usual appliances of smelting furnaces from the other matter found in the ores in their native condition. And the mode by which this is done, as explained by the patentees, is a simple reliance upon some of the principles of natural physical science. They say, and that is undoubtedly true, that the metal—any metal which is sought to be extracted from these ores—is heavier than the other particles of ore, than the other matter found in the ore. The art of smelting, itself, consists in the processes by which, through the use of heat and other substances called "fluxes," this mixture of the ore with calcareous matter, with some other metals, is separated, and the pure metal is in this manner disintegrated from, and in some shape brought to a separation from, the other more useless and less valuable parts of the ore. It is not necessary to inquire whether the ore of lead or of gold or silver or copper is merely a mechanical mixture,—as it mostly is,—or is in some cases a chemical mixture; the great result to be sought for in smelting is to separate them. Lead is perhaps the easiest of all the ores to separate from the surrounding materials found connected with it. The mechanical principle to which I allude is that, these ores being mixed in a large furnace or cylinder without other materials which offer attraction to some of its elements, they are separated. It is by means of the heat secured through a blast-furnace. It is all melted, all dissolved, all turned into one fluid mass within the furnace, and precipitated from the upper part of the furnace, where they are mixed together, into the base of the furnace. In this process of separation and precipitation, or falling down, the metal being the heaviest,

the pure metal gets to the bottom. I read a sentence or two in the work of Mr. Karsten, which will be referred to hereafter. This is a translation from Karsten's work on Smelting and Mines, on which the defendants are relying. He says, in the translation handed to me from volume 5, p. 135, of his work:

"The products resulting from the smelting of lead ores, regardless of how the ores were previously treated, or what fluxes were added, are invariably—*First*, lead; *second*, matte; *third*, waste products. The matte is always tapped together with lead into a tap-hearth, in which the specifically lighter matte separates from the lead. It congeals much sooner than the lead, is taken off, and the lead is then ladled into moulds. The matte is never so poor as to be worthless. Generally matte is re-treated, and in a similar manner as the lead ores."

Now, the usual mode of separating the "slag," as it is called, which is the largest product of this smelting operation, and which is the lightest, is to make orifices in the cylinder or furnace, and that, being tapped in the liquid state, it flows off and is in various ways conducted away from the further operations of the smelter. The matte and the pure lead are then left, with an inclination in the pure lead to get to the bottom and the matte to the top; but this does not seem to be so readily separated, and so clearly marked, as the slag which runs off from the eye or holes in the furnace. The mode adopted by the plaintiffs in this case was to insert a tube precisely at the base of the furnace, which tube necessarily communicated with the pure lead alone; all the impurities, the matte and the slag, being at the top. The patentee of this invention does not seem to have concerned himself about what became of the slag nor of the matte, because, inserting his withdrawal tube at the base, the lower end of the cylinder, he gets nothing but pure metal; and, as you will see by one of those plats there, or diagrams, his tube then bore an upward direction, and carried this pure lead to a bowl or basin. In this way, by the pressure of gravity in the furnace constantly forcing that lead out through the tube, and the slag and the matte not being able to mingle with it, but being used as a mere pressure with other lead that came down, working its way through, the pure lead was conveyed off, and separated from the matte and slag, and carried into the basin, from which it was ladled out, in the old-fashioned way, or perhaps carried out by another tube into moulds, and placed where they wanted it. But the thing to be done—the separation of the pure lead or any other metal from the impurities with which it was originally mingled in the ore—has been achieved, and the patent is for the mode of separating these materials, of carrying away the pure silver from these other materials, of smelting after it has been melted and after they have settled, the ore being still liquid, each having its place by virtue of gravity. That is his patent. He claims that he was the first man that ever did this in a way that did not require constant attention on the part of the smelter; that others made holes to let the metal run off, and then had to open and watch them; that others run off the slag, and left the metal at the bottom, and, after the slag was all run off, that the matte and the metal

went out together, and was not then in a pure state. He claims that his discovery of this mode of inserting a tube which, either directly or indirectly, with an inclination upwards, brought out the pure metal from the bottom to a place where it was distinctly separated, and could be dealt with as pure metal, was the first invention of that kind. Now, this invention, I have no question myself, was one that was used by the defendants. They did not exactly make a tube with an angle of 45 degrees; but you will observe that that tube, which may be made of any suitable material, is inserted in an additional or side wall built up alongside of the furnace; and the defendants, while they do not take a particular tube or piece of metal and make a round cylinder out of it, make a cylinder inside of that wall, lined with something, I suppose, to keep it from destroying the wall; but it is an orifice or opening answering exactly the purpose, and of the same nature of that tube, at an angle used by the plaintiff, bringing the pure metal from the bottom of the crucible, where it is lying after having been reduced, and taking it up through a rather circuitous, but perpetually ascending, tube, until it gets up to a basin like that of plaintiff. I think there is no question but what it is doing the same thing through the same instrumentality, and by the same principle and the same means.

But the great defense relied on here is that the patent itself is not valid, because the principle on which it operates, and the description of the instrument itself, is to be found in the works of Mr. Karsten, a German, who had published a work on the subject of smelting and dealing with ores in Germany, where there are a great many mines, and where the science of mining has been, perhaps, as much considered as in any country in the world. I can hardly expect to enlighten anybody much on this subject. It does not appear that Mr. Karsten ever made or invented a furnace for smelting. It is not known, as far as I know, whether he was a practical smelter. He seems to be a man of science, who undertook, by five volumes, to consider the science and the laws of smelting ores, and especially as they were understood in Germany. In his works he undertakes to describe the different kinds of furnaces. He mentions perhaps a dozen, and their modes of operation that were then in existence in Germany; and among others he describes a class of furnaces which are shown on that central diagram there, (Litharge furnace,) by which as the ore is melted it becomes fluid. The pure metal gravitates, as in other furnaces, to the bottom, and then is permitted to empty itself out into what he calls a "fore-hearth," a little projection from the bottom of the furnace out into the open air, where the metal comes, and is dipped out by ladles, as it is in the one of the patentee's. It is said that this is the same, or such a description of the mode of smelting as is to be found in the plaintiff's patent. I have not been satisfied of that. In the first place, it is very clear from what is said here by Mr. Karsten himself, which I read, that the separation is not complete when it comes out into that fore-hearth or front. He declares that the matte, if not the slag, goes with it; that this matte, after it comes out, forms a covering over the pure metal, and before you can dip out that pure metal you



have to in some way scrape away this matte, and get it separated after it comes out. Now, that is not any part of the patentee's claim. He drives his tap into the bottom of the pure metal, and by force of gravity it runs out through his tube, and has no matte in it. There is no reason why there should be any matte in the receptacle from which he draws the pure lead. There is at the bottom, first, pure lead; there is, then, this peculiar substance which they call "matte;" there is, then, above that, the great body of material which they call "slag." Now, with all these he has nothing to do. He says: "I take the metal at the bottom, where it is pure, where there is neither matte nor slag, because of the superior gravity of the lead, which excludes these." I have already read to you where Mr. Karsten says that in the instrument upon which they rely,—in the furnace on which they rely,—the matte comes out with the material, and is to be scraped away and got rid of afterwards. There is another very material difference between his patent and anything found in Mr. Karsten's work upon the subject. It is perfectly obvious from reading all that Karsten says upon the subject, and it is obvious from the evidence produced here about the older mode, whether they were older patents or not than the plaintiff's, that the final separation, the total disintegration, the taking apart of the pure metal from the slag and matte and other things which represent the *debris* of the ore, is conducted upon the principle of carrying of the slag and the matte first. Holes are made in all these furnaces at different places and at different points, and a good many devices for the use of those orifices or holes by which the slag, being at the top, is carried off from the top and above where the metal is. That is the principle of separation in all those. Either the slag itself, or the matte, or both of them, are carried off from an orifice in the furnace that is above the metal, and which orifice is kept open or shut up as exigencies may require. Messrs. Keyes & Arents' patent goes upon a totally different principle. It leaves the slag there if you want it; says, we have nothing to do with that; our mode is to get out the metal first, to transfer that to another receptacle; your slag you can do with as you please; we have got no patent for it; it may be used with our invention, if you desire, or without it, but our invention is simply, after all this material is melted into a molten mass, we, by the laws of gravitation, are perfectly certain that the pure metal will be at the bottom, so many feet, so much depth, according to the quantity of metal that is there, and we take that out and leave this stuff which was originally connected with it as ore,—leave that to be dealt with in anyway you choose. Our business is to take these furnaces which are in existence, which everybody knows, and in which all this ore is reduced to a fluid state, and in which, from the laws of gravity, the pure metal—whatever it be, copper, lead, iron, silver, gold—will be at the bottom by virtue of its intrinsic gravity, and at that bottom we begin to work to get it withdrawn from the other, and not to get the other withdrawn from it. I do not think that any furnace described by Mr. Karsten—and to that they are limited, because that is all that they set up, except that they do not infringe—operates upon that principle at all. His own extracts, which

I show you here, would further show that, after he has let this slag run out over and above,—in some way a little difficult to understand,—after he has let it run out, or as much of it as they choose to let run out, then the pure metal is brought out of the walls of the furnace into what is really a part of the furnace,—a front part excavated like a hearth in front of a chimney. But when it is done as I have read to you, he says the matter is there,—covers it. And they make a merit of it, some of the defendants do; and this matte covering prevents it from oxidizing, and it is a good thing. Very well; if it is a good thing let them use it; let them have their matte preventing the metal from oxidation. That is not what plaintiffs profess to do. They profess to get the metal separate from matte, slag, and everything else by the process I have named. I do not think the description found in Karsten is in anticipation or describes the invention of these parties. I think their patent is a good patent, and that it is infringed by the defendants; that they are entitled to an injunction, and a reference for accounting. The plaintiff's counsel will prepare a decree.

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STEGNER *et al.* v. BLAKE *et al.*

(Circuit Court, D. Vermont. August 6, 1888.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NOVELTY—BUNG FASTENERS AND COVERS.

Letters patent No. 215,178, granted May 6, 1879, to Steyner, for a device for protecting beer stamps and fastening bungs and covers by placing nails into the holes at the ends of the metallic sheet formerly used, and turning a strip of the middle of each end of such sheet over the heads of the nails, so as to keep them in place, and enable them all to be applied at once, instead of separately, as formerly, describe a patentable invention, and are not void for want of novelty.

2. SAME—INFRINGEMENT.

Making and selling cover fasteners, under letters patent No. 244,282, granted July 12, 1881, to Moore, like those made under patent No. 215,178 in all respects, except that the whole of each end of the metallic sheet, instead of the narrower central strip, is turned over the heads of the nails, is an infringement, though used only in fastening the covers of butter and sugar tubs, as the former patent covers every use to which the fastener can be put.

3. DEPOSITIONS—WAIVER OF OBJECTION.

An objection to a deposition that the certificate does not state the cause of the taking, is waived when not made before trial or final hearing, there being no suggestion that cause did not in fact exist.

4. SAME—DE BENE ESSE—EQUITY.

Rev. St. U. S. § 863, providing that "the testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*," applies to equity as well as common-law causes.

5. SAME—TAKING IN REBUTTAL.

Testimony which was regularly in order in rebuttal may be taken by deposition in that stage of the case.

6. EQUITY—EVIDENCE—OPINION—QUALIFICATION OF EXPERT.

In equity the fact that a witness testifying as an expert is not properly qualified goes to the weight, and not to the admissibility, of his testimony.

In Equity. Suit for infringement of patent.

Geo. J. Murray and S. C. Shurtleff, for orators.  
Küttredge Haskins, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 215,178, dated May 6, 1879, and granted to the orator Stegner, for an improvement in beer-stamp protector and bung retainer. The defenses are, want of patentability and novelty, and non-infringement.

Some of the orators' testimony is from witnesses residing out of the district, and more than 100 miles from the place of trial, and has been taken by deposition *de bene esse*, under the statutes. Objection was made at the time of the taking that it was being done "without authority of court," and "before an officer without authority under the equity rules or order of court." The objection was overruled, and the depositions were taken. The witnesses were cross-examined by counsel for defendants in the course of the taking. A motion to suppress the depositions for this cause, and because they have not been properly certified, was filed, and brought on at the hearing in chief. The statute provides that "the testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*." Rev. St. U. S. § 863. It is said in argument that this applies to common-law causes, and not to equity and admiralty causes, which are provided for by section 862. That section prescribes that the mode of proof in such causes shall be according to rules of the supreme court, except as therein specially provided. The provision for depositions *de bene esse* is special, and, as it applies to any civil cause, would extend to equity cases, which are essentially civil cases. They are taken in admiralty cases, which are coupled with equity cases in the statute. *The Samuel*, 1 Wheat. 9; *The Argo*, 2 Wheat. 287; *The Experiment*, 4 Wheat. 84; *Nelson v. Woodruff*, 1 Black, 156; *Rutherford v. Geddes*, 4 Wall. 220. The objection to the taking appears to have been properly overruled. *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1; *Arnold v. Chesebrough*, 35 Fed. Rep. 16. The defect in the certificate relied upon is the want of a statement of the cause of the taking. No suggestion is made that the cause did not, or does not, in fact exist. It might be obviated by a new certificate. Such an objection to a mere informality in a deposition ought to be taken and disposed of before trial or final hearing, or it should be considered as waived. *Doane v. Glenn*, 21 Wall. 33. This testimony was taken in rebuttal, and the point is made that it was not properly taken at that stage of the case. But it appears to meet the evidence in support of the defenses set up, and to have been regularly in order after that evidence was in. One witness testified as an expert, who is said not to be shown to be properly qualified. But that goes rather to the weight to be given to his testimony than to its admissibility, in equity cases, where all questions, as well of fact as of law, are for the court. The motion to suppress must, according to these views, be overruled. *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. Rep. 534.

Beer-stamp protectors and bung retainers, and also cover fasteners, were made of plain strips of sheet-metal, with holes at each end, to nail

them through. Their use made the holding of them in place, and the placing and driving of the nails separately, necessary. Stegner put the nails into the holes and turned a strip of the middle of each end over the heads of the nails before using, to keep them in place until used. They could be made cheaply by machinery, and could be conveniently and rapidly applied. The patent covers this improvement. They immediately superseded the others in use. This improvement is said in argument to have been so obvious that any skilled workman in the trade could have accomplished it, and to fall short of anything patentable as an invention. Now it has been done, and the manner of doing it has been seen, it seems to be very easy and simple; but before it had been done it had to be thought out and contrived. That it became so useful is good evidence that it was wanted; and that the old kind was used so long, and by so many workmen, without seeing the advantages of this and adopting them, is strong evidence that something more than the skill of an ordinary workman was necessary to bring this out. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Hoe v. Cottrell*, 17 Blatchf. 546, 1 Fed. Rep. 597. A consideration of all this tends to the conclusion that more than mechanical skill, amounting to an exercise of creative and inventive faculties, was involved, and that the defense of want of patentability is not sustained.

The defendants make and sell cover fasteners like these in all respects, except that the whole of each end is turned over the heads of the nails to keep them in place, instead of the narrower central strip. They operate under a patent to one Moore, assignor to one of them, No. 244,282, dated July 12, 1881, for a fastener with the nails through the ends turned under the body of the strip. If this difference between this fastener and Stegner's was patentable, clearly the difference between his and those preceding it was. When the whole end of the strip of metal is turned back over the body, the same part covers the heads of the nails and holds them in place that would if only a narrower central strip wide enough to cover them is turned over upon them. What is not necessary to cover them has no part in holding them in place, and there is no difference in the mechanical operation of the parts whether the remaining parts of the ends are turned over with the middle parts when they are turned over the heads of the nails, or are left to lie flat. The nails are held in place in each, ready for use, by substantially the same means, in substantially the same way. Therefore, if the device of the defendants preceded Stegner's invention, his patent was void for want of novelty. Stegner's invention appears to have been made in 1877. Moore testifies that he made such fasteners as those of the defendants, and furnished them to others to use, in 1862. In this he is corroborated to some extent by the testimony of one or two persons, to whom he says he furnished them, but none are produced, and they did not go into any general use. He did make and sell them in 1879, in the same vicinity, and they went immediately into extensive use. He applied for a patent for that fastener in that form March 24, 1881. On February 22d preceding he made an affidavit accompanying his petition, stating that the

same had not to his knowledge been in public use or on sale in the United States for more than two years prior to the application. His testimony is otherwise contradicted to some extent, and some of the witnesses appear to confound the old style of metal fasteners with these. What he did then at the utmost appears to have been but an abandoned experiment. Reasonable doubts arise, and the evidence falls far short of removing them, as is necessary under the law as established in order to defeat a patent. *Sim. Pat. Law*, 62, 63; *Bates v. Coe*, 98 U. S. 31. The defense of want of novelty therefore fails.

These patented articles are manufactures which are made, sold, and bought for use as such. The comparison already made of those made and sold by the defendants with those of the patent, shows that they are substantially alike. Stegner invented them for use to protect the stamps upon, and retain the bungs of, beer kegs. The defendants sell them for use in fastening the covers of butter and sugar tubs. The owners of the patent are not limited, however, to any particular use had in view when the invention was made, and the patent granted. The patent granted to them the right to the exclusive use of the patented invention without restriction. This covers every use to which it can be put. *Sim. Pat. Law*, 32. No patent could properly be granted for applying the invention to the new use. *Railroad Co. v. Engine Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220. For the same reason the prior patent would cover that use. From these considerations the orators appear to be entitled to a decree.

Let a decree be entered that the motion to suppress the depositions be overruled; that the patent is valid; that the defendants infringe; and for an injunction and an account, with costs.

## UNITED NICKEL CO. v. CENTRAL PAC. R. CO.

(Circuit Court, N. D. California. 1888.)

### 1. PATENTS FOR INVENTIONS—INFRINGEMENTS—NICKEL-PLATING.

Claims 1 and 4 of letters patent No. 93,157, granted August 3, 1869, to Isaac Adams, Jr., for an "improvement in the electro-deposition of nickel," describing the process and product of nickel-plating by means of a solution of the double sulphate of nickel and ammonia, or of the double chloride of nickel and ammonium, prepared and used in such manner as to be free from presence of potash, etc., or any acid or alkaline reaction, is infringed by the use of any solution chemically equivalent thereto, in the manufacture of the product described.

### 2. SAME—ACTION FOR INFRINGEMENT—DEFENSES.

It is no defense to an action for infringement of letters patent for an improvement in the electro-deposition of nickel, covering a process by means of certain solutions, and the product, that the defendant has become possessed of the solution he is using by purchase or otherwise, without obtaining a license so to use the same.

### 3. SAME—MEASURE OF DAMAGES—LICENSE FEE.

As evidence of the damage sustained by an infringement of a patented process, the prices fixed by plaintiff and voluntarily paid for licenses to use the

patented process are competent, but not prices or payments made in settlements of infringement claims, where the parties were liable to suit if they had not paid.

At Law. Action for damages for infringement of letters patent.

*Scrivner & Boone*, for plaintiff.

*M. A. Wheaton*, for defendant.

Ross, J., (*charging jury*.) The defendant is charged in this case with the infringement of the first and fourth claims of letters patent No. 93,-157, granted to Isaac Adams, Jr., (plaintiff's assignor,) on the 3d of August, 1869, for an "improvement in the electro-deposition of nickel." The claims of the patent that are said to have been infringed are as follows:

"(1) The electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction."

"(4) The electro-plating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

In the present case, as in other cases, the plaintiff must prove the material allegations of the complaint. It must show a valid patent, that defendant has infringed it, and the amount of damages plaintiff has suffered by reason of such infringement. In respect to all of those matters the burden of proof is on the plaintiff. But the patent in question, having been produced, is *prima facie* evidence that plaintiff's assignor first made the discovery claimed by him as an invention, and that it did in fact constitute a new and useful improvement in the electro-deposition of nickel. The *prima facie* case thus made out in favor of the validity of the patent is not overcome by any other evidence introduced, and you would not be justified in coming to any other conclusion than that the patent issued to the plaintiff's assignor in 1869 was in all respects valid. Indeed, it has been frequently so adjudged by the courts of the United States, and its validity is in the present case not contested by the defendant. Your real inquiries will therefore be limited, first, to the question of infringement; and, in the event of your finding that there was an infringement, then, next, to the question of damages.

You will have observed that the patent contains five claims, the third of which relates to the methods "for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium." It is not contended by plaintiff that there has been any infringement of this last-mentioned claim on the part of defendant. Some testimony has been introduced tending to show that defendant became possessed of one of the solutions referred to in the third claim of the patent, that is to say, the solution of the double sulphate of nickel and ammonia; but the fact, if fact you shall find it to be, that defendant did become possessed of that solution, either by purchase of the solution

itself or of the ingredients of which it is composed, and itself prepared the solution, did not confer on defendant the right to use the solution in the process described in the first, or in the product or manufacture described in the fourth, claim of the patent, without obtaining a license so to do. Each claim is, in effect, a separate and distinct patent. The first secures to the patentee and his assigns "the electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction," and the fourth claim secured to the patentee and his assigns "the electro-plating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact." Neither of these two last-mentioned claims, that is to say, the first or fourth, are in any way covered or embraced by that describing the methods for preparing the solutions referred to in the third, which, as has been said, is of itself a separate and distinct invention. If, therefore, you find from the evidence that defendant used the process described in the first claim, or manufactured the product described in the fourth claim, of the patent, you will find the question of infringement against the defendant.

Nor can the plaintiff's patent be defeated by evasion,—that is to say, by any mere colorable or unsubstantial change in the process or mode of bringing about the same result. Upon this point the language of Mr. Justice BLATCHFORD in a case involving the infringement of the same claims of the same patent now before you,<sup>1</sup> is very instructive. In that case the defendant claimed to have used, in the process of nickel-plating, a solution essentially different from that covered by the Adams patent. The judge said:

"Practical nickel-plating, as an art, has its origin in the Adams patent. Before that, because of the properties of nickel, it had been suggested that successful, practical nickel-plating would be a very useful invention. The invention made by Adams, and set forth in his specifications, covers the art of nickel-plating as now practiced. Before Adams, persons trying to plate with nickel proceeded as with gold, silver, and other metals, and failed. Adams discovered that it was necessary to avoid in nickel-plating the use of either what was not hurtful or was beneficial in other plating, and pointed out clearly what must be avoided. He mentions certain solutions which he says will give the best results of any solutions then known. He describes in detail the mode of preparing those solutions so as to get rid of the injurious substances. His invention applies to all nickel-plating solutions which act electro-chemically, like the solutions he mentions; for the facts he mentions are true of all such solutions. It applies to the defendant's solution, for that is the equivalent, electro-chemically, as regards nickel-plating, of the solutions mentioned by Adams. The defendant's solution is amenable to the same laws, and, in order to give the best results, must be used under the same conditions, and be free from the same impurities, and be made and used according to the principles laid down by Adams. Before Adams, no product possessing the properties

<sup>1</sup>Nickel Co. v. Pendleton, 15 Fed. Rep. 739.

described by him as those of his product was known. He introduced a new process, that of claim 1, as well as a new product or manufacture, that of claim 4. In attempts at nickel-plating before, acids had been used, which were known solvents of nickel. Adams used those acids to prepare his solutions. When he speaks of acid reaction in his specification, and in claim 1, he must be regarded as referring only to the acids he had spoken of as used to clean the article to be coated, or as solvents of nickel, namely, nitric, sulphuric, and hydrochloric acids. Those are the acids which he mentions as used to make salts of nickel, the metal being dissolved in the acids. Hence the acid reaction spoken of by Adams involves only the mineral acids referred to by Adams; those being the acids, and the only acids which could get into the solutions referred to by Adams, or into any plating solutions then known. Adams did not invent these solutions of claim 1. He showed how to prepare and use them successfully. The solution is the vehicle whereby the nickel is conveyed from the anode to the cathode, holding in suspension the nickel to be deposited, and supplying the place of the deposited nickel by taking other nickel from the anode. The real invention was in discovering the proper conditions for the use of such vehicle, not the particular chemical composition of the vehicle. Any proper vehicle used with those conditions would do the work. Any vehicle in the use of which those conditions should not be observed would not do the work. The actual chemical composition of the solution, so long as it should be a good working solution, was and is unimportant. The only material points was its freedom from the injurious constituents indicated by Adams. In this view, the defendant's solution is an equivalent, in the sense of the patent law, for the solutions of claim 1. It accomplishes the same results by the same electro-chemical mode of operation, by the same process, with the absence of the same injurious elements."

In the light of these instructions, it is for you, gentlemen of the jury, to say from all of the evidence in the case, whether the defendant used one of the solutions referred to in the third claim of the patent, or some other solution, the chemical equivalent of it, in the process described in the first claim, or in the manufacture of the product described in the fourth claim, of the patent; in other words, whether the alleged infringement has been established against the defendant. If defendant did not use either of the solutions mentioned in the claims of the patent, or any other solution chemically equivalent thereto in its process of manufacturing the nickel-plating in question; in other words, if the plating of the defendant was produced by means of a solution and a process essentially different from the solutions and process protected by the patent,—then, and in that case, I charge you that there has been no infringement of the patent on the part of the defendant. Those matters of fact will be for you to determine in view of all the evidence before you. If you find the question of infringement against the defendant, it will remain for you to consider the question of damages. If there has been an infringement, plaintiff is entitled to nominal damages at least, which, as you are doubtless aware, is considered one cent or one dollar; but if the evidence shows that the patent is of real value, then plaintiff is entitled to such substantial damages as the proof demands. The amount is for you to determine, always remembering that it devolves upon the plaintiff to prove the actual damages it has sustained, if any. I instruct you that it is competent, in cases like the present, for a patentee, in order that the



jury may measure his damages, to prove the contract prices at which licenses had been granted under the patent while it was in force, but that it is not competent for him to prove the prices paid for infringements; that is to say, payments made in settlement of infringements already committed. In order to be competent evidence of value, the prices agreed on must have been fixed with regard to future use, when, there being no liability between the parties, they are presumed, on both sides, to have acted voluntarily, and therefore to have made up their minds deliberately as to what was a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use. But settlements for past transactions, when the parties are liable to suit if they do not pay, I instruct you are not admissible as evidence for the plaintiff upon the subject of value, and will not be considered by you. *Shoe Co. v. Manufacturing Co.*, 19 Fed. Rep. 517; *Seymour v. McCormick*, 16 How. 480. If, therefore, you find that a fixed license fee was established by the plaintiff in the manner above indicated for the use of its solution, and that defendant used it in violation of the rights secured to the plaintiff by claims 1 and 4 of the patent, or either of them, then you are instructed that the rates so fixed for the use of the solution is evidence of what the recovery ought to be for the infringement, and you will consider it in arriving at a verdict. You are further instructed that the fact that the licenses put in evidence on the part of the plaintiff conferred on the licensees the right to use other patents than that for the infringement of which this action is brought is unimportant, if you find that they fixed the fees charged for the use of the solution in question. If, however, you should find from the evidence that the plaintiff issued its licenses for the same privileges to different persons at different rates,—in other words, if they were uncertain and irregular in amount,—then I charge you that it cannot be considered that any fixed fees were established. If you should find the question of infringement against the defendant, and should further find that license fees were established by the plaintiff in the manner already explained, and accept such rates as the measure of plaintiff's damages, you will allow interest thereon at the rate of 7 per cent. per annum from the dates at which such sums would, respectively, have become due under such established system of licenses, up to the time of the commencement of this action, which was January 8, 1886. There has been no testimony given tending to show any actual damages other than the license fees plaintiff claims to have established. Should you find for the plaintiff, the form of your verdict will be: We, the jury, find for the plaintiff, and assess its damages at \$———. If for the defendant: We, the jury, find for defendant.

Verdict for full amount claimed.

## BUTZ THERMO-ELECTRIC REGULATOR CO. v. JACOBS ELECTRIC CO.

*(Circuit Court, E. D. Wisconsin. October 1, 1888.)*

## 1. PATENTS FOR INVENTIONS — INFRINGEMENT — ELECTRIC HEAT AND VAPOR GOVERNORS.

Letters patent No. 222,234, issued December 2, 1879, to Julien M. Bradford and his assignee, Z. H. Harmon, for an improvement in electric heat and vapor governors for spinning and weaving rooms, consisting of a damper regulator operated by battery power, the current of which is opened and closed by the contraction and expansion of a thermometer in the room whose temperature is to be regulated, and which current, by means of a second circuit breaker, is in use only while moving the damper or valve regulating the supply of heat, and not while the valve is closed, as under former devices, cover, as to the second circuit breaker, an original invention, and are infringed by a device having two magnets, one for each circuit, two armatures, and two second circuit breakers, instead of one of each, as in the Bradford patent, and which performs substantially the same function.

## 2. SAME.

They are also infringed by a device performing substantially the same function, consisting of an opening and a closing circuit, each of which is closed by the thermometer at the proper time; a magnet, which is included in first one and then the other of said circuits; an armature to the magnet, which vibrates in response to the current; and a train of mechanism for opening and closing the valve; and some springs constituting a second circuit breaker; the motors in both devices starting when the thermometer makes a circuit, and continuing in motion until a half revolution is made, thereby opening or closing a valve, and then being automatically stopped by substantially the same means.

## 3. SAME—INFRINGEMENT—REMEDIES—INJUNCTION.

Where infringing articles have been manufactured for purposes of sale and use, and have been advertised for sale, injunction will issue, although none of the articles have been actually used or sold.

In Equity. Bill to restrain infringement of patent.

*E. H. Bottum* and *A. C. Paul*, for complainant.

*S. S. Stout*, for defendant.

JENKINS, J. The complainant files its bill to restrain the alleged infringement of letters patent No. 222,234, issued to Julien M. Bradford and his assignee, Z. H. Harmon, December 2, 1879, for "improvement in electric heat and vapor governors for spinning and weaving rooms," and as assignee of the patentees. The defendant, by its answer, (1) asserts that Bradford was not the original inventor of the alleged improvements purporting to be embraced in such letters patent, but that such alleged invention had previously been patented by certain letters patent of the United States, and of the kingdom of Great Britain, particularly set forth in the answer to the bill; (2) asserts that the alleged improvements embraced in the letters patent to Bradford and Harmon, in view of the state of the art at the time and previously existing, does not embrace any patentable invention, and is invalid; (3) denies infringement. At the hearing, all questions of the sufficiency of the Bradford patent, and of anticipation of his invention, were yielded by defendant's counsel. The questions submitted for decision were: (1) Should the complainants, under the proofs, be limited to the exact combinations and

methods specified in its letters patent, or may it hold as infringers those who use equivalents for any of the elements of those combinations? and (2) has the defendant infringed?

In order to determine the first of these questions, it becomes essential to examine the claimed invention of Bradford, and the state of the art at the time of such claimed invention, so far as may be necessary to ascertain whether his invention may properly be deemed a primary invention,—that is, one which performs a function never performed by any earlier invention,—or whether it is a secondary invention,—that is, one which performs a function previously performed by some earlier invention, but performing that function in a substantially different way from any preceding invention. I avail myself of counsel's accurate and intelligent description of Bradford's invention, and the state of the art at the time of such invention, so far as seems necessary to a correct understanding of the case presented:

"Prior to Bradford's invention, it had been proposed to place a thermometer in a room whose temperature was to be governed, and to connect the wires of an electric circuit with it, so that, as the temperature rose, the thermometer would expand, and close the circuit. The electric current flowing through the circuit would energize an electro-magnet that was arranged in the circuit, and this would attract and raise a lever to which a valve or damper was attached. The raising of the lever would shut the damper, and thereby cut off the supply of heat from the room in which the thermometer was situated. The temperature would then begin to fall, and the thermometer would contract sufficiently to break the circuit. The magnet would then be demagnetized, and would release the lever, and allow a weight or spring, acting on the damper, to open it. The objection to this regulator was that the electric circuit was necessarily closed all of the time while the damper or valve was closed, and, as this might require a large portion of the time, there would be an excessive consumption of battery power, the battery would be exhausted in a few hours, and the device would then become inoperative. In this regulator, also, the pull of the magnet was the only power that was used to operate the valve or damper, and it moved the damper only in one direction, and a spring or weight moved it in the other direction. The magnet must then have moved the valve against the tension of this spring or weight. The battery power must be used to move the valve against the force of a spring or weight that was sufficient to open the valve when released, and it must also hold it closed against this force. More than twice the force that would be needed to move the valve itself must be expended by the battery for a large portion of the time. The only other heat regulator that was used prior to Bradford's invention was like this, except that a continuously running independent power (such as a continuously running clock movement, or a continuously running steam-engine) was arranged to move the valve; and the lever, that was in the other instance connected to the valve itself, in this instance was arranged to throw a clutch into engagement between the continuously operating power (engine or clock movement) and the valve. As long as the circuit was closed, and the clutch was in engagement with the proper device, the valve would be turned in one direction, and the heat would be cut off from the room. When the temperature fell, and the circuit was broken, a spring threw the lever in the other direction, and withdrew the clutch, and brought another clutch into engagement with the proper mechanism, which then reversed the valve. In this device, as in the other, so long as the temperature was above the normal, and the heat was shut off, the circuit must

be closed, and the excessive consumption of battery power would continue. In addition to this, while larger valves could be used than in the other case, as the valve was moved by an independent power, still, as there was no way of stopping the motor, and having it start again when it was needed to move the valve, it was necessary to have it running all of the time, so that it would move the valve whenever the clutch mechanism was connected with it. There were some other devices more or less analogous to these, but all operated on the same principle; that is to say, in all of them the electric circuit remained closed, and the battery was being consumed all of the time while the valve was closed. The problem that Bradford undertook to solve was to produce a heat regulator in which the battery power and the motor would be in use only while the valve was being moved, and would both be at rest all of the time while the valve was stationary, whether in its opened or closed position. Bradford made a regulator having two electric circuits connecting the thermometer with the motor. One of these circuits he called the 'closing' circuit, as its whole office was to cause the motor to close the valve, and the other circuit he called the 'opening' circuit, as its whole office was to cause the motor to open the valve. Bradford also provided a second circuit breaker that was adapted to form a part of either circuit, and was arranged to be moved by the valve-operating mechanism, and break either circuit immediately after it had been closed at the thermometer, and the motor had started to close or open the valve. This circuit breaker consisted of a spring that was attached to a moving part of the valve-operating mechanism, and played between two insulated pins. When the valve is open, the spring is in electrical contact with one of the pins, and forms a part of the 'closing' circuit. The valve being open, and the heat entering the room, the temperature rises. As soon as the thermometer expands sufficiently it completes or closes the 'closing' circuit, an electrical impulse passes to the motor, causing it to start, and close the valve. At the same time the second breaker moves away from the pin against which it was resting, and passes over against the other pin. When it leaves the first pin it breaks the 'closing' circuit, and the consumption of battery power instantly ceases. When it comes in contact with the other pin, it closes the other or 'opening' circuit at that point. This circuit, however, is now open at the thermometer; but as the heat is now cut off from the room, the next movement of the thermometer will be a downward or contracting one, and after a time the metal spring carried by the thermometer will come in contact with the other contact screw, and the other or 'opening' circuit will be complete, an electrical impulse will be sent through this circuit, the motor will start, will open the valve, and at the same time the second circuit breaker will break the circuit which has just acted, and will move over into the other circuit, and put that in condition to be closed at the thermometer, and so on indefinitely. The second circuit breaker alternately forms a part of each circuit, and breaks each circuit immediately after it has done its work. This causes the battery to be in operation only while the valve is moving, and also causes the motor to stop as soon as it has moved the valve. In other words, to quote the language used by the inventor in his specification: 'By this arrangement the machine is always at rest, and the electric current always broken, excepting while the valve is being moved; thereby economizing the electrical and motive power to the greatest extent.' "

This automatic second circuit breaker is the distinctive feature of the invention, and its novelty, as applied to heat regulators, is confessed by the defendant at the hearing. It is therefore claimed in behalf of his patent that Bradford is a pioneer in the art, in the use of a heat regulator having a second circuit breaker of any kind, and that no one can avoid infringing his claims by a second circuit breaker of another form in the

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same combination, or by omitting any one of his elements and substituting therefor an equivalent. Upon the other hand, it is asserted that, although the second circuit breaker was first applied by Bradford to heat regulators, yet that the idea of a second circuit breaker was not new; had previously been used in respect to other devices for other purposes; and that therefore the Bradford device must be limited to the "specific form of device" described, and that the complainant cannot invoke in its behalf the doctrine of equivalents. To sustain this position the defendant has introduced in evidence United States patent to H. W. Spang, No. 168,056, dated September 21, 1875. This was issued for an improvement in electric railroad signals, and is claimed to embrace the idea of a second circuit breaker. I am entirely satisfied from the evidence that this claim is unfounded; that in the Spang device the circuit is not broken at all, but the current is merely changed in its direction, and that no thought of a second circuit breaker was in the mind of the inventor. This, to my mind, is clear from the examination of the drawing attached to the specifications of the Spang patent, and from the clear description of it by the expert witness, Mr. Bates:

"The Spang patent No. 168,056 shows and describes an electric railway signal. A clock-work is tripped by an electro-magnet, and makes a quarter revolution, and shows a certain railway signal, the magnet being energized by an electric current in a circuit, which is closed by a key. When the circuit is broken again by the same key, and the magnet ceases to attract its armature, a spring draws the armature in the opposite direction, and thereby trips the clock-work motor, and displays another signal by a quarter revolution of the clock-work. This is the entire operation of the circuit, magnet, and motor-device. To show the operator at the key whether the proper signal is displayed, a pole-changer is applied to the motor, which changes the direction of the current sent over the circuit. In other words, changes its polarity, and causes an indicator near the key to point to the word 'caution' or 'safety,' as the case may be. The pole-changer consists of a metallic drum having two rows of insulated spots, which alternate with each other. Three springs press upon the drum, one for each row of insulations, and one on the plain part of the drum. Whatever the position of the drum, one of these keys will rest upon an insulated spot, one upon an uninsulated spot, and the third upon the plain part of the drum. The two latter will therefore be in electrical communication with each other. The current is not broken by this device; it is simply changed in its direction; and the current flows over the circuit after the operation just as much as it did before. This drum, with its springs, therefore, is not a second circuit breaker like Bradford's. Bradford's absolutely breaks the circuit so that no current can pass, and it at the same time makes another circuit. The Spang device does not break the current at all. \* \* \* It has no second circuit breaker, and therefore lacks the main and valuable feature of the Bradford patent."

The defendant's contention in this regard failing, Mr. Bradford must be regarded as the original inventor of the second circuit breaker applied to heat regulators as described in his patents, and is entitled to treat as infringers all who make heat regulators having a second circuit regulator, "operating on the same principle, and performing the same function by analogous means, or equivalent combinations, although the infringing machine may be an improvement on the original, and patent-

able as such." *McCormick v. Talcott*, 20 How. 405; *Clough v. Manufacturing Co.*, 106 U. S. 166, 178, 1 Sup. Ct. Rep. 188, 198.

There are two devices exhibited in the record, marked respectively "Defendant's Device No. 1," and "Defendant's Device No. 2," which are claimed to have been manufactured by the defendant, and to infringe the patent of the complainant. The main points of difference between "Defendant's Device No. 1" and the Bradford device is that in the former there are two magnets, one for each current; two armatures; and two second circuit breakers. In the latter device there is but one of each. I think there can be no question of substantial identity. In all essentials the alleged infringing device is like Bradford's. The two magnets are used for the same purpose; first one, and then the other. Bradford uses the same magnet all the time. The second circuit breaker in "Device No. 1" performs no function useful or material in the operation of the device which is not performed by the second circuit breaker in Bradford's device. The device meets the two tests of equivalency, identity of function, and substantial identity of way of performing that function. This is confessed by the defendant's experts, and is placed beyond question. The "Device No. 2," when connected, forms an apparatus having a thermometer; an opening circuit and a closing circuit, each of which is closed by the thermometer at the proper time; a magnet which is included in first one and then the other of said circuits; an armature to the magnet, which vibrates in response to the current; and a train of mechanism for opening and closing the valve; and some springs, which constitute a second circuit breaker. The motive power in this apparatus is electricity, and the magnet referred to is made use of to transmit the electrical energy to the gearing which operates the valve. The second circuit breaker consists of a drum, half of whose surface is metallic and the balance non-conducting; and this drum is turned by the gearing which moves the valve, so that its metallic or conducting portion and its non-conducting portion alternately join the ends of the spring, thereby making and breaking an electrical connection. There are two sets of springs acted on by this drum, one being in one of the circuits, and the other in the other circuit. The difference between the second circuit breaker in this device—a drum and spring, instead of a plain spring as in Bradford's—is not material, for the two forms were well-known substitutes and equivalents for each other at the time of Bradford's invention. The difference in motors is also, as I conceive, immaterial. This device has an electric motor; that in Bradford's device is mechanical; but electric and mechanical motors were well-known substitutes and equivalents for each other at the time of Bradford's invention. In the Sweet patent, No. 169,057, of October 19, 1873, a similar electric motor is used to drive a clock; and spring and weight motors are undoubted equivalents, and have been long so used. These devices are alike in their use and operation. Both motors are started when the thermometer makes a circuit, and continue moving until a half revolution is made, thereby either opening or closing a valve, as the case may be; and then they are automatically stopped. Both motors are stopped by substan-

tially the same means. In the Bradford mechanical motor a mechanical resistance is interposed, which the mechanical power cannot overcome, and the motor stops in consequence. In the electrical motor an electrical resistance is interposed, which the electrical power cannot overcome, and the motor stops in consequence. In both cases the resistance is interposed automatically, by the motor itself. In Bradford's it consists of a dog which is caused by a half revolution of a wheel to engage the moving part of the motor, and stop its running. In "Device No. 2" the resistance consists of the non-conducting portion of the drum, which is caused by a half revolution of the drum, to intercept the moving electric current, and stop its flow. This is the usual way of stopping electric motors, and has been since such motors have been known; and Bradford's method is the usual way of stopping mechanical motors, and has been since such motors have been known. I cannot resist the conviction that each of these devices Nos. 1 and 2 is in substantial identity with the Bradford device, both in respect to function and the manner of executing its function. There may be slight differences of form, but none of substance. The principle is established that mere change of form, or an alteration in unessential parts, or the use of known equivalent powers, not varying essentially the machine or its mode of operation or organization, will not avail to avoid infringement. *O'Reilly v. Morse*, 15 How. 63.

It only remains to consider whether the defendant is responsible for these devices Nos. 1 and 2, in such manner as to authorize the exercise of the restraining power of the law. In its answer the defendant asserts that it has been and is engaged in manufacturing and selling—claiming the right so to do—electric apparatus for regulating temperature, under various letters patent owned by it, and has invested large capital in the enterprise, and in introducing the invention to the public. One of these patents, No. 365,600, issued to H. E. Jacobs, June 28, 1887, for electric temperature controlling device, exhibits the second circuit breaker as in the "Device No. 2" and makes claim thereto. It is disclosed by the evidence of Mr. Jacobs, the president of the defendant, that the company made five of the "Devices No. 1," and about twenty-five of the "Devices No. 2," claiming right so to do under his application for patents, and under patents to George W. Sternberg. Mr. Jacobs cannot remember of selling any of these devices, but recalls that, although the company has never received any money for any, it has advertised and offered for sale the device No. 2; that it is intended for use in connection with a battery and thermostat, connecting wires, dampers, or valves, as described in circulars issued by the company defendant. He claims that "Device No. 1" was put up for experimental purposes, to test its efficacy; and it proved a failure. There seems, however, to be no contention but that "Device No. 2" was actually manufactured with the intention to use as a feasible device, and that it has been so advertised and offered for sale. It is claimed that the complainant's proof is defective in that no actual use or sale for use of these devices had been proven. The evidence satisfactorily establishes that they were manufactured for the purposes

of sale and use, and have been largely advertised for sale. If the objection were of substance, I think, upon the showing made, that it would be incumbent upon the defendant to clearly establish that there had been no actual sale or use. There certainly has been a threatened invasion of complainant's rights. The plea—however potential upon the question of damages—is unavailing to prevent the issuance of the injunctive writ. It constitutes an infringement to manufacture for the purpose of use, even if not actually used. *Whittemore v. Cutter*, 1 Gall. 429; *Truck Co. v. Railroad Co.*, 10 Blatchf. 292, 306; *Carter v. Baker*, 4 Fish. Pat. Cas. 404, 419. Entertaining, therefore, no fair or reasonable doubt from the record of the substantial identity between the device manufactured by defendant and the Bradford device, there must pass a decree for the complainant, with an injunction, and the usual reference.

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THE MENOMINIE.

(District Court, D. Minnesota. September 8, 1888.)

1. MARITIME LIENS—STATE STATUTES—CONSTRUCTION.

Gen. St. Minn. 1878, c. 83, § 1, providing that every boat or vessel navigating the waters of the state is liable for all debts contracted by the master, owner, etc., on account of supplies furnished, work done, or services rendered for the benefit of such boat or vessel, or on account of labor done or materials furnished by mechanics, tradesmen, or others in building or equipping the same, creates a lien on the boat or vessel in favor of the claims named, though it does not in terms declare that they shall be liens.

2. SAME—PROCEEDINGS IN REM—CONSTITUTIONAL LAW.

While section 2 of such chapter authorizing the enforcement of the lien by a proceeding *in rem* in the state courts is unconstitutional, section 1, creating the lien, is not thereby rendered inoperative and void, as the lien may be enforced in the courts of admiralty.

3. SAME—STATUTE—REPEAL.

Such section 1 is not repealed by Gen. St. 1878, c. 90, providing that whoever performs labor or furnishes materials or machinery for constructing, altering, or repairing any boat or vessel, by virtue of a contract with the owner or agent thereof, shall have a lien on the boat or vessel, etc., as the latter statute does not expressly repeal the former, and is not inconsistent with it.

4. SAME—LIMITATION OF ACTIONS—APPLICATION TO FEDERAL COURTS.

The provision of chapter 83 which requires a proceeding for enforcement of the lien to be brought within one year after the cause of action accrued, applies to proceedings in the United States as well as the state courts.

5. SAME—PRIORITY—ADMIRALTY RULE.

A state cannot by legislation control the rule to be followed by the courts of admiralty in distributing the proceeds of boats and vessels sold under admiralty process; but, when liens are created by a state statute, the court of admiralty will recognize such liens, and assign them to the class to which they belong under the maritime law of priority, where they will share equally with other liens of the same class, whether arising by statute or by the law maritime.

6. SAME—ADVANCES—TO PROCURE BOAT'S RELEASE.

Where a libel for supplies furnished has been filed, and the boat seized in a foreign port, a person furnishing to the master money necessary to release the boat is, in the absence of fraud, entitled to a lien on the boat for the money advanced.



In Admiralty. On exceptions to master's report.

*Fayette Marsh*, for libelant.

*Fouke & Lyon*, for E. M. Dickey Company, intervenors.

*Henderson, Hurd, Daniels & Kiesel*, and *H. C. James*, for Knapp, Stout & Co. Company.

*Lawler & Durment*, for Rhodes and others.

SHIRAS, J. 1. The questions presented by the record in this cause, both of law and fact, are numerous, and in many instances difficult of solution. The master to whom the cause was referred has given to all the questions arising on the record very careful consideration, and by the very clear and able statement of his findings and conclusions, set forth in his report, has greatly lessened the burden that would otherwise have been imposed upon the court. Exceptions to the report have been filed on behalf of several parties, which require for their decision an examination and determination of several mooted questions arising under the maritime law and the statutes of the state of Minnesota. The steamer *Menominie* was formerly owned by the Knapp, Stout & Co. Company, a corporation organized under the laws of the state of Wisconsin, but doing business also in the state of Iowa, in which state part of the company's officers resided. The boat was enrolled at Dubuque, Iowa. Subsequently a contract for the sale thereof was entered into between the Knapp, Stout & Co. Company and the Matt Clark Transportation Company, a corporation organized under the laws of the state of Minnesota, and located at the town of Stillwater. By the terms of the contract of sale, which was duly recorded in the office of the surveyor of customs at Dubuque, Iowa, the title remained in the Knapp, Stout & Co. Company until the purchase price was fully paid, which has not yet been done, but the possession and full control of the vessel was delivered over to the Matt Clark Transportation Company. The several claims of the seamen, material-men, and others, now in controversy, arose after the delivery of the boat to the transportation company, and while it was engaged in the business of that company. The master finds, under the facts shown in his evidence, that the boat must be deemed to have been the property of the transportation company, and its home port to have been in the state of Minnesota at the time the claims of the several libelants herein arose, and in this finding I concur.

It further appears that supplies were furnished and labor done upon this vessel at its home port, and the question arises whether the creditors have a lien therefor upon the vessel. The labor and material being furnished at the home port, a maritime lien therefor does not arise. *The Lottawanna*, 21 Wall. 558; *The Albany*, 4 Dill. 439. If a lien exists, it must be found in the provisions of the state statutes. Chapter 83, Gen. St. Minn. 1878, enacts that "every boat or vessel used in the navigating of the waters of this state is liable—*First*. For all debts contracted by the master, owner, agent, or assignee thereof, on account of supplies furnished for the use of such boat or vessel, on account of work done or service rendered on board or for the benefit of such boat or vessel, or on

account of labor done or materials furnished by mechanics, tradesmen, or others in building, repairing, fitting out, furnishing, or equipping the same." The succeeding section of the act provides the method of procedure for the enforcement in the state courts of the right conferred in the first section, and in substance the remedy consists in a proceeding *in rem*. This statute was enacted before the decisions of the United States supreme court in *The Moses Taylor*, 4 Wall. 411, and *The Hine v. Trevor*, Id. 555, in which it was held that it was beyond the power of the state legislature to confer upon state courts the right to enforce by proceedings *in rem* claims and liens against vessels upon the navigable waters of the country. In deciding what the statute as originally passed was intended to provide for, we have the right to consider it as the legislature enacted it. It said that it does not create a lien because the statute does not so expressly declare; that is, it does not declare in set phrases that the claims named in the act shall be liens. Liens are, so far as the source of their creation is concerned, divisible into common-law, equitable, maritime, and statutory. Originally, by the common law, a lien consisted merely in the right to retain possession, under certain circumstances, of the property of another, until some debt or charge was paid. Equitable liens did not depend upon possession, nor, strictly speaking, did they constitute a *jus in re* or a *jus ad rem*, but more properly constituted a charge upon the thing. 2 Story, Eq. Jur. § 1215; *Peck v. Jenness*, 7 How. 612. At common law, though ordinarily the delivery of possession by the one entitled to a lien destroyed or terminated the lien, yet by contract the parties might agree to continue the lien after delivery, or, in other words, might agree that the property, after delivery, should be subject to be taken and sold if the purchase price or other charge thereon was not paid. *Gregory v. Norris*, 96 U. S. 619. In equity, the lien consisted in the right to subject the property, even though not in possession of the lienor, to the payment of the debt or claim, as a charge upon the property; and a maritime lien is of like nature in this respect. Thus, in the case of *The Rock Island Bridge*, 6 Wall. 213, it is said:

"A maritime lien, unlike a lien at common law, may, in many instances, exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages."

Bouvier defines a "lien" to be "a hold or claim which one has upon the property of another as a security for some debt or charge." When, therefore, a statute declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt or charge due, what is meant is that the person shall have the right to hold the property for, or subject it to, the payment of the claim or charge. On the other hand, if the statute declares that the person shall have the right, under the given circumstances, to hold certain property for, or subject it to, the payment of a certain claim or charge, this, in like manner, creates and confers a lien, although the word "lien" may not be used in the statute. It is the right to hold or subject the property to the pay-

ment of the claim or debt that constitutes the lien, and the mere words used in the statute are immaterial, so long as the substantial right itself is created. The statute passed by the legislature of Minnesota declares that every boat or vessel used in navigating the waters of this state is liable for the several classes of debts or claims named in the statute, and then provides the method by which the boat may be seized and sold for the payment of the claim or debt. The fact that the legislature did not use the word "lien" in the statute cannot change the fact that the act does and was intended to make the classes of claims therein named charges upon the boat or vessel, and to subject the boat to seizure and sale for the payment thereof; and, this being the very essence of a lien, it follows that the act does create a lien in favor of the classes of claims therein enumerated.

It is, however, argued with much force that, it having been held that the state legislature had not the right to enact that the lien thus created should be enforced by a proceeding *in rem*, the whole statute must be held invalid and void. In the case of *The Edith*, 94 U. S. 519, this exact question was suggested by the supreme court, but was not decided. The general rule is that, "where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other. \* \* \* If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley, Const. Lim. 215. What was the purpose of the legislature in enacting the act in question? It having been held that by the maritime law no lien existed for supplies furnished to or labor done upon a domestic vessel, persons furnishing the same in Minnesota to vessels belonging to that state could not hold the boat liable for claims due them. To remedy this, and to place persons furnishing supplies and labor to domestic vessels on an equality with those furnishing the same to foreign vessels, the statute was enacted. The creation of a lien upon a domestic vessel for claims of the character named was a subject-matter wholly within the legislative power of the state, and the legislature had the undoubted right to declare that for claims due for supplies or labor furnished to domestic vessels a lien should exist upon the vessel. The main object of the statute, to-wit, the creation of the lien, was within the power of the state legislature. Having created the lien, as it had a right to do, the legislature then undertook to provide a means by which such lien might be enforced in the state courts. The means provided fail of effect because it is held that the state cannot confer the right to entertain a proceeding *in rem* upon the state courts in cases involving vessels used upon the navigable waters of the United States. The lien created by the statute may be enforced without resort to the courts of the state; that is, by a proceeding *in rem* in the courts of the United States. Can it be held

that, if the legislature had understood that the lien given to persons furnishing supplies to domestic vessels could only be enforced by a proceeding *in rem* in the United States courts, it would not have created the lien? To so hold would, in effect, be deciding that the legislature gave greater weight to the mere form of the remedy than to the right which the remedy was intended to carry into effect. Suppose the legislature had passed an act the first section of which was identical with that of chapter 83, but instead of the remedy therein provided had enacted a common-law remedy in a suit against the owner; in such case, the lien would have existed with a constitutional means of enforcing the same in the state courts. At the same time, however, the lien thus created could have been enforced in the courts of admiralty by a proceeding *in rem*. Suppose the legislature had then repealed the sections providing the common-law remedy, leaving the section creating the lien unrepealed in terms, would it be held that the repeal of the common-law remedy defeated the right to the lien, or would it not be held that the legislature intended to leave the right to the lien intact, so that the holders thereof might enforce the same by the aid of the courts of admiralty? It seems clear that a court would not be justified in holding that the right to the statutory lien was destroyed simply because one means of enforcing the same was taken away, so long as another and entirely efficient method was in existence. Is not this substantially the exact position the statute is now left in? The legislature, in enacting the statute, created a lien on vessels for the protection of those furnishing supplies or labor at the home port, and also provided a means for enforcing such lien in the state courts. The latter, having been held unconstitutional, cannot avail the lienholder, but he is left for the protection of his rights to a proceeding in the courts of admiralty. This remedy being open to him, it cannot be said that the section of the statute creating the lien is wholly inoperative. If it can be enforced, it is certainly not inoperative; and yet that is the only ground upon which it can be held void. The section creating the lien is not unconstitutional. If it is invalid, it is so simply because no remedy exists for the enforcement of the right to a lien thereby created. Yet, as already said, an efficient remedy for the enforcement of the lien can be found by a proceeding in the courts of admiralty.

In *Bank v. Dudley's Lessee*, 2 Pet. 492, in discussing the effect of the occupying claimants law of Ohio, the supreme court held that the provisions of the state law in regard to the appointment of commissioners to assess the damages could not be enforced in a law case in the United States court, yet the general benefit of the statute could be saved to the occupant by an application on the equity side of the court; it being held that, "if any part of the act be unconstitutional, the provisions of that part may be disregarded, while full effect will be given to such as are not repugnant to the constitution of the United States, or of the state, or to the ordinances of 1787." The principle recognized in this case, that the remedy provided in the statute could not be followed in the United States courts because it deprived a party of a trial by jury in a law case, yet that the substantial right created by the statute could be made effect-

ual by an appeal to the equity court, supports the proposition that the mere fact that a special remedy provided in the statute may be invalid does not, of necessity, render the whole statute inoperative.

In *Fletcher v. Morey*, 2 Story, 555, it was held that a lien or equitable claim constituting a charge *in rem* could be created by agreement, and that such lien was valid, although no remedy for its enforcement was provided by the state statutes, the rule being that courts should strive to so construe statutes that effect shall be given thereto, rather than that they should be held void. It being clear that the main purpose in the enactment of the statute in question was to create a lien for supplies furnished and labor done on domestic vessels, and as this purpose is wholly free from constitutional objection, I deem it the better course to hold that the portions of the statute creating the lien are separable from those providing a remedy, and that the invalidity of the latter does not render the former also void, for the reason that the lien thus created can be enforced in the admiralty courts, and thus the substantive right created by the statute is preserved for the protection of those for whose benefit the statute was enacted.

2. It is further urged that this statute touching the liability of boats and vessels has been abrogated by the subsequent statutes on the subject of mechanics' liens. Chapter 90, Gen. St. 1878, provides, *inter alia*, that "whoever performs labor or furnishes materials or machinery for erecting, constructing, altering, or repairing any house, mill, manufactory, or other building or appurtenances, or for constructing, altering, or repairing any boat, vessel, or other water-craft, by virtue of a contract with the owner or agent thereof, shall have a lien to secure the payment of the same upon such house, mill, manufactory, or other building and appurtenances, and upon such boat, vessel, or other water-craft," etc. This statute does not expressly repeal the act touching boats and vessels, but it is claimed that it is inconsistent therewith, and therefore repeals it by implication. The rule applicable in determining whether such is the effect of the latter statute is that "when there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that is practicable. If the two are repugnant, the latter will operate as a repeal to the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases, the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says: 'It may be merely affirmative, or cumulative, or auxiliary.'" *Railway Co. v. U. S.*, 127 U. S. 406, 8 Sup. Ct. Rep. 1194; *Wood v. U. S.*, 16 Pet. 342. The mechanic's lien law by its terms includes labor and materials expended in constructing, altering, or repairing boats or vessels, and is therefore mainly, if not wholly, applicable to boats in the process of construction, or when laid up for repairs; or, in other words, when the same are not upon the navigable waters. Furthermore, the mechanic's lien law does not apply to supplies furnished to or labor done in and about the boat in the navigating the same. The one applies to labor

done or materials furnished in constructing the boat or refitting it in order that it may undertake the business of navigating the waters of the state, while the other deals with supplies furnished or labor done in connection with the navigation thereof; so that while there may be cases arising in which the labor done or supplies furnished might come within the purview of either statute, this does not show that the legislature intended to abrogate the one act by the enactment of the other. The two statutes deal with the property when in widely different circumstances, and there is no repugnancy or inconsistency between the provisions of the two acts of such a marked character as to justify the conclusion that the latter statute repeals the other. The act of March 8, 1877, which has been commented on by counsel, does not refer to boats or vessels by name, and if they can be included in the general words used in the statute, which in my judgment they cannot, yet the lien given by the statute is for labor done or materials furnished in the construction of the article. Giving a lien for labor done or materials furnished in the building of a boat, does not in any manner conflict with the liens created by chapter 83 of the General Statutes, and hence that chapter remains unaffected by any subsequent statute.

The first section of chapter 83 of the Statutes of Minnesota being then in force, it follows that persons who have furnished supplies for the use of the boat, or have done work or rendered services on board the same or for the benefit thereof, or have done labor or furnished materials in repairing, fitting out, furnishing, or equipping the same, are entitled to a lien for the sums due them, provided proceedings for the enforcement of the lien have been brought within one year after the cause of action accrued to them,—this being the express limitation found in the statute; and it is applicable to proceedings for the enforcement of such statutory liens in the United States courts as well as to proceedings in the state courts. *The Edith*, 94 U. S. 519. Subdivision 4, § 1, c. 83, provides that the cause of action shall accrue against the vessel when the contract for the work done or services rendered is fully performed. If, therefore, any of the libelants herein claiming liens under the state statute have failed to file their libels, original or by intervention, within one year from the time the cause of action accrued, the right to a lien no longer exists.

3. The master disallows an item of \$132.50 in the claim filed on behalf of the E. M. Dickey Company. This money was advanced at the request of the master of the vessel, to release it from a seizure by the United States marshal at Dubuque, on a libel filed to recover that amount for coal furnished at Le Claire, Iowa, by other parties. As I understand the report of the master, he disallows this item on the ground that the E. M. Dickey Company should have alleged and proved that the parties furnishing the coal had a valid lien upon the vessel, thus placing the right of the Dickey Company on the same footing as though it had bought out the claim of the Le Claire parties, and succeeded to their rights and no more. The facts are, however, that the money was advanced at the request of the master to relieve the boat from an actual

seizure then existing, and to prevent the loss and damage that would have been occasioned to all had the boat been detained in the custody of the marshal. The E. M. Dickey Company did not buy the claim from the creditor, but advanced the money to the debtor. While in many cases courts hold under somewhat similar circumstances that the party advancing the money is subrogated to the rights of the original creditor, this is an equitable principle applied for the purpose of protecting the one who advances money for the benefit of the property. It is a misapplication of the rule to hold that a person who advances money under such circumstances has, in fact, thereby bought the claim of the libellant, and by reason of having bought the same succeeds only to the strict right of the libellant, and has thereby lost the right to a lien. As it is a fact that the Le Claire Company did not sell their claim to the E. M. Dickey Company, equity will not so treat the transaction for the purpose of defeating the rights of the latter company. When that company was appealed to for aid by the master of the boat, the facts were that a libel had been duly filed in the United States court at Dubuqué, claiming a lien upon the boat for coal furnished thereto by the Le Claire parties, and the vessel had been seized thereon by the marshal. Such seizure effectually interrupted the voyage of the boat, without reference to the validity or invalidity of the claim upon which the libel was filed. Certainly it was the duty of the master to do all within his power to release the boat, and prevent the loss that would otherwise accrue from the detention of the vessel. For that purpose he applied to the E. M. Dickey Company to advance the sum needed to discharge the claim. If, under such circumstances, the rule is that the person advancing the money to release the boat cannot hold the boat for the money advanced, unless he can prove that the claim upon which the seizure was had was a valid lien on the boat, or, in other words, if he is placed in the shoes of the original libellant, few advances would ever be made to release boats under such circumstances. That the libel for supplies furnished had been duly filed; that the boat had been seized, and was held in custody; that such seizure was in a foreign port; that the master applied for the money needed to release the boat; that no circumstances throwing doubt upon the *bona fides* of the claim or upon the action of the master were known to the E. M. Dickey Company, and none are now claimed to exist,—these are facts which, it seems to me, entirely justify the conclusion that the E. M. Dickey Company are entitled to a lien for the amount claimed; and the exception to the report on this ground is therefore sustained.

4. The question of priority of the several liens for supplies and for labor done as between liens created by the maritime law and by the state statute has been discussed by counsel, and may now become of importance, in view of the fact that the right to a lien under the state statute is recognized. Without attempting a review of the conflicting authorities on this subject, I shall content myself with a brief statement of what on principle seems to me to be the correct rule on this subject. In the first place, the state cannot by legislation control the rule to be followed by

the courts of admiralty in distributing the proceeds of boats and vessels seized and sold under admiralty process. When liens are created by state statutes, the court of admiralty will, when called upon to recognize and enforce such liens, assign them to the class to which they belong under the maritime law of priority. When thus assigned to the class of liens to which they belong under the maritime law, they will ordinarily share equally with all other liens of the same class. Thus a claim for supplies furnished at the home port, if a lien therefor is created by the state statute, will ordinarily be placed in the class of supplies furnished, and will share with all other liens of the same nature; no distinction being made between supplies thus furnished and those furnished at a foreign port. In both instances the supplies are furnished on the security of a lien on the vessel; the use made thereof, and value to the vessel, is the same; and I can see no good reason for holding that the equity of the one party is superior to that of the other, simply because in the one case the lien is created by the law maritime, and in the other by a state statute. The character of the supplies furnished or work done, whether the same are or are not maritime in their nature, and whether they are or not, under the rules of the law maritime, entitled to priority, will determine, as I have already said, the class to which the several claims are to be assigned; but, when thus assigned, equality is equity among claims of the same class. As the ruling herein made on the question of the lien given by the state statute will require a restatement of the accounts, the case will be sent to the master for that purpose.

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THE ANDREW ADAMS.

BOSTON TOW-BOAT CO. v. THE ANDREW ADAMS.

(*District Court, D. Massachusetts.* August 18, 1888.)

1. SALVAGE—COMPENSATION—ORGANIZED WRECKING COMPANY.

It is of the utmost importance to commerce on the New England coast that the business of assisting vessels in distress should be undertaken and carried on by somebody with sufficient capital and enterprise to assist wrecked vessels, and to keep in readiness the necessary apparatus, stationed at different places where there is liability for its use for vessels in jeopardy and misfortune; and courts of admiralty should bear this in mind, and see that a liberal measure of salvage is awarded to a company undertaking to furnish such effectual means of assistance, when a salvage service has been undertaken by it, and successfully performed.

2. SAME—AMOUNT OF COMPENSATION.

A schooner, valued with her cargo of coal and freight at \$19,375, was stranded on the southerly coast of No Man's Land, in the district of Massachusetts, in a place where she was certain to go to pieces in case a storm occurred before she was got off, and where no vessel had ever been got off before. She was on a soft and shifting beach in the nature of quicksand, into which a wreck would sink and become imbedded. An organized wrecking company, at the request of the master and owners, undertook to get her off, and dispatched a number of powerful tugs, lighters, steam-pumps, and the



necessary men and wrecking gear, to her assistance. The services began on May 8d, and, with some intermission, continued, with no great danger to the salvors, but with all possible skill, until the 23d, when the efforts of the salvors turned out to be successful, and the vessel was hauled off the beach, and towed into Martha's Vineyard, where repairs to the amount of \$2,500 were made by the salvors. *Heid*, that 50 per cent. of the value of vessel, cargo, and freight should be awarded in gross, without any addition for the repairs, which were deemed to be included in the award.

In Admiralty. Libel for salvage.

*L. S. Dabney and F. Cunningham*, for libellant.

*F. Dodge and E. S. Dodge*, for claimant.

NELSON, J., (*orally*.) In the case of the Boston Tow-Boat Company against the schooner Andrew Adams it appears that on the night of the 30th of April, 1887, the Andrew Adams ran ashore on the southerly coast of No Man's Land, and required assistance. By an arrangement with the Boston Tow-Boat Company, made by her master and owners, the libellant commenced the work of saving the vessel, and hauling her off the beach. The services commenced on the 3d of May, and continued, with some intermission, until the 23d, when the efforts of the tow-boat company turned out to be successful, and the vessel was hauled off the beach, and towed into Martha's Vineyard. It appears by the stipulation of the parties that the value of the vessel, cargo, and freight saved amounted to \$19,375.

In the first place, it appears that the vessel was ashore at a place where she was certain to go to pieces in case any storm or bad weather should occur before she was got off. She was exposed to the open ocean. She was on a soft or shifting beach, (the shore being in the nature of quicksand,) and at a place where several vessels had been wrecked in former years; but no vessel had ever before been got off, the nature of the ground being such as to cause the wreck to sink, and become imbedded in the sand. And it also appeared that the vessel was so situated that it was impossible to relieve her without the assistance of apparatus of the most costly character. The ordinary service of men, unaided by powerful machinery would have been used by the company without avail, and it was essential to the preservation of the vessel that apparatus of the very best character and quality should be used. For effecting this service the libellants made use of tow-boats of a very considerable size, some of them of the largest and most powerful description, and also of steam-pumps of great capacity,—the whole amount in value, in proportion to the rescue, being very large.

In the second place, the element of danger to the apparatus is to be considered. There was certainly no evidence that this service was of a character to endanger lives, or afford a great deal of unusual hardship and discomfort to the men employed; and as to a portion of the machinery made use of, it does not appear that that was exposed to any particular danger; as, for instance, the tow-boats themselves were not exposed. But it does appear that some of the pumps of the tow-boat company were placed on board this vessel, and exposed to the hazard of a

storm, and, in case a storm had arisen, would undoubtedly have been lost. In regard to the amount of skill made use of, there was an attempt made on the part of the owners of the schooner to prove that the tow-boat company failed in the exercise of skill and good management in performing these services. I must confess that this defense does not impress me much. I have no doubt that Capt. Cook and Capt. Tower used all the skill which possibly could be used, under the circumstances; and I do not believe that they were negligent or failed in taking such precautions as the circumstances at the time seemed to demand. Certainly, a great portion of their efforts was unsuccessful, and, of necessity, experimental. Various experiments were tried, and most of them did not succeed. Still, they exercised their best judgment, under the circumstances, in a case of great peril; and I have no doubt they used all the skill that any other persons engaged in this business could possibly have used. Of course, after the event, it is, perhaps, easy to perceive how some things might have been different, but, at the time these efforts were made, it seems to me very plain that these gentlemen exercised as much skill as it was possible to apply to the extraordinary service in which they were engaged; therefore, I hold that the services were skillfully, as well as successfully, performed.

It was also claimed that the tow-boat company was negligent, and failed in their duty towards this vessel, for which the salvage should be diminished, by having left the vessel for several days to go to the rescue of another vessel, the *Miranda*, which was on shore in Vineyard sound. In regard to that, it seems to me that certainly ought not, under the circumstances, to be alleged against the tow-boat company, so as to make any material reduction in their salvage. The situation of the *Andrew Adams* was such that it was extremely doubtful whether she could be got off, and in the mean time another vessel was demanding assistance, and situated where there was a greater probability of success; and it would seem that the tow-boat company would have been negligent in the general performance of its duties if it had seen fit to devote all its apparatus to the *Andrew Adams*, and had taken no account of the other vessel, which was on shore, and needed assistance also. Though it undoubtedly exposed the *Andrew Adams* to some danger on account of the lapse of time, because a storm might have come up any moment which would have brought about her entire destruction, yet, in point of fact, that did not happen, and therefore I am not at all inclined to look upon that as any dereliction which should diminish the salvage to be awarded in this case. Then the court should especially take into consideration the business which is carried on by this tow-boat company. It has procured apparatus of the most expensive character, which is used almost entirely for the purpose of saving vessels wrecked on this coast. It is of the utmost importance to commerce on our coast that such a business should be undertaken and carried on by somebody, with sufficient capital and sufficient enterprise, to assist wrecked vessels. This company has seen fit to come forward and furnish this capital, and keep in readiness the apparatus, stationed not merely at Boston, but also stationed at other

places on the coast, where there is liability for its use for vessels in jeopardy and misfortune. It appears that there was not in this vicinity, certainly not on the Massachusetts coast, any company organized with sufficient force to undertake this important service; certainly, there is no company in existence this side of New York which would have been capable, as I understand the situation, of getting this vessel off. Therefore I think the court should bear that in mind, and see that a liberal measure of salvage is awarded to a company undertaking and performing successfully a service of this kind.

Now, it also appears that, after this vessel had been got off the beach and taken into Vineyard haven; the tow-boat company made a large expenditure in repairing her. There was an attempt made to cast suspicion upon this expenditure, and to show that these repairs were voluntary, and not asked for, nor assented to on the part of the owners; but I think the attempt failed. I think it is clear, from all this evidence, that the owners assented to the repairs. It was done, perhaps, with some formal objection, for the purpose of saving their rights, without any real opposition to the expenditure; certainly, it was in their power to stop the repairs at any moment, but they never exercised it. They saw this go on with, certainly, no positive objection—some grumbling and scolding about it—but nothing that I regard as depriving the tow-boat company of the right to have this considered on a matter of salvage. The amount expended, as appears by the bills rendered, was somewhere in the vicinity of \$2,500, and is to be included in the salvage award which I propose to make.

It appears, as I have said, that the entire amount of property saved amounted to \$19,375,—vessel, cargo, and freight. The libellant claims one-half of this as salvage. I think the claim is not an unreasonable one; and, with the understanding that this is to include the expenditure made by the tow-boat company after the arrival of the vessel at Vineyard haven, that amount is awarded. This really amounts to an award of one-third of the whole amount of property saved, with the addition of the repairs. The amount of the salvage which I have fixed upon is one-half of \$19,375, to be apportioned upon the vessel, cargo, and freight.

## ARMSTRONG v. ETTLESOHN.

*(Circuit Court, N. D. Illinois. May 21, 1888.)*

## 1. COURTS—FEDERAL CIRCUIT—JURISDICTIONAL AMOUNT.

A declaration filed in the circuit court in Illinois averring that the plaintiff is a citizen of Ohio, and containing three counts.—one upon a promissory note for \$875, one for money had and received, \$875, and one for work and labor, \$875,—is sufficient upon demurrer to give that court jurisdiction, as the aggregate of the sums alleged to be in controversy exceeds the sum of \$2,000.

## 2. SAME—SUITS BY OFFICERS OF UNITED STATES—NATIONAL BANKS—RECEIVERS.

The receiver of a national bank in process of liquidation, having received his appointment from the comptroller of the currency, under the national banking laws, is an officer of the United States, and as such may sue in the circuit court, without regard to citizenship or the amount involved, under Rev. St. § 629, cl. 3, conferring upon that court jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under authority of any acts of congress, are plaintiffs."

At Law. On demurrer and motion to dismiss.

Action by David Armstrong, receiver of the Fidelity National Bank, against Benjamin Ettlesohn.

*J. S. McClure*, for complainant.

*Kraus, Mayer & Stein*, for defendant.

BLODGETT, J. This case is now before me on a demurrer to the declaration and a motion to dismiss. The question raised both by the demurrer and motion is one of jurisdiction of this court. The declaration contains three counts. The first is upon a promissory note of \$875, of which there is about \$900 now due; the other two counts are the usual common counts for money had and received, and work and labor done,—one charging that the sum of \$875 is due for money had and received; and the other, that the sum of \$875 is due for work and labor done. The declaration avers that the plaintiff is a citizen of the state of Ohio, and, as will be seen from the statement in regard to causes of action set out in each count, the aggregate of the sums alleged to be in controversy exceeds the sum of \$2,000. It was urged in argument that the only right of action that the plaintiff had against the defendant is upon a promissory note mentioned in the first count, and that may prove to be so when the case comes to trial; but upon the face of this declaration, which we can only look at under this demurrer, there appear to be three causes of action, which, when aggregated, make more than the amount required to give jurisdiction. So that, upon the question of citizenship and amount, the declaration seems to me to show jurisdiction.

There is, however, another ground for jurisdiction, which seems to me equally conclusive of the plaintiff's right to maintain this suit in this court. Clause 3, § 629, defining the jurisdiction of circuit courts of the United States, gives the circuit court jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under authority of any acts of congress, are plaintiffs." The plaintiff in this case is the receiver of a national bank in process of liquidation, and as such has the

right to bring suits. He has received his appointment under the national banking laws from the comptroller of the currency, and is acting under such authority. In *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395, it was held, in a carefully considered opinion by Judge NIXON, that a receiver of a national bank is an officer of the United States, and as such may sue in the federal courts; and the same rule was adopted by Mr. Justice GRAY, at circuit, in *Price v. Abbott*, 17 Fed. Rep. 506, so that this plaintiff is entitled, in the light of these decisions, to sue in this court without regard to his citizenship or the amount involved. The demurrer and motion to dismiss are therefore overruled.

### GRAND RAPIDS & I. R. Co. *et al.* v. SPARROW *et al.*

(Circuit Court, W. D. Michigan, S. D. October 2, 1888.)

#### 1. CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—QUIETING TITLE.

Laws Mich. 1887, No. 260, p. 337, extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is not unconstitutional, as depriving the defendant of the right to trial by jury, secured by Const. art. 6, § 27, as such constitutional provision extends only to cases where by the common law trial by jury was customary, and at common law ejectment did not lie where defendant was not in possession.

#### 2. EQUITY—JURISDICTION—FEDERAL COURTS.

When defendant is not in possession, complainant has not a plain, complete, and adequate remedy at law, in which case suits in equity are forbidden by Rev. St. U. S. § 723, but the federal courts may administer the equitable remedy given by such Michigan statute.

**In Equity.** On demurrer to bill to quiet title.

In this case a bill in equity was filed in the proper state court to quiet the title to certain lands, and it appears upon the face of the bill of complaint that neither party is in possession of the premises in controversy. The defendants, having removed the cause to the United States circuit court, filed therein a general demurrer for want of equity. The Michigan statute regulating proceedings by bill in equity to quiet title, prior to 1887, was as follows:

"Any person having the actual possession and legal or equitable title to lands, may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant; and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands, and give a release to the complainant, in which case costs shall be awarded as the court may deem just." 2 How. Ann. St. § 6626.

By act No. 260 of the Session Laws of 1887, the foregoing section was amended so as to read as follows:

"Any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person, not in possession, setting up a claim thereto in opposition to the title claimed by

the complainant; and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claims thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands, and give a release to the complainant, in which case costs shall be awarded as the court may deem just." Sess. Laws, 1887, p. 337.

*T. J. O'Brien*, for complainants.

*Isaac Marston*, for defendants.

SEVERENS, J., (*after stating the facts as above.*) Respecting the argument that the act of the legislature of Michigan (Laws 1887, No. 260, p. 337) extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is unconstitutional, because it deprives the defendant of the right to trial by jury, secured by the constitution of Michigan, (article 6, § 27,) I think it must be held that this constitutional provision extends only to cases where by the common law a trial by jury was customary. It does not reach those cases where the remedy is given by statute. At common law, ejectment did not lie where the defendant was not in possession, and it is sustainable in such a case only by virtue of the statute in Michigan. The objection, therefore, cannot be sustained. *Tabor v. Cook*, 15 Mich. 322, and cases cited. It is further suggested that the federal court in equity will not take cognizance of such a case, because there is an ample remedy by ejectment at law. But this court will administer the remedies given by local statutes, where it can be done without violation of the principles it is accustomed to regard in the exercise of its jurisdiction. It is argued by the defendant that one of those principles is that the court will not take jurisdiction where there is a plain remedy at law; and it is said that ejectment is such a remedy. But, when the act defining the jurisdiction of the federal courts in equity was passed, and suits were forbidden when a plain, adequate, and complete remedy at law existed, (Rev. St. U. S. § 723,) it was the remedy furnished by the common law which was thereby intended. Supplementary statutes, giving new legal remedies, do not disturb the original equitable jurisdiction, nor supplant it. The courts in equity of the United States have undoubted cognizance of bills *quia timet* when the complainant is in possession. They may also take cognizance where he is not in possession, if local legislation gives the remedy in such a case, and the defendant is not thereby deprived of his right to a jury trial, according to the course of the common law. According to the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 496, the circumstance of the complainant's being in possession is not essential to the jurisdiction of courts of equity in such cases, and may be dispensed with. That being so, a bill in equity is maintainable, if there was not by the common law a plain, adequate, and complete remedy. There was no such remedy where the defendant was out of possession. The demurrer must be overruled, and leave be given to answer.

ADAMS *et al.* v. KEHLOR MILLING Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. October 3, 1888.)

1. CORPORATIONS—INSOLVENCY—PREFERENCES—LIABILITY OF DIRECTORS.

The directors of a corporation known to be insolvent granted a preference to the estate of a deceased director and president of the corporation. The board, at the time of the preference, consisted of but three persons, two of whom were brothers of the deceased director, and one of whom was agent of the deceased's estate, and voted his stock at corporation meetings. One of the brothers was also a creditor of the estate. *Held*, that the preference was illegal, and that an unsecured judgment creditor of the corporation was entitled to recover of the two directors, brothers of deceased, who had voted for the preference, such percentage of his debt as he would have received if the sum wrongfully paid by way of preference had been divided *pro rata* among all the unsecured creditors, but was not entitled to such recovery against the other director, who was not present at any of the directors' meetings, and did not vote for any of the resolutions whereby the preference was secured.<sup>1</sup>

2. EQUITY—PLEADING—MISTAKE IN RELIEF ASKED.

That complainants erroneously supposed themselves entitled to relief under a statute, when they were in reality entitled to relief on general equitable grounds, does not justify a dismissal of the bill.

In Equity. On petition for rehearing. For former opinion, see 35 Fed. Rep. 433.

*Mills & Flitcraft*, for complainants.

*G. B. Burnett and Dyer, Lee & Ellis*, for defendants.

THAYER, J. The matters urged in support of the motion for a rehearing, filed by J. B. M. Kehlor and Duncan M. Kehlor, were fully considered when this case was decided.

1. It did not appear to the court then or now, that the fact that complainants erroneously supposed themselves to be entitled to relief by reason of the provisions of section 744 of the Revised Statutes of Missouri, when they were in reality entitled to relief on general equitable grounds, as both the complaint and the proof showed, would justify a decree dismissing the bill. When it appears from the averments of a bill and from the proof that a complainant is entitled to relief, it is immaterial on what ground he predicates his right; whether it be the provisions of a statute or otherwise. It may be doubtful, however, whether the relief granted in this case was fairly embraced within the prayer of the bill for special relief, and the bill contained no prayer for general relief, as equity rule No. 21 requires. For these reasons complainant will be permitted to amend the bill in support of the decree, by adding a prayer for general relief.

2. Respecting the more important question whether the preference granted to the estate of J. C. M. Kehlor, was granted under such circumstances that it can be supported as a valid exercise of power by the directors, it will suffice to say, that after a careful reconsideration of that

<sup>1</sup>See the note to the former report of this case, cited in the opinion, 35 Fed. Rep. 433. See, also, *Bernard v. Barney Myroleum Co.*, (Mass.) 17 N. E. Rep. 887, and note.

question, the court remains of the opinion heretofore expressed. *Vide Adams v. Milling Co.*, 35 Fed. Rep. 434, 435. In addition to the facts previously recited as rendering the preference unlawful, it should be stated that J. B. M. Kehlor, (who, as a director, was instrumental in securing a preference for the estate of J. C. M. Kehlor,) besides being at the time agent for the estate, was also a creditor thereof in the sum of \$9,000. He therefore had a personal interest in preferring the claim due to the deceased director and president of the corporation.

3. On further consideration of the fact that defendant H. M. Blossom was not present at any of the directors' meetings, and did not vote for any of the resolutions whereby a preference was secured to the estate of the deceased director, both the circuit judge and myself (as intimated on the hearing of the motion) are of the opinion that he cannot be held liable to account to complainants in the manner heretofore ordered. The decree will accordingly be modified so as to direct the dismissal of the bill as to him, but in all other respects it will be allowed to stand.

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JACKSON v. McLEAN *et al.*

(Circuit Court, E. D. Missouri, E. D. October 18, 1888.)

CONTRACTS—PUBLIC POLICY—EQUITY—ACCOUNTING.

J. & M. formed a partnership to build a railroad, and to that end caused a railroad corporation to be formed under the general laws of the state of Illinois. J. was one of the directors, and the other directors were clerks of M. The bill averred that all of the directors acted at the dictation of J. & M., and were in fact merely their agents. Such board of directors awarded the contract for building the railroad to J. & M., agreeing to give them all the stock of the corporation and first mortgage bonds of the company, issued at the rate of \$15,000 per mile. This contract was taken nominally by third parties, but in reality for the benefit of J. & M. On a bill filed by J. against the legal representatives of M., to obtain an account of the profits of the partnership growing out of a partial execution of the contract for constructing the road, *held*, that the contract was fraudulent, and against public policy, and that a court of equity would not entertain the suit for an accounting, even as to the profits actually realized by M. up to the time he abandoned the enterprise. The case distinguished from *Brooks v. Martin*, 2 Wall. 78.

In Equity. On demurrer to bill.

*Minor Meriwether*, for complainant.

*Fisher & Rowell*, for defendants.

THAYER, J. The question that arises on the demurrer to the bill is whether the relief prayed for by the complainant ought to be denied, on the ground that the demand sought to be enforced grows out of an illegal or immoral contract or transaction, to which the complainant was a party. The decision of this question involves a statement at some length of the material allegations of the bill, which is very lengthy. I shall only state the substance of the pleading, mainly in my own language. The com-



plainant avers that, in the life-time of Dr. James H. McLean, he entered into an agreement with him to construct a railroad from Carbondale, Ill., southwardly, to a point on the Ohio river, near Paducah, Ky., and eventually to extend it northwardly from Carbondale to the city of St. Louis. The arrangement entered into contemplated that complainant and McLean should be partners in the enterprise, and divide whatever profits were realized from the venture. To enable them to build the road it was agreed that they would organize a corporation, the entire capital stock of which should be divided equally between McLean and the complainant, Jackson, and should be held by them either in their own names, or in that of their agents or friends. It appears that, pursuant to such agreement, a railroad corporation was formed under the general incorporation laws of the state of Illinois, but the bill states with great candor that the corporation so formed was designed to be used and controlled "by complainant and McLean, in every legal and legitimate manner, as an adjunct for the accomplishment of their partnership enterprise;" that the persons who signed the articles of association, and subsequently acted as the board of directors of the corporation, (other than complainant, who was an incorporator and director,) had no "substantial interest in the corporation, or in the enterprise in which it was engaged;" that complainant and McLean set apart to each of said directors one share of stock to render them eligible as directors; that they never paid for the stock, or promised to pay for it; and that "each and all of the directors acted throughout the business, at the request of complainant and McLean, nominally for themselves, but in truth and in fact as the agents of and for the sole use and benefit of complainant and McLean, who were to own the entire capital stock of the company in equal parts." After the corporation was organized, the directors of the same, acting at the dictation of Jackson and McLean, the so-called partners, entered into a contract with them for the construction and equipment of the railroad in question. This contract was signed on one side by complainant's son and by a confidential clerk of McLean's, but it is alleged with great care that they were financially irresponsible, and that in signing the contract they acted merely as the chosen representatives or agents of Jackson and McLean, respectively, who were the real contractors and were to have whatever profit was realized from the undertaking. By the terms of the construction contract the contractors were to receive for building the road all of the capital stock of the corporation, which was to be issued at the rate of \$16,000 per mile for each mile of completed road, and all of the mortgage bonds of the company, which were to be issued at the rate of \$15,000 per mile, and all donations of land, municipal bonds, or other property that might be made to the corporation in aid of the enterprise. The foregoing plan of building a railroad in the name of the corporation, and under the guise of a contract with it, was a plan devised by the attorney of Jackson and McLean, as the bill states, and it was adopted by them, as the bill also states, "in order to reap for themselves the profits to be earned from the construction of said road." The bill further alleges that Jackson and McLean, having acquired the contract for the

building and equipment of the road, in manner and form before stated, through the agency of subcontractors, began the construction of that section of the road lying south of Carbondale, and prosecuted the work together for several months. McLean, as it appears, was to advance the money necessary to pay subcontractors for building the first 25 miles of that section of the road, and was also to furnish them with adequate supplies, while the complainant was to superintend the practical operations in the field. After about 25 miles of track had been graded, according to this arrangement, a difficulty arose between Jackson and McLean with respect to the prices which the latter had charged the firm for supplies furnished to subcontractors. The result of the difficulty was that Jackson was ousted from the firm by McLean, and was not allowed to participate further in the joint enterprise. McLean thereupon caused himself to be elected director and president of the corporation, as the bill states, by means of the "absolute control" which he exercised over the other directors, two of whom appear to have been his clerks. He also took possession of all the books and accounts of the firm of Jackson & McLean, and caused the corporation to execute a mortgage and mortgage bonds on all of its property, including the 25 miles of road-bed that had been built by said firm, and received in such mortgage bonds \$375,000 for the 25 miles of road-bed so constructed by the firm. The bill next avers that the actual cost of said 25 miles of road, including equipment, did not exceed \$250,000, and that, after McLean was reimbursed out of the \$375,000 by him received for all expenditures made by him on account of the firm, he still had in his possession \$68,749 of firm money, one-half of which belongs to complainant. The complainant also charges that if McLean had faithfully complied with the agreement entered into between them, as before recited, and the entire division south of Carbondale had been completed, a further profit in the sum of \$40,500 would have been realized by the firm. In view of the premises complainant prays that an account be taken of all the transactions between himself and McLean under the alleged agreement for the construction of the railroad in question, and that McLean's legal representatives may be decreed to pay what is found to be due him, both on account of profits actually realized and that might have been realized if the division south of Carbondale had been fully completed, and the enterprise had not been abandoned by McLean.

From the foregoing statement of the contents of the bill it appears that the profits of the enterprise, to which the complainant lays claim, and with respect to which he desires to have an account taken, were all realized from a contract made by himself and McLean with the railroad corporation, for the building and equipment of its road, and beyond all question that contract was constructively fraudulent. Complainant himself was one of the directors of the corporation when the contract was executed. The remaining directors were clerks of McLean, who had become directors at his request, merely to represent his interest and execute his orders. They had no personal interest in the corporation or in the enterprise in which it was engaged, and were not even the beneficial

owners of the respective shares of stock that stood in their names. According to the showing made by the bill, Jackson and McLean were the real managers and directors of the company, but, notwithstanding that fact, they caused the company to enter into a contract with themselves, or, rather, with their representatives, for the building and equipment of the road, by which the company parted with all of its stock, mortgage bonds, and other available assets, for what plainly appears to have been an inadequate consideration. The contract was manifestly an improvident one, so far as the corporation was concerned, but, without reference to that fact, it was obviously fraudulent and unlawful, for the reason that both Jackson and McLean, by virtue of their relation to the corporation, were incapable of making an agreement with it. It is hardly necessary to add that the law would lend no sanction to the agreement made by them with the corporation, even though the bargain had not been detrimental to the company. The position which they occupied precluded them from taking the contract for the construction of the road. *Wardell v. Railroad Co.*, 103 U. S. 651, and 4 Dill. 330; *Thomas v. Railway Co.*, 1 McCrary, 392, 2 Fed. Rep. 877; *Poor v. Railway Co.*, 59 Me. 270-277; *Railroad Co. v. Kelly*, 77 Ill. 426; *Railway Co. v. Blakie*, 1 Macq. 461; *Railway Co. v. Magnay*, 25 Beav. 592. I ought to further say in this connection that the parties to the partnership agreement seem to have had no proper conception of the quasi public character of railroad corporations, or of the manner in which the law requires them to be controlled and used. They seem to have acted on the assumption that they can be properly used merely as an instrument to further the interests and enhance the profits of a private partnership. In view of what has been said it is evident that complainant is confronted by the salutary rule of law which forbids a court to lend any aid in the enforcement of contracts that are either unlawful, immoral, or opposed to public policy. The same rule, as generally understood, also precludes a court from entertaining a suit between persons who have been concerned in an unlawful transaction, the purpose of which is to compel an accounting with respect to profits that may have accrued from such illegal transaction. *Snell v. Dwight*, 120 Mass. 9; *Watson v. Murray*, 23 N. J. Eq. 257; *Green v. Corrigan*, 87 Mo. 359; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. Rep. 483; *Sykes v. Beadon*, 11 Ch. Div. 196; *Cook v. Sherman*, 4 McCrary, 24-28, 20 Fed. Rep. 167. In the present case it will be observed that the court is not only asked to compel the defendants to account for profits actually realized under the fraudulent contract, but to compel them to account for profits that might have been realized, if McLean had not abandoned the work, and refused to proceed further with the enterprise when the contract had only been partially executed. In other words, the court is asked to enforce an immoral contract by compelling one of the parties thereto to respond in damages for refusing to execute it. A proceeding of such character must, of course, be dismissed as wholly without merit. It may, perhaps, have been thought that the decision in *Brooks v. Martin*, 2 Wall. 78-82, would at least justify the court in taking an account of the profits that had actually accrued when McLean abandoned the en-

terprise. I entertain a different view of the scope of that decision. In that case a bill was filed by a partner to set aside a sale of his interest in a firm that had been brought about by the fraudulent representations or conduct of a copartner to whom the sale was made. It also prayed for an accounting and division of the firm assets. It appeared that the original partnership agreement was unlawful in that it contemplated, to some extent at least, the purchase of soldiers' claims for land warrants, before warrants were issued, which was forbidden by an act of congress, but was not otherwise immoral. The court sustained the bill, and granted the relief prayed for, apparently upon the ground that the illegal contract was fully executed, and that it was not necessary to enforce the same, or inquire as to the manner in which the firm property, consisting of money, notes, and lands, had been acquired. That case has heretofore been construed as holding, in effect, that suits may be maintained to recover money that may have issued from an illegal transaction, when the transaction has been fully consummated, and the proceeds thereof have been received and carried to the credit of the plaintiff, so that he can show a title to the fund claimed without reference to the illegal transaction out of which it may have originated. *Bank v. Bank*, 16 Wall. 499, 500; *Cook v. Sherman*, *supra*. That case will not justify the court in entertaining the present suit, and the demurrer is accordingly sustained.

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MARTIN *et al.* v. ROBERTS.

(Circuit Court, D. South Carolina. September 15, 1888.)

1. PRINCIPAL AND AGENT—RIGHT OF AGENT TO COMPENSATION.

The non-resident mortgagees of an island, valuable principally for its phosphate rock, employed defendant to look after the investment as their agent. He was at the time agent and manager for a firm which was the largest purchaser of phosphate in the market, and the assent of his employers was necessary to his acceptance of the agency, of which facts the mortgagees were informed. *Held*, that under the law of South Carolina the agent was entitled to compensation for his services, although there was no agreement to that effect.

2. SAME—AMOUNT OF COMPENSATION.

The agent caused the mortgage to be foreclosed, employed a watchman to look after the property, occasionally visited it during a period of eight years, and frequently gave advice and information in regard to this and other investments of the mortgagees. He expected to be remunerated in part for his services from the management of the property or from its sale, but the mortgagees terminated the agency without fault on his part, thus destroying these expectations. *Held* that, under all the circumstances, the agent was entitled to \$2,000 compensation.

3. SAME—CONSTRUCTION OF CONTRACT—CONFLICT OF LAWS.

A contract of agency, to be performed in South Carolina, in which state the agency was accepted, is governed by the law of that state.

In Equity.

*Mitchell & Smith*, for complainants.

*Inglesby & Miller* and *Smythe & Lee*, for defendants.

SIMONTON, J. The questions in this case yet to be decided are: Is the defendant entitled to compensation at the hands of the complainants? If so, what should be the amount of such compensation? The complainants, bankers in London, of established reputation and credit, owned certain bonds of the Willimans Island Phosphate Company, secured by a first mortgage on Willimans island, in this state. Feeling some apprehension with regard to this investment, and as to the solvency of the company, to which they had made advances, they sought a representative in South Carolina, who could ascertain and look after their interests. To that end they consulted Brown Bros. & Co., the well-known bankers, and on their recommendation they sought the services of David Roberts, the defendant. Mr. Roberts consented to act for them, provided that this met the approval of, and did not conflict with the interests of, Wylie Teacher & Co., for whom Mr. Roberts was manager and agent in this country. The result was the engagement of Mr. Roberts, and his acceptance of the agency. The whole matter was arranged by letter. Mr. Roberts began at once to realize the interest of Martin & Co. in their bonds. He caused a suit for foreclosure to be entered by able counsel. The suit, after some necessary delay, was carried to a successful issue. The mortgage was foreclosed, a sale had, and Willimans island and the property thereon were purchased by Roberts, in the name of and for Martin & Co. Thenceforward he took charge of the property for them, and continued in charge until he was relieved by Capt. Gardyne, who had been sent out from England by complainants to examine the property, and who was subsequently constituted by them its sole manager. Roberts' period of service was from December, 1875, to September, 1883. The property thus secured to Martin & Co. by Roberts consisted of Willimans island, and certain valuable machinery thereon, adapted to the manipulation of phosphate rock, with some other articles of less value. The island proper is an undeveloped territory, containing, or supposed to contain, phosphate rock. To the island is appurtenant the bed of a navigable stream (Bull river) to low-water mark, which had been mined to a considerable extent before Martin & Co. purchased. On the island was a small forest, of pine and palmetto trees, principally. The agency of defendant was for the most part as custodian of this property, protecting the phosphate territory from intrusion, taking care of the machinery, and keeping it in order. To these ends he employed a watchman, and occasionally, at rare intervals, visited the island, which was at a remote distance from his home in Charleston. The expenses attending this were paid principally by wood cut from the island under instructions of the defendant, and sold by him. Besides these duties, the defendant looked after a claim of Martin & Co. against Spofford & Tileston, of New York, in which—through no fault of his, however—he was not successful. During his agency he carried on a correspondence with complainants, frequent in its earlier stages, containing all the information he had with regard to the origin, progress, and result of the foreclosure suit in South Carolina, and the steps taken by him in New York. In its later stages it was less frequent, relating to the condition of the property, its possible value, containing

advice as to certain other investments concerning which Martin & Co. made inquiries. Mr. Roberts is a merchant in active business, the sole manager and agent of the firm, the largest purchaser of phosphate in this market; a man of ability and energy. Nothing whatever is said in the whole correspondence, nothing was ever said in any interview between him and Martin & Co., on the subject of compensation. When the agency ended, he made up his account current, in which he showed a balance to the credit of the Martins of some \$200. In this he made no mention of any commissions or charges for services of any kind. As this was simply an account current of moneys received and paid out, and as Roberts did not look for compensation to his commissions upon receipts and disbursements, no force is attached to this omission. This account was duly vouched. Six months afterwards this bill was filed. Ostensibly it was for an account of his actings and doings as agent; really it was an action for damages against him for misfeasance and malfeasance in the conduct of his agency, a gross and willful betrayal of his trust, with damages laid down at \$100,000. Roberts, in his defense, set up the claim for compensation. There being no express contract for payment of compensation, can the defendant recover it? The answer to this question must be found in the law of South Carolina. The acceptance of the agency by Roberts was in South Carolina. The performance of the contract of agency was to be made in South Carolina. The contract is governed by the law of South Carolina. *Scudder v. Bank*, 91 U. S. 411. The leading case in South Carolina is *Ravenel v. Pinckney's Assignee*, quoted in *Muckenfuss v. Heath*, 1 Hill, Eq. 182; *Poag v. Poag*, 1 Hill, Eq. 285, again quoted and affirmed in *Lever v. Lever*, 2 Hill, Eq. 160. The complainants rest on that case, contending that in this state a private agent is not entitled to any compensation in his agency unless he makes it a part of his contract. This case is not reported, and the facts on which it was decided do not appear. *Muckenfuss v. Heath*, in which it is quoted, distinguishes itself from the leading case, and says that it does not apply to its facts. *Poag v. Poag* accepts it. *Lever v. Lever* properly goes off on another ground. There the supposed trustee was not held responsible for interest. This was sufficient compensation. The present case rests on this case of *Ravenel v. Pinckney's Assignee*. What is the full force and effect of that decision? These are all the words of it quoted:

"The act of assembly of 1745, allowing commissions to executors, administrators, guardians, trustees, etc., embraces only that species of agents or trustees therein specifically mentioned, or such as are under the authority of the law and the control of the courts. Factors, commission merchants, commercial agents, and assignees are entitled to commissions from the usage of trade. But the private agent or assignee of an individual is not entitled to any such claim unless he makes it a part of his contract." *Muckenfuss v. Heath*, 1 Hill, Eq. 183.

The doctrine here stated, taken broadly, does not commend itself. It certainly cannot apply to every private agent, in the sense that he can get no compensation, if it be not expressed in his contract, for in *Scott v. Baldwice*, 2 Const. (S. C.) 410, an overseer recovered on an entire contract the

*quantum meruit*. One can easily understand how a person who voluntarily undertakes to settle or compromise the debts of a friend with money furnished to him for that purpose cannot deduct the commissions of an assignee without a stipulation to that effect. But it shocks the sense of justice to deny compensation to a stranger who performs services—a series of services—for another, in no way connected with him by the ties of blood, friendship, or obligation, especially when in the performance of his duties he has been held to the rigorous responsibility of a trustee. Distasteful as the doctrine may be, we must apply it, if it reaches this case. Martin & Co. are bankers, engaged in the most important and most liberal department of commerce. In the course of their business they negotiated for the services of Mr. Roberts, a merchant, at the time, to their knowledge, acting as agent and manager of a large commercial house, and of course under their pay. They wanted him to do for them like services, so much alike that the assent of Roberts' principals was a *sine qua non* to his employment by Martin. In the transactions of commerce time is money. In business there is no place for sentiment. No services are gratuitous, not expressly declared so. "In the ordinary course of commercial agencies a compensation is always understood to belong to the agent, in consideration of the duties and responsibilities which he assumes, and the labor and services which he performs." Story, Ag. § 326; Bish. Cont. § 219, and cases quoted; Id. § 220, and cases quoted; 3 Add. Cont. § 1401. In the case of *Ravenel v. Pinckney's Assignee*, "factors, commission merchants, commercial agents, and assignees are held entitled to compensation from the usages of trade;" that is to say, by immemorial usage it is distinctly understood that all persons engaged in commerce, called upon to do services in the due course of business, are *ex necessitate* entitled to compensation, as growing out of, and inseparably connected with, the contract of their employment. I am of the opinion that the defendant is entitled to compensation for his services, and that this was in contemplation of both parties in the creation and progress of the agency. He cannot be deprived of this, unless it be shown by the testimony that he has released, waived, or surrendered it for a consideration. This does not appear.

What that compensation would be, is the next and most difficult question. There can be no doubt that, when the correspondence between Martin & Co. and Roberts began, and during its progress, the latter counted upon great ulterior results apart from and outside of his present service, to be derived by him from his confidential connection with a banking-house of repute. In his letter, 3d May, 1880, Roberts says to Martin & Co.: "As yet I have been little more than a custodian of your property, and you have had no opportunity of judging me in any other capacity." This suit has defeated this expectation, and for this disappointment there can be no compensation. The reward of his care and services, however, was to come also in part from the management of the property for them, or from its sale, or from some disposition of it. Certainly not from its bare custody; else the consent of Wylie Teacher & Co. was not needed, and would not have been asked. This precludes

any idea of an annual salary. When Martin & Co. terminated the agency of Roberts, they destroyed any hope of compensation from the management of the property as phosphate territory, or from its sale, or from some other disposition of it. This disappointment can be measured in money. By the former decree in this cause it appears that the agency was terminated without such fault on Roberts' part as to justify the action against him, or such as to deprive him of reasonable reward for services rendered. As we have seen, there is no room for the charge of an annual salary, or for anything like clerical compensation. Roberts was the agent of a foreign principal, with large powers, employed because of his experience and ability in managing similar interests. He was not employed to do clerical work, or to devote a certain measure of his time; but he was to exercise his judgment. The testimony taken before the special master does not apply to the case, and does not produce the impression desired. His services must be valued as a whole, and the compensation awarded should be in the nature of indemnity, rather than full compensation. Considering all the circumstances of the case, he should be paid \$2,000. It is so ordered. Let a decretal order be prepared carrying the result of this opinion into effect; each party to pay his own costs, all other costs to be divided between them.

NOTE. Since this opinion was prepared, Mr. H. A. M. Smith has kindly furnished the full text of the opinion in *Ravenel v. Pinckney's Assignee*. The only point decided in that case is that, under the act of assembly of 1745, commissions as compensations are allowed only to the classes of agents mentioned specifically in that act, and that no private agent can reserve commissions *eo nomine*, unless they be specially contracted for. "But," adds the judge, deciding for the court, "I have no doubt that such an agent is entitled to reasonable compensation for his trouble." It thus appears that the leading case in no way conflicts with the conclusion reached in this case. See MS. decrees, Columbia, 28th March, 1828.

## MERCANTILE TRUST CO. OF N. Y. v. MISSOURI, K. & T. RY. CO. *et al.*

(Circuit Court, D. Kansas. October 8, 1888.)

### 1. RAILROAD COMPANIES—BONDS AND MORTGAGES—FORECLOSURE.

A mortgage of railroad property to a trustee to secure certain bonds and interest coupons, providing that in case of demand and default of payment of interest for six months the trustee may enter upon the property, containing a similar provision as to advertisement and sale, and also an article stipulating that both said remedies were cumulative of foreclosure proceedings in the courts, which the trustee should institute at the direction of the bondholders "upon default being made as aforesaid," authorizes a bill to foreclose, although the default has not continued six months.

### 2. SAME—RECEIVERS—APPOINTMENT.

That a railroad, heavily mortgaged, has made several defaults in the payment of interest, aggregating over \$1,000,000; that the business is decreasing, with probability of further decrease from competition with new lines; that it is in need of repairs and improvements; that the bondholders are not in har-



mony; that a foreclosure is about to be decreed; and that no other way exists for applying the rents and profits of the road to its debts,—are sufficient reasons to justify the appointment of a receiver.

**In Equity.** Bill for foreclosure and appointment of a receiver.

Bill by the Mercantile Trust Company of New York, trustee for certain bondholders secured by a mortgage on the property of the Missouri, Kansas & Texas Railway Company, against said company and the Missouri Pacific Railway Company, to foreclose the mortgage, and appoint a receiver.

*Alexander & Green, Thos. H. Hubbard, John J. McCook, and William N. Cromwell, for complainant.*

*Simon Sterne, Charles F. Beach, Jr., James O. Broadhead, and L. B. Wheat, for defendants.*

BREWER, J., (*orally.*) In this case, I have had no opportunity to write out the conclusions to which I have come, nor, for that matter, to arrange my thoughts in any very orderly and systematic manner. I should have preferred to take a little further time to put in better shape what I have to say; yet, aware of the fact that many of you gentlemen are from a distance, and are anxious to return home, I concluded to waive the matter of form and order, and state, in a crude way, my conclusions. Nor are these conclusions reached simply from information developed in these few days. This bill was presented to me more than three months ago. I have had a copy of it in my possession since, and have taken frequent occasions to examine the stipulations of this mortgage. Further than that, the newspapers have been full of many of the features of this controversy; and the property itself, being a property starting in my own state, and growing up there, is, neither in itself nor its history, a stranger. So that many of the facts which have been presented and discussed are facts which were not new.

This bill was filed a few days after default in the payment of interest, June last. And the first question—a vital question—is whether this suit was prematurely brought; for, being a suit to foreclose, and not one for the preservation of the property, if prematurely brought, it would finally have to be dismissed, and a receiver ought not to be appointed *ad interim*. The ground upon which the claim rests is the fact that this mortgage or deed of trust requires a six-months delay after the default before certain proceedings—and foreclosure, it is claimed, is one—are permissible. The second article provides for entry by the trustee, but by its terms such entry cannot be till six months after default and demand of payment. The third article likewise authorizes sale by advertisement, and that is equally limited. At the close of that article follows this paragraph:

“This provision is cumulative to the ordinary remedies by foreclosure in the courts; and the trustee herein, or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the bondholders of a majority in value of said bonds then unpaid, shall,” etc.

Now, the contention is that those words, "upon default being made as aforesaid," being in the last part of this article, by fair construction refer back to the entire provision in the first part, in respect to default, and include both the happening and continuance of the default. The argument rests merely on the force of the last two words, "as aforesaid," and is forcibly put by counsel. That is the real question in the case, for, if this last paragraph in article 3 were omitted, the decision of the supreme court in the case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, would leave no question. In that case, as appears from the statement, there were in the mortgage stipulations providing for entry and sale by advertisement six months after default. The validity of those provisions was recognized by the supreme court; but it held that, notwithstanding this, if by other stipulations in the mortgage it was a security for the payment of interest as it semi-annually accrued, as well as of the principal, the trustee, or, on his failure to act, any bondholder, might, on the non-payment of interest, bring suit and foreclose. Turning to this mortgage, I find the same provision. It is given as security for the payment of the interest as well as of the principal. By article 2 possession is secured to the railroad company,—the mortgagor,—until default be made in the payment of principal or interest. Unquestionably the right of action at law on the coupon exists. Unquestionably, if articles 3 and 4 were omitted, the mere fact that this property was by the mortgage pledged as security for the payment of coupons would permit the coupon-holder to come into a court of equity and enforce that pledge.

It is insisted that these articles, not excluding the jurisdiction of courts of law, not debarring a party from his right of action upon the coupons, deprive him of a present right of action upon the mortgage by a suit in equity to enforce that pledge. Language requiring such construction should be clear. If the parties—and it is to be assumed that they who drafted this mortgage or deed of trust were competent for that business—contemplated not merely that no entry should be made, no sale under the power until the lapse of six months after default, but also that the coupon-holder, having his right of action at law on the coupons, should not have a right of action in equity, such purpose, it seems to me, would naturally have been expressed in clear and unmistakable language, and not in that of doubtful interpretation. In every other place that I have been able to find in this mortgage, where a right rests upon the continuance of the default, and that appears in articles prior and subsequent to this paragraph, the language is express: "In case default shall be made in payment of interest, and shall continue for six months." Now, if it was intended to limit the jurisdiction of a court of equity until after the lapse of six months from the time of the happening of the default, it seems to me that the draughtsman would have placed the stipulation therefor in a separate article, and would have made its meaning so plain that there would be no question. We all know in the preparation of instruments how common the expressions "said" or "as aforesaid" are used without any clear or definite intent. They are words which we use, not

thoughtlessly, but carelessly; and although they are used here, yet as it is also found that the continuance of the default is not mentioned, it seems to me it is giving to those words an enlarged and unnecessary force to hold that they broaden the expression "making default" into "making and continuing default," as expressed in the first part of the article. Nor is this a mere resting upon the language of the paragraph. It opens with the distinct announcement that these special provisions in respect to entry and sale under a power are cumulative to the ordinary remedies by foreclosure; contemplating, in its opening words, a proceeding in a court of equity in any case of default. Nor is it strange that there should be special limitations upon the two matters provided in articles 2 and 3, and none about proceedings in a court of equity. An entry is a speedy remedy; it runs to the *corpus* of the property; it takes instant hold of it, and takes it away from the mortgagor. The parties may well have contemplated that, if there was a temporary default, there should be no such speedy interference and summary seizure by the mortgagee. So a sale by advertisement—in this case an advertisement of eight weeks—is speedy and summary; and if, upon the happening of a temporary default, the trustee at the instance of a single coupon-holder should thus advertise and sell the property, it is obvious that great wrong might be done; and six months' delay is a very natural provision. But proceedings in a court of equity are not thus hasty. They are not within the control of any coupon-holder or any trustee. They stand advanced or delayed, as in the judgment of the chancellor the best interests of the property require. If it appears in any case that a coupon-holder, from improper motives, or from a simple greed for his money, is willing to wreck a large property, and comes into a court of equity upon the happening of a temporary default, it goes without saying that the chancellor holds his hands until it becomes apparent that the property as a whole cannot be saved to its owners. Inasmuch as these proceedings stand upon the discretion of a court of equity, it is not strange that the parties were willing to leave to the bondholders and coupon-holders an open door into such a court. They left an open door into a court at law, and there is at least equal chance, if not greater, that the freer motions of a court of equity will afford as full protection to the mortgagor. These considerations, perhaps not very clearly expressed, are the reasons which have led me to hold that this case is within the rule laid down in 106 U. S. 47, 1 Sup. Ct. Rep. 10, *supra*, and that this suit is not prematurely brought.

That only passes from one trouble to another. The right to foreclose does not carry with it the right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If,

looking at the situation of the litigating parties, and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why, no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment.

I shall not go over all the matters that have been discussed. I want to suggest some things that have impressed me. Of course, so far as the adequacy of this security, so far as the solvency of the corporation, is concerned, so far as the question whether this is a temporary embarrassment or permanent, these facts stand out confessed, indisputable at least. It has ceased to pay interest on its mortgages; one, two, three, and four have defaulted. The amount of that interest runs considerably over a million; and the payment of interest on the large mortgage comes due in two months. The business of this year from the 1st of June to the 1st of September, as shown by the statistics, is decreasing; from the 1st of September to the 14th there was a slight increase. The road is not along the main highway of travel eastward and westward. It is one running north and south, along which business to-day is, as we all in the west know, comparatively in its inception. It crosses for two or three hundred miles a territory which is occupied by Indians, and furnishes little business. It has been for years the only road that traversed that territory. Within the last year or two, two more roads have crossed, and a third is seeking to cross. Competition between these roads traversing that territory, and bringing Texas and its commerce into relations with Kansas, Missouri, and the north, as a matter of necessity, it seems to me, must tend against the increase of earnings.

The report of the committee—a committee appointed by the company—tends to show that the payment of interest which has been made prior to this year, has been largely at the expense of the proper repairs and improvement of the road. I do not mean to say that all this is absolutely conclusive on the question, but these are matters which have forced themselves upon my mind. While it is true that—the road paying no interest since the 1st of June—the revenues have diminished by four or five hundred thousand, the amount which is due as claimed to the Missouri Pacific for advancements, yet the earnings must increase largely before these back interests can be met, to say nothing of future interests speedily maturing. That a road thus situated, some 1,600 miles in length, is burdened with a mortgage of \$28,000 a mile, carries with it, to my mind, very strong evidence that there is no reasonable probability of its ever being kept in proper condition when paying the interest on such a debt. The only way in which any mortgagee can get possession of the rents and profits is through a receiver. The law of Kansas forbids any other remedy upon a mortgage than a foreclosure in the court. No possession could be had under article 2. No sale could be made under the power attempted to be given in article 3. The sole remedy is by foreclosure. Unless a receiver is appointed, the rents and profits pass into the possession of the mortgagor, to be expended by it according to its best judgment. That is affirmed by the three cases of *Railroad Co.*

*v. Cowdrey*, 11 Wall. 463; *Gilman v. Telegraph Co.*, 91 U. S. 603; and *Dow v. Railway Co.*, 124 U. S. 652, 8 Sup. Ct. Rep. 673. Not merely that; suppose this foreclosure proceeding should pass to a decree, and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to the rents and profits. That is settled in the case of *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. Rep. 911. So that this litigation might proceed and continue for a long time in this and in the supreme court, without ever giving the mortgagee a hold upon the profits, unless a receiver is appointed. This mortgage is a second mortgage on a large part of the road. As such mortgagee it has, more than any other party, an interest in reaching after and securing those rents and profits. The first mortgagee, having a limited amount upon the part of the road upon which its mortgage rests, may feel safe; for his principal and interest must be paid before the second mortgagee can come in. So that the complainant has a special interest in reaching for, and as soon as possible obtaining possession of, the surplus earnings. More than that, it is perfectly obvious that the real owners of this property are not in harmony. The stock controls the road, but with \$45,000,000 of bonded indebtedness—\$28,000 a mile—on the road, the real owners are the bondholders, and that they are not agreed in respect to what shall be done with this property is, I think, confessed. For years the property was in the management of a certain interest. That interest was removed last spring from the control. It was not removed so long as the road was apparently prosperous, and paying its coupons. When adversity threatened it, as was natural, those who held interests in the road were not satisfied with the management, and sought control. If these gentlemen now in control could make it a promptly paying road within a reasonable time, why, it might be expected, according to the laws of human nature, that they would remain in control; but we all know how, when one fails and continues to fail, all who are interested are prone to lay the responsibility upon him, and to seek a change. And there is no certainty that another year different interests might not combine, and so the road be subject to different control. At any rate, it is very evident that there is no harmony—no unity of purpose—between those who are the real owners. Now, if it were a partnership, and it was apparent to a court that the partners had got into a quarrel, the very fact of their quarrel would be a strong reason why it should take possession of the property. Of course that consideration has not so much force in respect to a corporation, but it strengthens other considerations. Those are the principal reasons that have operated on my mind,—the default in interest, the fact that the rents and profits can only be appropriated in this way, the decreasing revénues, the recent construction of parallel roads, the fact that it passes through such a portion of territory so unprofitable, the condition of the road as developed by this report of the committee, and the conflict between various parties having real and substantial interests. Much as I should be glad to be free from the annoyance of a receivership,—and I know something about it,—it seems to me I should be delinquent if I refused this application. There are some minor mat-

ters that I might refer to, yet, perhaps, they would not strengthen anything I have said.

There is one matter, however, I must notice,—the suggestion of the Missouri Pacific that it could defeat this application, and that it was here in the attitude of a party to consent upon the condition that the balance due it was properly protected, and that no order should be made in reference to the possession by the receiver of the International & Great Northern Railroad or its stock. If I understood the situation to be that this application depended on the consent of the lessee, the Missouri Pacific, and its consent was tendered upon any such condition as that, there would be no receiver appointed. The rights of the lessee, as I look upon these two instruments, are subordinate to the rights of the mortgagee, and it is the mortgagee whose application is sustained, and all parties having claims of any kind must depend upon the inherent equity of their claims. So far as the stock in the International & Great Northern is concerned, as well as some other assets, they are, as stated, now under pledge, and in the possession of this complainant; perhaps, also, attached by certain garnishment proceedings. I think the interests of the mortgagor require that there should go an order upon the complainant not to part with that possession, except in obedience, of course, to the process of the courts in New York, until the ultimate rights of the parties are determined. As to the possession of the International & Great Northern, I doubt whether it is within the province of this court to determine that question. It is a separate road, whose stock, I believe, in part has become the property of the Missouri, Kansas & Texas corporation; but it is wholly situated in another circuit, and certainly at present I am not prepared to say that this court would have a right to determine whether a receiver of the Missouri, Kansas & Texas should take possession of that separate road. It may be that is a question which will have to be determined by the judge of that circuit. At any rate, I should not at present, without further consideration, perhaps consultation with Judge PARDEE, feel like making any order in respect to it. It is a matter in which I shall be glad to hear counsel hereafter upon, and perhaps try and arrange with Judge PARDEE jointly to hear them as soon as practical. That, I think, is about all I have to say in reference to this matter, except as to the receiver. If parties agree upon a receiver, of course I shall appoint whoever you agree upon. If not, I will hear any suggestions from any of the parties in interest, and reasons for or against any person to be named by one side or the other.

BARRY v. MISSOURI, K. & T. RY. CO. *et al.*

(Circuit Court, S. D. New York. September 28, 1888.)

## RAILROAD COMPANIES—BONDS AND MORTGAGES—MISAPPLICATION OF EARNINGS—INJUNCTION.

Where a railroad company has misapplied its earnings as against an income mortgage, and a decree allows the income bondholders to move for an injunction against further misapplication, and the company relies on a bare denial of a charge of misapplication, giving no figures from which the condition of its business or the manner of disposing of its earnings can be determined, and giving no explanation of the shrinkage of its semi-annual net earnings from \$1,449,463 to zero, an injunction will be allowed, though for a cause other than the particular one formerly had in view, and though the charge is in part on information and belief.

In Equity. Application for injunction.

*Davenport, Smith & Perkins*, for complainant.

*Dillon & Swayne*, for defendant.

LACOMBE, J. The injunction asked for by complainant is phrased in the precise terms of the eighth clause of the decree of April 26, 1886. That clause reads as follows:

"*Eighth.* And it is further ordered, adjudged, and decreed, that the complainant be at liberty to make application to the court, that the Missouri, Kansas & Texas Railway Company, its officers and agents, attorneys and servants, be enjoined and restrained from applying any of its earnings derived, or to be derived, from the railway and property described in the said mortgage, dated April 1, 1876, to any purpose other than to the payment of the operating expenses of the said railway, as described in the said mortgage, and to the payment of the expenses for keeping in repair its said railway and property, and to the payment of the interest on the several incumbrances which are prior to the said mortgage of April 1, 1876, and which are therein mentioned and described."

It is true that the particular misappropriation of earnings to which the court's attention at that time was directed is not the same as that now charged. There is nothing in that circumstance, however, which should debar the complainant from making, as they do, *in ipsissimis verbis*, the very motion which the decree contemplated. The allegations in complainant's affidavit as to misapplication of earnings are denied in the affidavit submitted by the defendant. That circumstance would, perhaps, ordinarily be sufficient ground for refusing the injunction, or for sending it to a master to find the facts; but in the case at bar other circumstances are entitled to consideration.

1. Although complainant's charge of misapplication is made in part on information and belief, it could not well be otherwise; complainant not being an officer of the company, nor personally familiar with its transactions, nor having free access to its books.

2. The defendant heretofore did misapply its earnings, and in a manner so plainly in violation of the trust created by the mortgage under which the income bondholders hold that this court characterized the theory un-

der which the officers of the road acted as "preposterous." *Barry v. Railway Co.*, 27 Fed. Rep. 1.

3. The last semi-annual period as to which there is definite information before this court touching the amount of earnings is that ending October 1, 1886. The master has reported that the net surplus earnings of that period, even after paying \$619,175, the interest on the earlier mortgages, on which defendant is now defaulting, was \$830,288.38.

4. The secretary of the company, who makes the denial relied on, confines himself to a mere bald contradiction of the charge in complainant's affidavit. With the books at his command and abundant information in his possession, he does not give the figures even of a single month from which the condition of the company's business, and the manner in which its earnings are disposed of, could be determined, and does not suggest a single fact to account for the shrinkage of net earnings from \$1,449,463.38 to zero.

5. The injunction, if granted in the terms prayed for, would only require the road and its officers to refrain from doing what this court has after full argument decided that they have no right to do.

These considerations seem controlling. Injunction as prayed for is granted.

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FRELINGHUYSEN v. NUGENT *et al.*

(Circuit Court, D. New Jersey. September 25, 1888.)

1. TRUSTS—CONSTRUCTIVE—EX MALEFICIO.

A bank cashier, who was also financial agent of the defendant, proved a defaulter for more than \$2,000,000, covering his operations by charging on the bank-books drafts of defendant on a third party as sent by another bank for collection, and taking up the drafts by his own check as cashier. He testifies that he loaned the money to defendant for use in the latter's business; that defendant knew he was taking the money wrongfully; furnished blank drafts for the purpose; and kept urging him not to confess it, and assuring him that he would soon square the account. Defendant's testimony squarely denies this; also that any such sum was used in his business; which is corroborated by other proof. He testifies that he thought he was heavily in debt to the bank in the regular course of business; that he trusted the cashier as his agent, but could not get from him a statement of his account with the bank. The evidence shows that the defalcation occurred in 1878, at the time of the stock panics, and that the cashier and his brother used large sums of money, and speculated, and lost heavily. Defendant's present assets were mostly obtained on credit from other *bona fide* creditors. *Held*, that the evidence was not sufficient to establish a trust *ex maleficio* of defendant's assets in favor of the bank as against defendant's other *bona fide* creditors.

2. SAME—EQUITY—JURISDICTION—RETAINING BILL.

The bill seeking to establish the trust was followed by a supplemental bill, praying that, if the original prayer could not be granted, defendant's assets might be divided among all the creditors, including the bank. Issue was made on this bill, and the validity of an assignment made by defendant for the benefit of all his creditors at the instigation of the complainant bank was contested by other creditors, who were made parties to the bill, thus involving in the case much litigation, which must fall with the bill. *Held* that, though the evidence failed to establish the trust, the bill should be retained for the



general benefit of all creditors who had filed their claims; that they should be allowed to contest complainant's claim, and a *pro rata* distribution of the assets should be decreed under the general assignment.

**8. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—ESTOPPEL.**

Creditors who have voluntarily presented their claims before an assigned, without questioning the validity of the assignment, are thereafter estopped from disputing its validity, although the assignment was made at the instance or in behalf of one of the creditors.

In Equity. Bill to establish a trust. On final hearing.

This was a bill for an injunction, and to establish a trust *ex maleficio*, brought by Frederick Frelinghuysen, as receiver of the Mechanics' National Bank of Newark, against Christopher Nugent and James Nugent, partners under the firm name of C. Nugent & Co., George B. Jenkinson, receiver and assignee, Eugene Kelly and others.

A. Q. Keasbey and J. Emery, for complainant.

J. W. Taylor, for respondent Jenkinson.

T. N. McCarter, for respondents Kelly and others.

BRADLEY, Justice. On Monday, the 31st day of October, 1881, the Mechanics' National Bank of Newark, an old and reputedly strong and wealthy institution, closed its doors, and announced itself bankrupt. Perhaps no single event had ever occurred in that city which so completely shocked and astounded its inhabitants. By his own confession, made to the directors on the day previous, the catastrophe was caused by the delinquency of Oscar L. Baldwin, the cashier. His story was that he had used the bank's money to carry along a firm of morocco manufacturers by the name of C. Nugent & Co., consisting of Christopher Nugent and his brother, James Nugent; and that the means by which he had kept the transactions concealed were a series of fictitious charges against the Mechanics' National Bank of New York, the correspondent of the Newark bank in the latter city, by which, according to the books of the Newark bank, the New York institution was in debt to it in the gross sum of over \$1,900,000, while in truth and in fact the Newark bank owed the New York bank over \$270,000, which was shown by the books of the latter; the discrepancy being nearly or quite \$2,200,000. This was the proximate amount of deficiency found to exist in the funds of the bank. The whole capital (which was \$500,000) and the surplus were entirely swamped, the assets were insufficient to pay the deposits and other debts of the bank, and the deficiency had to be made up by the directors and stockholders. The institution was completely wiped out of existence. The cashier, who had held his office for 18 years, and occupied an eminent position in the city of Newark as a financier, either for the purpose of diverting to some extent the odium and execrations which he knew would fall upon his head, or because his story was the true one, endeavored to lay the inciting cause of the defalcation at the door of C. Nugent & Co., and especially of Christopher Nugent, the senior partner of the firm. His statement is substantially this: That about 1872, Nugent & Co., who had been large dealers with the bank, became

embarrassed, and wanted him (Baldwin) to get them more money to use in their business than the directors of the bank would give them by regular discount; their line of discount being then about \$75,000. Being overpersuaded by Christopher Nugent, and relying on his promise to secure the bank by a conveyance of their property in case of disaster, he lent the firm, on their own paper alone, on behalf of the bank, considerable sums, amounting in 1872 to about \$142,000, without reporting the loans to the directors,—a step which it was necessary to conceal, and which gave Nugent a power over him. The latter, availing himself of this advantage, and magnifying the profits he expected to realize from the business, and repeating his promises to secure the bank in case of disaster, induced Baldwin to continue and increase his advances, until in 1874 they amounted to more than \$400,000. That he then told Nugent the thing could go on no longer; that he should tell the directors, and end his own life. Nugent implored him not to do anything of the kind; represented that his business was growing better, and that soon he would control the matter, and be able to pay all his debts. Baldwin yielded, and renewed his endeavors to carry the firm along, involving further advances and extension of the business; and so year by year the debt increased until it reached over \$2,000,000, under the weight of which the bank failed. During all this time Baldwin says that he met Nugent almost daily; explained to him the situation, so that he knew he was lending him the funds of the bank, and that the dread of exposure was forcing him to do it. Nugent, he says, would furnish him at the beginning of a month with a list of payments to be made, saying it was all, when frequently it did not cover half, and other checks would appear which would increase his overdrafts largely, requiring further loans. During the entire period of these irregular advances, Nugent & Co. were in the habit every day of sending to Baldwin their receipts, cash, checks, and notes, sometimes forty or fifty thousand dollars worth of paper, which Baldwin would deposit to their credit, or get discounted for their benefit; in fact, Baldwin says he practically acted as their agent in the management of their financial affairs; taking all their receipts, and paying their obligations. He says that Nugent (he generally speaks of Christopher Nugent, who represented the firm) would leave with him his drafts on Martin & Runyon, (New York brokers,) signed in blank 10 or 20 at a time, and he (Baldwin) would fill them up for whatever amounts were necessary from time to time to make their account good; and then he (Baldwin) would meet them with the funds of the bank, sometimes by check as cashier, and sometimes by cash. This diversion of the funds of the bank was concealed by charging them to the Mechanics' Bank of New York; and drafts on Martin & Runyon were sent to that bank for collection, and charged to it. So it happened that the advances thus made to Nugent & Co. became falsely charged to the New York bank, and the entire deficit in the Newark bank's assets was due to such advances; all which, according to this account, went into the concern of C. Nugent & Co., and produced the *corpus* of its assets, or at least the major part thereof.

Acting upon the faith of Baldwin's statements Frederick Frelinghuyssen, the receiver of the bank appointed by the comptroller of the currency, filed the original bill in this case on the 5th of November, 1881, charging, in substance, that, by the complicity of Nugent & Co. in the embezzlement of the cashier, they became trustees *ex maleficio* of the bank's moneys, and held their entire property and assets subject to and charged with a trust for the use of the bank to the extent of said moneys in preference to the claims of any other creditors. The bill prayed an injunction against the disposal of the property, and application was also made for the appointment of a receiver to take charge of it for the benefit of all parties interested therein under the order and direction of the court, and an injunction was granted, and George B. Jenkinson was appointed receiver, and as such took possession of the whole property and assets, both of the firm of C. Nugent & Co. and of the individual partners, as completely as if the parties had been declared bankrupt, and he had been appointed the assignee. This was certainly, in the language of the medical profession, very heroic treatment; and, if Baldwin's representations were true, (and he verified them by oath,) the course pursued was probably justified by the circumstances. A whole community had been shocked and thrown into financial disturbance, if not actual panic, by the enormity of the delinquencies disclosed; and there was naturally a demand for severe measures, and a rigid execution of the law. Baldwin, of course, was subjected to criminal prosecution, and criminal proceedings were also commenced against Christopher Nugent. But there were other interests involved besides those of the bank. Nugent & Co. were indebted to a large amount—somewhere about \$375,000—for materials and other things used in and about their business, and a large number of their creditors immediately commenced suit against them, or threatened to do so. The Nugents denied the allegations of Baldwin as to any complicity with him in embezzling or improperly using the funds of the bank, and denied that they had any knowledge or notice that he made loans to them on account of the bank without due authority. Their counsel prepared an answer to the bill of complaint in this case, and the Nugents swore to it on the 21st day of November, 1881, in which all the charges made by Baldwin and by the bill of any such complicity or knowledge were squarely and fully met and denied. They also denied that they had obtained through Baldwin's means any such amount of money or loans as he pretended they had. They admitted that Baldwin had acted as their financial agent for several years past, ever since they were first embarrassed in 1872 or 1873; that they turned over to him daily all their receipts, and he paid their obligations as they became due. They state that this mode of transacting their business was done at his request; and they admit that they gave him drafts signed in blank to use for them in case of necessity during the absence of Christopher Nugent, who was the principal business manager of the firm, but they never knew that he made any such irregular use of them as he pretends in his statement. They state that their bank-account was always kept good, or, if temporarily deficient, they always made immediate arrangements for making

it good; but that for the last few years they had been unable to know exactly what the account was, except as Baldwin informed them, inasmuch as they could get from him no pass-book or statement; that they had not had a pass-book since early in 1879; that once a week they sent Baldwin a list of the assets turned in to him during the week past, and once a month furnished him with a list of their obligations coming due for the month; but they were much embarrassed for want of an accurate statement and account from him as to the condition of their accounts in his hands, and often applied to him for such a statement, which he would promise to give them, but never did. It was stated in the bill of complaint, founded on suggestions of Baldwin, as a reason for the absorption of such a large amount of money as it was charged that the Nugents had received through him, that they had speculated largely in goat skins, in order to have control of the market, and had lost large amounts by such transactions; also that they had gone to great expense in enlarging their factory and machinery, and had spent hundreds of thousands of dollars in extravagant outlays which were of no practical advantage. They denied these charges *in toto*; stated that they had never bought skins except for the purposes of their manufacture, and had always bought at reasonable prices; and, as to their plant of buildings and machinery, they stated that these had not been increased since 1873 beyond the wants of their business, and not to exceed some \$20,000 or \$30,000 in amount. It may be added here that these statements about their business and their purchases of skins, and about their buildings and machinery, were all corroborated by the testimony subsequently taken in the case. As before said, this answer of the Nugents was sworn to on the 21st of November, 1881; but on the 22d of the same month, before it was filed, an interview was had between them and their counsel and the counsel of the complainant, who was also district attorney of the United States, representing the government, perhaps, in a way, in the civil as well as in the criminal proceedings, and it was agreed that Nugent & Co. should withdraw opposition to the application for an injunction and the appointment of a receiver, they having the naming of the receiver; and that the criminal proceedings against Christopher Nugent, which had been carried to the extent of his being held to bail in \$25,000, and of certain testimony being taken, should be stopped. This, from the evidence taken together, I understand to have been the main arrangement. It was stipulated then or subsequently that the Nugents might be employed by the receiver to conduct and carry on the business of manufacture for the purpose of working up the unfinished stock, and that they should continue for the present to occupy and use their dwelling-houses and furniture. In pursuance of the agreement thus entered into, an order for an injunction and the appointment of a receiver was made by the court on the 26th of November, 1881, which order commenced as follows:

“An order having been granted on the filing of the bill of complaint in this cause, requiring the defendants to show cause why an injunction should not issue in pursuance of the prayer of said bill, and why a receiver should not be appointed, and the court having on the day fixed for the argument of the

said rule postponed the hearing of the same until the 1st day of December next, and the court being now advised by the written consent of the solicitors of the defendants that it has been agreed between the counsel of the respective parties that an injunction may issue in pursuance of the prayer of the bill, and that George B. Jenkinson may be appointed receiver upon giving proper bonds, without further argument upon said rule to show cause, it is therefore, on this 26th day of November, 1881, hereby ordered and decreed that a writ of injunction do issue out of this court, etc., and that the said George B. Jenkinson be and he is hereby appointed the receiver of all the real estate and personal property, assets and choses in action of every description, whether held or owned by them as partners, or by either of them individually, with full power, as soon as his bond shall be approved and filed as hereinafter directed, to take immediate possession and control of said real estate and personal property and assets, and to hold and dispose of the same for the benefit of all parties interested therein, under the order and direction of the court."

The order went on to give directions to the receiver as to the management of the property; among other things, authorizing him, if he should think it desirable, to retain and employ the Nugents in the practical working of said business and manufacture, and to allow them to use and occupy their dwelling-houses and furniture, until the further order of the court. Jenkinson, it seems, was a friend of the Nugents, and was one of Christopher's bondsmen in the criminal proceedings which had been instituted against him. From this period the Nugents for some time seemed to be favorably disposed to the complainant and his case, whereas up to this time they had expressed much interest for their other creditors, and a desire to aid them in getting satisfaction of their demands. There is no doubt that they were hopelessly insolvent anyway, and it was really a matter of little interest to them what destination their property took. Their real estate was all covered by mortgages, which by subsequent foreclosure absorbed the whole of it, though undoubtedly at some sacrifice of value, as is usual in such cases. Their entire personal property and assets have netted less than \$200,000, which is still in the hands of the receiver, awaiting the decision in this case. The litigation in this suit subsequently became more complicated. The creditors of Nugent & Co. were pushing their suits against the firm with all speed, and it was evident that if they should get judgments they would have power to bring the claims of the complainant and the validity of his proceedings directly in question. Whether to obviate such an exigency, or to provide a way for the representative of the bank to come in against the proceeds of the property on an equal footing with the other creditors in case the bill should not be sustained, the Nugents, on the 14th of December, 1881, made an assignment of all their property, partnership and individual, to Jenkinson, the receiver already appointed by the court. It is reasonably apparent that this move was made at the instance of the complainant, or in his behalf. An order prepared by his counsel was made the day before the assignment in the following terms, to-wit:

"Application being made on behalf of the defendants to this case, representing that they desire to make a general assignment to the receiver appointed in this cause for the equal benefit of their creditors, under the state laws, to the end that any of the property of the defendants placed in the hands of the

receiver under the order of the court made in this cause on the 26th day of November, 1881, with consent of defendants, which may not be decreed to belong to the complainants, or held in trust for him as receiver, as claimed in his bill, may be equally distributed among all their creditors, and praying that they may be permitted to make such assignment without being held to violate the injunction granted in this case; and such proceeding appearing to the court to be just and equitable, it is ordered and decreed that such assignment by the defendants will not be decreed a breach of such injunction."

The assignment was made accordingly, professedly for the equal benefit of all creditors. The counsel for the complainant, in an affidavit made by him on the 25th of March, 1882, states that this assignment was made in order to secure absolute equality among all creditors in any property which the court might declare to be free from the paramount equitable lien of the receiver of the bank, and that Jenkinson was selected as assignee in order to save the complication that might possibly arise from the appointment of another party. He further states, in the same affidavit, that the whole object of the transaction was to submit to the court, in the fullest way possible, the question whether the receiver of the bank, under the circumstances of the case, had an equitable lien upon the property, and to secure the equal distribution of the property among all the creditors in case such equitable lien should be denied; an object which, as the counsel continued to say, "from its intrinsic fairness, he, as well as the counsel of the firm, supposed would meet with the approval of all persons interested in the property." There can be no doubt, from this statement and other evidence in the case, that the assignment was by the procurement and at the instance of the complainant, or in his behalf, whatever, if anything, may be the effect of this fact, in the consideration of particular aspects of the case. On the 10th of January, 1882, the defendants Christopher and James Nugent filed an answer to the bill of complaint, not signed by them nor sworn to, and quite different from the answer previously sworn to, but still denying all complicity with, or knowledge of, any irregular transactions of Baldwin, the cashier. This answer can have very little effect in the case, as it was evidently intended to carry out the arrangement made on the 22d of November. On the same 10th of January, 1882, the defendants Eugene Kelly & Co. recovered judgment against the Nugents for the sum of \$29,494, and on the 7th of February application was made on behalf of said Kelly & Co., and other creditors of Nugent & Co., to have Jenkinson, the assignee, and said creditors made parties to the suit, in order that they might assert their rights and claims as creditors to participate in the distribution of the assets of Nugent & Co. This application was not granted, but at the suggestion of the court the bill of complaint was amended by making Jenkinson, as assignee, a defendant to the suit, and the counsel representing the said creditors was allowed to prepare and file an answer in the name of Jenkinson, setting up substantially the same defense to the bill which had been set up by the Nugents in their first answer, which was sworn to. The counsel for the creditors then, on the 6th of March, 1882, called Christopher Nugent before a commissioner to be examined; but his counsel appeared with him, and objected to any answers being given

by him relating to his business connection with Baldwin, lest it should tend to criminate him. Nugent complied with the suggestions of his counsel, and the examination accomplished nothing. On the next day the assignee, Jenkinson, procured an order from the court, allowing him to withdraw the answer filed in his name. The creditors Kelly & Co. then petitioned for leave to file an original bill on their own behalf, in order that they might litigate the claims of the complainant to the property of the Nugents. This application was denied, but the court made an order on the 30th day of March, 1882, that, for the purpose of enabling it to determine all questions relating to the disposition of the funds in the hands of the receiver between the petitioners and all other persons claiming the same, the complainant should make the petitioners parties to the cause by supplemental bill, and that the petitioners, upon filing answer in the cause, should have leave to file a cross-bill. Such supplemental bill was filed, making Eugene Kelly & Co., in addition to the Nugents and Jenkinson, the receiver, parties defendant. Kelly & Co. filed an answer and a cross-bill. In the former they again set up substantially the same defense which had been originally made by the Nugents in their sworn answer; and in their cross-bill they set out all the circumstances and the whole history of the case, and claimed that there was not only no trust arising *ex maleficio* in favor of the bank on the property of the Nugents, but that the assignment was intended to hinder and delay the creditors of Nugent, and was therefore fraudulent and void.

In August, 1887, Christopher Nugent was again put under examination; this time without being attended by counsel, and apparently not disposed to conceal or hold back any facts relating to the matters in litigation. He was under no further fear of criminal proceedings, since the statute of limitations had now rendered him exempt from prosecution. He was examined and cross-examined in great detail, and, as he had done in his original answer, he entirely contradicted Baldwin's statements as to any unlawful or irregular use of the moneys of the bank with his consent or knowledge. Many of the side issues which had been raised with regard to his business transactions—his alleged speculation in hides, large expenditures in buildings and machinery, great losses in trade, etc.,—were brought to his attention, and refuted and explained by him in an entirely satisfactory manner; and in nearly all that he testified to on these subjects he was fully corroborated by other witnesses. It is impracticable to go over the evidence in detail. It has been carefully read and examined, together with the evidence of Baldwin and that of Lewis, the expert accountant, who has stated what is to be gathered from the books of the Mechanics' Bank of Newark, the Mechanics' Bank of New York and the drafts, checks, notes, and documents in their possession; and the conclusion to which I have come is that the main question,—whether the funds of the Newark bank were unlawfully and clandestinely used in the business of the Nugents with their complicity or knowledge,—the question on the affirmative to which the original bill of complaint in this case was founded, depends at last on the relative credit to be given to Baldwin and Nugent. If Baldwin's story is true, the affirmative is

made out. If Nugent's is true, the affirmative is not made out, and the bill in its original aspect cannot stand. And on this main issue the books and papers of the bank, examined by the expert, furnish no satisfactory corroboration of Baldwin's statements. They may show a large indebtedness of the Nugents to the bank,—an indebtedness for which they are bound in consequence of reposing so much confidence in Baldwin, and allowing him the use of their name and funds,—but they do not and cannot show that the Nugents were implicated with Baldwin, by knowledge, consent, or otherwise, in any unlawful use of the funds of the bank. Baldwin says he repeatedly told Nugent the unfaithful course he was pursuing. Nugent flatly denies this. Baldwin says he told him so in the presence of two friends, McGregor and Reynolds. McGregor peremptorily denies it, and so, in fact, does Reynolds, though he once signed a paper to be used by Baldwin's counsel to obtain a mitigation of his sentence, in which he did say that something of the kind was said at the interview referred to; but it is so different from the story that Baldwin tells that we must believe in his (Reynolds') sworn testimony, rather than in the paper. Baldwin says that on one occasion he sent Nugent to New York with a dispatch to be sent from there, as coming from an officer of the Mechanics' Bank of New York, to deceive the public bank examiner as to the balance of accounts between the two banks. Nugent says he never went on any such errand. He does recollect that Baldwin once came to the factory, and wanted him to send a boy to New York with a letter to be mailed there, and he sent him; but what was in the letter he did not know, but understood that Baldwin wanted it to go as speedily as possible to Boston, which would be effected by its being mailed in New York, rather than in Newark. And so to the end of the chapter.

The case made by the bill, then, stands on the testimony of these two men. Which of them are we to believe? Or, if their contradictory testimony leaves the question in doubt, how is the doubt to be decided? Surely the complainant is bound to make out his case. He should make it out, not only by preponderance of proof, but by a very clear preponderance. The claim is of the whole property and assets of the firm of C. Nugent & Co., and of the individual partners. It is anomalous and startling. It should be supported by the strongest proof. Other parties, having nothing to do with the alleged transactions, suffer by it. Here are *bona fide* creditors, whose claims amount to nearly \$375,000, who have given credit to Nugent & Co., on the faith of their being in possession as reputed owners of a large factory, stock, and assets. If this is all swept away before their eyes by the claim of equitable ownership on the part of the bank, it is a case of great hardship, of which they have good right to complain, unless the soundest reasons exist for such an interposition. It has for ages been a rule of the English bankrupt law that possession with reputed ownership renders property liable for the debts of the possessor to those who have given him credit on the faith of it. The principle of that law is just. We have no such law in terms, but, wherever the case occurs, equity will favor the application of the



principle. It adopts it fully in favor of *bona fide* purchasers against those claiming the benefit of a secret trust. The principle referred to should at least be so far regarded in a case like the present as to require the party claiming the benefit of the trust to make very clear and satisfactory proof of his right to make such claim.

On the question of credibility as between the two witnesses, it seems to me that the preponderance of circumstances is greatly in favor of Nugent. There was nothing in the character of the firm's business, or in their mode of carrying it on, or in the habits of the men, to account for such a large dissipation of funds as that which is charged against them, in addition to the legitimate debts which it is conceded they owe. They seemed utterly aghast at the charge. They knew that they were largely in debt to *bona fide* creditors; they knew that they were owing the bank a considerable amount, contracted in the usual course of business; they knew that their paper was held by several directors of the bank, negotiated by Baldwin for their use; but that they had been drawing and using the bank's money in an irregular way till the amount rose to \$2,000,000 was utterly beyond their comprehension or belief. It is difficult to believe that any such sum was ever used by them or on their account. Where, then, did the money go? It must have gone somewhere. We are at no loss to see where it might have gone when we are informed, as we are by the testimony, and by the charges made by the complainant in a bill filed by him against Baldwin and his brother, that Baldwin's personal use of moneys was very large. He was intrusted (such is the allegation of the complainant) with almost the sole management and control of the financial affairs of the bank, by which he was enabled at his own will so to manipulate the accounts and to control the disposition of its funds as to permit him to apply such funds to any use and purpose he might desire, and to use the same for his own purposes; and his personal accounts with the bank show very large transactions, amounting in one year to over \$2,000,000, and on an average, since the year 1871, to about \$500,000 a year. The complainant adds that he had been unable to verify the statement of the cashier that the entire misapplication and abstraction of the funds of the bank had been for the benefit of the said firm of C. Nugent & Co.; but he had reason to believe that very large sums, funds of the bank, had been from time to time fraudulently embezzled and misapplied by Baldwin, and used for his own purposes, in the purchase of stocks, in loans to individuals, and in other speculations. It also appears that Theodore Baldwin, the brother of the cashier, who was first teller of the bank, had the handling of the cash of the bank, and became owner of a large amount of real estate; and that he dealt largely in stocks, and met with some heavy losses; and that, on one occasion, he delivered to his brokers in New York \$40,000 in bank-bills. Yet the said Theodore had only a salary of \$3,500. It was shown that he was cognizant of the abstraction of the bank's money by his brother, and made many false entries in the books of the bank to cover up those irregular transactions. With such opportunities to obtain money and to dispose of it, there is no great difficulty in conceiving how the funds of the bank were probably employed.

Nor is it difficult to understand that the manipulation and management of the finances of such a large manufacturing concern as that of Nugent & Co., somewhat straitened, and compelled to borrow money both from the bank and from private parties, presented to the cashier a convenient means of carrying on operations which he might desire to conceal. It is significant that the offer to manage the financial affairs of the firm took place in 1873, a year noted for stringency in the stock speculating world. It is not at all improbable that some of Baldwin's ventures may have been unfavorable at or before that time, and that the unlimited use and control of the name and securities of the Nugents may have presented itself to him as a convenient means of facilitating his own operations. There is no direct proof of Baldwin's gambling in stocks. He himself denies it, and endeavors to throw the procuring cause of his delinquencies on Nugent. His denial is not entitled to much weight after his admission of having committed so many guilty acts as he was obliged to do in order to verify the false periodical reports of the bank's condition, and to deceive the bank examiners; and it is not to be wondered at that after the bank's failure any brokers with whom he may have transacted business would desire to keep in the background, and not allow his operations with them to be known. Looking over the entire case, only a small part of which has been adverted to, I feel obliged to say that I cannot believe Baldwin's story that the \$2,000,000 which disappeared went into the Nugents' concern. Much less can I believe that they were cognizant of or implicated in any such abstraction. Nugent's testimony, on the other hand, seems to me to be generally entitled to credit. It accords better with the probabilities of the case than the statements made by Baldwin. In my judgment, therefore, the main ground of the bill is not supported by the proofs.

Another difficulty in the complainant's case is the want of identity of the property claimed with the proceeds of the money abstracted from the bank. Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed,—that is to say, the stock on hand, finished and unfinished,—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank. On the contrary, the goods and stock on hand were purchased of the other creditors of Nugent & Co. almost entirely, if not wholly, on credit, and really stand in the place of,

and represents the debts of, the firm due and owing to said creditors. This is true with regard to all the raw stock on hand, and with regard to all the stock and materials from which the manufactured or partially manufactured goods were produced. If any moneys derived from the bank entered into the latter, they were those moneys which were regularly drawn by checks of the firm weekly for the payment of their hands. It seems impossible, therefore, to sustain any such general charge or trust upon the goods and property of Nugent & Co. as that which has been set up and claimed by the complainant.

The question then arises whether the bill may be retained for the purpose of disposing of the general equities of the case as between the parties. There are the assignment, and the cross-bill, which seeks to set it aside, and to have the fund in court applied to the payment of the judgments of Eugene Kelly & Co., and the other creditors who have obtained judgments. If the bill is absolutely dismissed, the entire litigation respecting the assignment goes for nothing, and the parties must begin over again. This is a result not to be reached, if it is possible to avoid it. It seems to me that the bill may be retained. The complainant, in his supplemental bill filed in pursuance of the order of March 30, 1882, prayed in the alternative that, if the prayer of his original bill should not be granted, the property of Nugent & Co., or the proceeds thereof in the hands of the assignee, might be distributed equally among all their creditors, including the complainant himself, as receiver of the bank. Issue was made on this bill, and the defendants, by their cross-bill, raised the question of the validity of the assignment. The whole case, therefore, is before the court. I will state shortly the conclusions to which I have come on these supplemental issues, without going at large into the reasons of them:

*First.* I think that the assignment, notwithstanding it may have been made at the instance of the complainant, or in his behalf, cannot be set aside as fraudulent and void; and intended to delay and hinder the creditors of Nugent & Co. It is intended for the benefit of all the creditors; and the ordinary creditors of the firm, or nearly all of them, have voluntarily presented their claims before the assignee, without any protest as to the validity of the assignment. This estops them from making objections to its validity.

*Secondly.* I think that the judgment creditors must come in *pro rata* with the creditors at large. The *status* of the parties in relation to each other is that which it was when the assignment was made.

*Thirdly.* I think that the court having possession of the fund may administer the estate under the assignment in accordance with the state law. It is only necessary that the rights of the parties should be preserved substantially as secured to them by that law. One of these rights is that of contesting the validity of claims presented for allowance. The other creditors of Nugent & Co., who have regularly presented their claims, and have filed exceptions as provided by law, should have the opportunity of contesting the claim of the bank, if they see fit to do so. This right has been substantially accorded to Eugene Kelly & Co, by their be-

ing made parties in the cause, and defending the same. They have filed an answer and cross-bill, and taken testimony as fully as they desired. The result is before the court in the extended record of the case. It is not probable that any further light could be shed upon the questions involved. But as I am informed that one of the other creditors, who duly presented his claim to the assignee, did file exceptions to the claim of the complainant within the time prescribed by law, provision should be made in the decree for opportunity to him to adduce evidence in support of said exceptions. As the case is on the equity side of the court, a jury trial is not necessary. I am not satisfied from the evidence produced that the complainant is entitled to a judgment against Nugent & Co. for the full sum which has been claimed under the assignment, which amounts to \$2,191,902.69. This includes over \$900,000 which were never credited to Nugent & Co., and from which there is no evidence, except the general allegations of Baldwin, that they ever received a dollar of benefit. The common case was simply this: On a certain date a draft of Nugent & Co. on Martin & Runyon would be charged on the books of the Newark bank to the Mechanics' Bank of New York, as being sent to it for collection. That draft would either be replaced before reaching the New York bank, or would be taken up after it had reached it, by a check of Baldwin as cashier; thus using or appropriating so much of the Newark bank's funds. Some of these drafts on Martin & Runyon were found in a tin box of Baldwin's, found in the vault of the bank. Now, Nugent & Co. did not derive the benefit of a dollar from this transaction. It was simply a device of Baldwin's to increase the apparent account of the Newark bank against the New York bank, evidently done to cover up some embezzlement of the bank funds which had previously taken place. The bank lost nothing and gained nothing by the transaction effected by means of the draft. It got an increased credit with the New York bank, which was balanced by its funds checked out by Baldwin, or taken in the shape of bank-bills to meet or replace the draft. Nugent & Co. had nothing to do with it in any way, except as Baldwin used one of their blank drafts as an instrumentality in raising the apparent credit of the bank against its New York correspondent. He might have used any other piece of paper in the same way, for the like purpose. As to that part of the account put in by the complainant which went to the credit of the Nugents, amounting to \$1,014,750.17, it seems to me that, whether they received the benefit of the money or not, they are bound for it. The authority given by them to Baldwin to manage their financial affairs would, I think, be sufficient to make them legally liable for this amount.

This is the general result to which I have come, after quite a careful examination of the case. It is unnecessary, and almost impracticable, to exhibit in an opinion all the grounds and reasons which have led to it. The conclusion is that there must be a decree to dismiss the bill of complaint so far as it prays for the establishment of a trust *ex maleficio* against the property or assets of the firm of C. Nugent & Co., or of the individual partners of said firm; and also to dismiss the cross-bill so far

as it seeks to have the respective deeds of assignment executed by Christopher and James Nugent as partners and as individuals declared fraudulent and void, and to have the claim of the complainant entirely disallowed. Also to declare the said deeds of assignment to be valid and operative, and to establish and allow, under said assignments, the claim of the complainant as a creditor of said Christopher and James Nugent to the amount of \$1,014,750.17, and the claims of the other creditors to the several amounts set up and duly verified by them respectively. And the decree should further provide that the fund remaining in the hands of the receiver and assignee, George B. Jenkinson, after payment of costs and expenses, be distributed among said creditors *pro rata* according to the amount of their several claims as above stated. The complainant will be decreed to pay the costs of both parties up to the time of filing the cross-bill. The counsel will prepare a decree in accordance with this opinion.

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*In re* THOMAS *et al.*

(Circuit Court, D. Colorado. June 6, 1888)

**ATTORNEY AND CLIENT—MISCONDUCT OF ATTORNEY—DISBARMENT.**

Upon a motion to disbar attorneys for malpractice, it was shown that they were notified that the deposition of a witness for whom they had sought would be taken by the adverse party. Being desirous of knowing what he would testify, they sent an agent to see him, with instructions to try to incline him as favorably towards their client as possible. Their agent induced the witness to keep out of the way, making him drunk for the purpose, and got him to come to the city where one of the attorneys was, and have a consultation with the latter at his office. There was no evidence that the attorneys directed the witness to be made drunk, or to be kept out of the way, nor that he should be bribed or intimidated. *Held* not sufficient misconduct for disbarment.

**Motion to Disbar.**

MILLER, Justice, (*orally.*) The case of the prosecution against Charles S. Thomas, a member of the bar, and James M. Downing, having been considered by Judge BREWER and Judge HALLETT, and they finding some difficulty in coming to a conclusion on the subject, the papers, with the testimony and printed arguments of counsel, were sent to me at Washington last winter, and I agreed to look into it; and the decision of the case has been practically left to me. It is not a very agreeable matter, and the record was a very long one. I did not have an opportunity to examine it until the end of the term at Washington. I propose to dispose of it this morning.

The charge made against these parties is a very serious one. Stripped of its verbiage, it is that Mr. Thomas and Mr. Downing, being employed as attorneys in a contest in one of the courts, undertook—to use a short and expressive phrase—to “tamper” with the witness of the other side.

The substance of the charge is that they, having received notice that the deposition of this witness, whose name is Oswalt, I believe, would be taken at Salt Lake City, sent an agent of theirs to find him out, and to get him away from Salt Lake City, so that the deposition would not be taken at all; and that they further brought him to this city, and that Mr. Thomas had private interviews with him, and that he was then spirited away, and registered at the hotel by a false name, so that even here he could not be found; and in various ways partaking of that character, that these attorneys undertook to thwart the ends of justice by contriving to get this witness out of the way, and also by offering him inducements to swear favorably to their client. If this charge were established by the evidence, I would have no hesitation in turning out the highest man that ever lived, if I had power to do it. The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right; and it should be understood that they are subjected to the same responsibilities. They have a duty, undoubtedly, to their clients; but that is not the first duty, as is generally supposed. Their first duty is the administration of justice, and their duty to their client is subordinate to that. With regard to what has been proved in this case, I am happy to say that I do not think the case is made out in that full sense of an intention to do the great wrong which is charged against these parties that it should be proved, to justify an order to dismiss them from the bar. With regard to Mr. Downing, I shall say no more in these remarks, because he must stand or fall with Mr. Thomas. Mr. Thomas very manfully takes the whole of this matter upon himself. The instructions under which Mr. Eames, who did all this wrong, acted, were submitted by Mr. Downing to Mr. Thomas, as senior counsel in the case, who examined them, who approved of them, and who directed them to be delivered to Mr. Eames. It appears that this man Oswalt was familiar with the facts of the early inception of a mining claim which is in contest between Mr. Tobey and a Mr. Wheeler, and that it had been difficult to find out where he was. It may perhaps be said it sufficiently appears that both sides were anxious to get hold of him. Certainly it appears that Mr. Thomas, for his client, the defendant Wheeler, had been seeking for the whereabouts of this man for a good while, and his first intimation about where he probably was, was the receipt of the notification given by counsel on the other side that Mr. Oswalt's deposition would be taken on commission at Salt Lake City. Thereupon he and Mr. Downing instituted proceedings by which Mr. Eames, who is not a lawyer, as I understand it, but is some kind of an agent that does not shine very creditably in this connection, was requested to go to Salt Lake City and find Oswalt, and have a conversation with him, and, as is averred, get him away from there and

bring him here, where he could be interviewed by Mr. Thomas. It is very clear that Mr. Eames did go to Salt Lake, and found his man, had conversations with him, made him drunk, got him away so that the deposition could not be taken at the time appointed at Salt Lake, brought him to this place, took him to the office of Mr. Thomas, and Mr. Thomas had the conversation with him. Now, if it were clearly proved that Mr. Thomas gave directions and instructions to do all of this, I think his case would be a bad one. But Mr. Eames' instructions, so far as Mr. Thomas is concerned, are in writing, and what is not in writing depends mainly on the testimony of Mr. Thomas himself; and I must say, on behalf of Mr. Thomas, he swears with a great deal of apparent candor, with none of the usual effort to evade, and not to recollect, and get round things; and it is favorable to him, I think, that he states the case just as he understood it, and tells the truth. Mr. Thomas' view of some of these things may be unfortunate; and his explanation of why he did some of these things does not, in my opinion, come up to the highest standard of honor in the legal profession. He has views about those things which I would not approve. He has notions about the rights and duties of an attorney to look after his client's interests, and to seek interviews with his opponent's witnesses, and to bring them to his office, and things of that kind, which I do not think are justifiable. But we cannot expect every attorney of the court to be imbued with the very highest standard of legal ethics, and it would be a very dangerous rule that would throw every man over the bar whose views upon that subject were of a lower grade than those of gentlemen of a higher notion of the moral obligations of an attorney. It is somewhat like the general distinction between crimes punishable by statute and moral delinquencies, to which men must be left for their correction to the public sentiment of the community, or to religious principles, or to their general sense of right and wrong.

The main charge against Mr. Thomas, and the one which presses the hardest, is in these written instructions, which were prepared by Mr. Downing, were submitted to Mr. Thomas, considered by him very fully, and handed to Mr. Eames as the guide of his conduct. I do not think it necessary to read those particular sentences which bear the hardest upon Mr. Thomas, but they do imply a desire that this witness shall be seen by Mr. Eames before this deposition is given; they do imply a desire that Mr. Thomas shall in some way have an opportunity of talking with Mr. Oswalt; they do imply a desire that Mr. Eames shall, in his interview with Mr. Oswalt, if he obtains one, endeavor to make a favorable impression on Oswalt in regard to Mr. Thomas' client, (I think that is the worst expression in the instruction,) that he shall have a talk with him, and that he shall try to incline him favorably to Mr. Thomas' client. Certainly that cannot be approved of. Certainly it is a thing that ought not to be done. Certainly the practice of the law would become a very bad thing if the lawyer opposed to a man shall go to his witness and seek to impress him favorably to their side, or against him for whom he is known or expected to be a witness. I disapprove of such a thing as that

very much. I feel bound to say here that I do. But that is not the question that I am to decide. I am to decide whether Mr. Thomas was guilty of such moral delinquency and intention of wrong as disqualifies him for practicing law in this court. I cannot say it. I think Mr. Thomas acted very unwisely, very imprudently; did not act well in the matter. I should hate to see other attorneys here follow that example. But Mr. Thomas says, and swears, (and there comes in the value of the frankness with which he does swear; he does not deny all that; he takes it upon himself)—he says:

"I approved of these instructions, but I never thought for a moment of any improper inducements being held out to Mr. Oswalt to make him swear otherwise than what he would have sworn. It was no part of my advice that he should be tampered with by being made drunk, carried off to a hotel, or kept out of the way. I had no purpose of that kind; and the language does not necessarily imply it. I simply knew he was a very important witness for both sides, and that he had been hiding out of the way for months and months, and we wanted him as badly as the other side. I wanted an opportunity to know from his own mouth what he would swear to."

That is the substance of what Mr. Thomas says, and I am inclined to think he tells the truth. I do not think he meant bribery, or intimidation, or any guilty means of achieving the object which he had in view. The trouble is that that kind of a thing is susceptible of misconstruction; not only misconstruction, it is susceptible of abuse, and it is one of the means which lead to abuse.

Now, under the English system of law by which counsel and attorneys practice in the courts of that country, and from which we derive most of our law upon the subject, the attorney and the counselor or barrister have separate and distinct duties. All this which Mr. Thomas undertook to do through Mr. Eames belongs in that country to the attorney at law, or the solicitor in chancery,—the man who never appears in court at all, who gets up the testimony, who learns what witnesses will swear, or at least what the witnesses on his side will swear to, who endeavors to inform the barrister or counselor what will be proved on the other side,—and he, having ascertained all this, puts that into a paper called a "brief." That is the origin of the word "brief" in the practice of the law. This attorney, if it is a case at law, hunts all this up, ascertains, has his talk with his witnesses, learns from their own mouths what things they will testify to, and puts it down on paper, hands it to the barrister; and these are called "instructions" in the English practice. In those early days the lawyer made his speech before the evidence was offered. He says, "I am instructed that such and such things will be proven," and he refers to his paper, and he relies upon that instruction of the attorney; but he never has an interview with the witness, and it is considered unprofessional for him to have any talk in advance with a witness, even on his own side. But in this country that system has not prevailed. There is no separation of the duties of an attorney and a counselor. There is none in practice, although often those admitted to the bar are sworn in as attorneys and counselors both, but they perform the functions of both; and so the lawyer, placed as



Mr. Thomas was, is very often compelled for himself to have interviews with his own witnesses, and to ascertain what they will testify to in the matter; and in the same way he must seek, either from his client or somebody else, to know what will be the case against him.

Now, in this double capacity, Mr. Thomas was seeking for light, and pursuing, as he supposed, the best interests of his client, as he swears; and I think did believe consistently with the proper course for a lawyer exercising both the function of an attorney and counselor. I think he was mistaken in the propriety of some of the efforts he made to discharge that duty. I should be sorry to have them prevail as the common modes of practice in this country. But, having read all the testimony in this case, and read the deposition and sworn answer of Mr. Thomas, I cannot feel that he was morally guilty of such intentional misconduct as justifies his expulsion from the bar. The motion to that effect is accordingly overruled, and also with regard to Mr. Downing.

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UNITED STATES *ex rel.* COND *et al.* v. BARRY *et al.*

(Circuit Court, W. D. Michigan. October 15, 1888.)

**BANKS AND BANKING—SHAREHOLDERS—RIGHT TO VOTE—UNPAID LIABILITIES.**

The past due and unpaid liability of a shareholder, which, under Rev. St. § 5144, disqualifies him from voting at an election of directors of a national bank, is limited to his liability for unpaid subscriptions to stock.

**Information in the Nature of a *Quo Warranto*.**

This was an information in the nature of a *quo warranto* to oust the respondents from the directorship of the Farmers' National Bank of Constantine. The facts, most of which were admitted, were substantially as follows: At an election of directors, held January 10, 1888, the relators received 249½, and the respondents 250½ votes. The respondents, with two others who were elected unanimously, proceeded at once to organize, by the election of Charles H. Barry as president. The validity of the election of the directors Barry, Markham, and Thorne was attacked upon the ground that Charles H. Barry, president of the bank, and owner of 93 shares, was liable to the bank upon commercial paper which was due and unpaid at the time of the election, and therefore that his vote was cast in violation of Rev. St. § 5144, which declares that "no shareholder, whose liability is past due and unpaid, shall be allowed to vote." The facts were that he had become liable as surety upon two notes of \$857.40 and \$94, which had matured a few days before the election, and remained unpaid until about January 14th. At the time of the election he had forgotten the existence of these notes, which he had signed as joint maker, though he was really only a surety, and for the purpose of obtaining the custom of the principals for his bank.

C. F. Uhl and Dallas Boudeman, for relators.

*M. L. Howell and John B. Shipman, for respondents.*

BROWN, J., (*after stating the facts as above.*) This is a very simple case. It turns practically upon the construction to be given to the last clause of section 5144, which provides that "no shareholder, whose liability is past due and unpaid, shall be allowed to vote" at any election of directors of a national bank. If, by the word "liability," in this case is meant the liability of the shareholder of every name and nature, or even his liability upon commercial paper, it is difficult to avoid the conclusion that Barry was disqualified to vote. If, upon the other hand, the word is limited by the context to his liability for unpaid subscriptions to or assessments upon stock, then it is clear that he was not disqualified, and that the respondents were duly elected directors. I have no doubt whatever that the latter is the proper construction.

The section in question is found in the first chapter of the national banking law, entitled "Organization and Powers." The prior sections provide for the formation of national banking associations by any number of natural persons, not less than five, for the requisites of the organization certificate, for the acknowledgment and recording of the same with the comptroller of the currency; defines the corporate powers of banks, the limitations under which they may hold real estate, the requisite amount of capital, which shall be divided into shares of \$100 each; declares that at least 50 per cent. of the capital stock shall be paid in before the bank shall commence business, and the remainder shall be paid in monthly installments of at least 10 per cent. each. It further provides that whenever a shareholder fails to pay an installment upon his stock, the directors may sell the stock of such shareholder at auction, and the excess, if any, over the amount then due, shall be paid to the delinquent shareholder. After providing both for an increase and reduction of the capital stock, the statute further declares (section 5144) that "in all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing, but no officer, clerk, teller, or book-keeper of such association shall act as proxy, and no shareholder, whose liability is past due and unpaid, shall be allowed to vote." The succeeding sections provide for the election, qualifications, and oath of directors and of the president, limit the individual liability of shareholders, and make other provisions with reference to the organization of associations from state banks. Other chapters relate to the obtaining and issuing of circulating notes, the regulation of the banking business, and the subject of dissolution and receiverships. Found in the connection in which it is, it is evident that section 5144 was intended as a piece of legislative machinery for the organization of national banks. The clause in question, declaring the circumstances under which a shareholder should be disqualified from voting, is in the nature of a penalty, and should be limited in its construction to the object sought to be accomplished by the general provisions of the chapter. By the act in question congress proposed to

establish a system of responsible banks throughout the country, which should be under the authority and control of the federal government, and subject to the supervision of federal officers. It had been a common complaint against the banking laws of the several states, that subscriptions to stock were often little more than nominal, and that the capital was too frequently represented by promissory notes, which, upon the insolvency of the banks, proved to be wholly worthless. To obtain the confidence of the public, it was important that the capital stock should be paid in cash, and to secure such payment it was provided that the stock of delinquent shareholders should be subject to sale for non-payment of assessments, and also that such shareholders should be debarred from voting at any election of directors. This was a perfectly reasonable requirement, but it would not be reasonable that every liability of the shareholder should be adjusted before the election. A large amount of the business of every bank is done by the shareholders themselves, who are sometimes numbered by the hundred, and it would naturally be a matter of frequent occurrence that there would be unpaid liabilities of some of these at the time of the election. Against them the bank would have the ordinary legal remedies it has against its other debtors, but it is difficult to see why it should be entitled to any extraordinary remedies; especially when, as in this case, the liability is only that of a surety, and the failure to pay merely accidental. Such a construction would not only subject the shareholder to a penalty for the non-payment of his own debts, but would disentitle him to vote by reason of the non-payment of the debts of others, in which he has no personal interest beyond the obligation to pay them in case such other persons fail to do so. I think the statute should be limited to the liability of the shareholder for the non-payment of his subscription as such shareholder.

Judgment will therefore be entered for the respondents, with costs, against the relators. I am authorized to state that the circuit judge concurs in this opinion.

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### McKEE v. SIMPSON.

(Circuit Court, N. D. Texas. May 31, 1888.)

#### 1. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—LAND CERTIFICATES—TITLE.

Certain land certificates of an insolvent decedent were sold at auction in accordance with an order of the probate court, and, the successful bidder having been reported to the court as the purchaser, an order was issued confirming the sale and directing the conveyance to be made in accordance with said account of sales. The administrator, however, under circumstances amounting to the express direction of the purchaser at the auction, conveyed the land to the law partner of the latter, by an instrument reciting the order of the court, and also that the purchaser at the auction was really bidding for his partner. *Held* that, although under the law at the time, the confirmation by the court of the auction sale vested title in the successful bidder without fur-

ther conveyance, yet, it being the fixed custom to make such conveyances by further writing, the title, under the circumstances, would be held to have been vested in the grantee of the administrator's conveyance.

**2. SAME—VALIDITY OF INDEBTEDNESS.**

Where an order by a probate court for the sale of land recites that certain claims against the estate in process of settlement have been allowed and approved, the appellate court, called upon to determine the validity of the sale, will not go back of such order to determine whether any indebtedness had been authenticated, allowed, and approved.

**3. SAME—ANCILLARY ADMINISTRATION—LACHES.**

An ancillary administration, granted upon the estate of an intestate, is not void on the ground that 12 years elapsed after the testator's death before such administration was granted.

**At Law.** Suit for land.

Action to recover lands. A jury was waived, and the questions of law and fact submitted to the court.

*John L. Henry*, for plaintiff.

*William L. Crawford*, for defendant.

**MCCORMICK, J.** The plaintiff sues to recover a certain tract of land described in her pleadings, which she says is a part of the community estate of herself and her first husband, William Irvin, who died in October, 1851, leaving no child, and intestate. And if the land did belong to their community estate at the time of her said husband's death, she is entitled to recover. This land was patented to John M. Ross, assignee, by virtue of Toby scrip land certificate No. 864, for 640 acres. John M. Ross appears by the proof to have resided in Natchez, Miss., and to have been engaged in business there, and to have died at his lodgings adjoining his office in that city in 1837. Administration was opened on his estate in Mississippi at the September, 1837, term of the probate court for the county in which the city of Natchez is situated. In the due course of that administration, the estate was declared insolvent, and a distribution of 33 $\frac{1}{3}$  per cent. was ordered by the court to be distributed by the administrator to the creditors. One of the creditors was A. L. Gaines & Co., who, on the 1st of August, 1838, presented a claim against said estate for \$2,043.62, which was duly allowed by the administrator, and approved by the judge of probates. On the 16th March, 1840, A. L. Gaines indorsed on this claim a receipt for \$674.38 paid him thereon by the administrator in Mississippi. On the 28th of January, 1849, one Thomas Newcomb applied to the probate court for Bexar county, Tex., for letters of administration on the estate of said John M. Ross, representing that he was formerly of Bexar county, and that he left certain property in the town of San Antonio, in Bexar county, to-wit, 10 land certificates of 640 acres each, and that decedent died indebted to A. L. Gaines, of Natchez, in a large sum of money, "which said debt is still unpaid;" and that said Newcomb had been solicited by said creditor to take administration upon said estate. On the 26th February, 1849, administration was granted, and Newcomb qualified as administrator. On the 26th November, 1849, said court in Bexar county made an order reciting that Newcomb had died, and declaring the estate of John M.

Ross vacant. On the 9th of May, 1850, Henry Beaumont, by his attorney, William Irvin, presented his application to said Bexar county court, showing that as the representative of certain creditors of Ross, said Beaumont had procured Thomas Newcomb to administer upon said estate, and, Newcomb having died, he, (Beaumont,) at the instance of said creditors, asks that letters of administration *de bonis non* may now be granted to him. On the 27th of May Henry Beaumont presented another application to said court, referring to his former action, and showing that he had applied for letters *de bonis non* because he could not find any one else willing to take the administration; that now William H. Ker was willing to take it, and asking to be permitted to relinquish his right to appointment in favor of Ker, and that the court would appoint Ker instead of himself, which was done, and Ker qualified as such administrator. On the 25th of November, 1850, William H. Ker, as administrator, obtained an order of the court to sell said 10 land certificates for the payment of debts and the expense of administration. The orders of said court recite that the claim of A. L. Gaines had been allowed by the administrator, and approved by the probate judge, against the estate of John M. Ross for the sum of \$11,106.78. In accordance with the order of sale, the certificates were sold at public sale by the administrator on the 7th of January, 1851; and at the sale six of the certificates, including the one numbered 864, (the one involved in this suit,) were bid off to William Irvin. The sale was duly reported to the court, showing William Irvin to be the purchaser of certificate No. 864, and of five others, and showing the name of the purchaser of the other certificates, and the terms of sale and price for which each was sold. The sale was duly confirmed, and the order confirming the sale directed the administrator "to make conveyances in accordance with said account of sales and the requisition of the law to the respective purchasers of the certificates aforesaid." On the 12th day of April, 1851, the administrator, William H. Ker, by a formal instrument in writing, executed in the presence of two witnesses, (as a deed to land was then executed,) conveyed certificate No. 864 (and certificate No. 867) to Henry Beaumont, reciting in said instrument the facts as to the order of sale, the making the sale, and the bidding off of these certificates at the sale to William Irvin; and reciting further that in bidding these two certificates off at the sale the said William Irvin was bidding for said Henry Beaumont. The proof shows (and this is undisputed) that William H. Ker was the father of plaintiff, and that plaintiff was at that time the wife of William Irvin; and that William Irvin and Henry Beaumont were then, and for several years previous thereto, and thereafter until said William Irvin's death, partners in the practice of law. And the proof strongly tends to show, and does show to my satisfaction, that as such partners in the practice of law Beaumont and Irvin held the claim of A. L. Gaines for collection, and were to get one-half of what they could recover on it from the estate of John M. Ross, the expense of administration in Texas to be paid out of their half. In my opinion, the proof clearly shows that the attorneys conducted the business, and that William H. Ker was merely the nominal adminis-

trator, signing and qualifying to papers that required the personal action of the administrator, but which had all been prepared and arranged by the attorneys. Beaumont testifies that this business was almost, if not altogether, wholly managed by William Irvin, and I see no reason to doubt his testimony on this point, and to my mind the record of the probate proceedings strongly supports this part of Beaumont's testimony. The testimony of John Henry Brown, who (on the stand) says he knew William Irvin well, and was familiar with his handwriting, and knew it well, is that, in his opinion, the body of the conveyance of certificate No. 864, (and No. 867,) above referred to, is in the handwriting of William Irvin.

It is urged by the defendant that the Texas administration on John M. Ross' estate was void, because of the length of time that had elapsed between his death, in 1837, and the opening of the administration in Bexar county. To this I cannot agree. The case of *Martin v. Robinson*, 67 Tex. 371, 3 S. W. Rep. 550, and previous decisions, are express authority for a contrary holding.

It is also urged that the sale of the land certificates was void, because no indebtedness except the expense of the administration in Texas was ever authenticated and allowed and approved against the estate in Texas. But this proposition, I am of opinion, is conclusively met and overturned by the recitals in the orders of the court that the Gaines claim had been allowed and approved. However suspicious its wonderful growth in 10 years may appear to us, we cannot, in this proceeding, inquire into it. The defendant holds title from the heirs of Ross and from Beaumont, and relies, in case the administration and sale are held to have been valid, upon the conveyance of the certificate No. 864 by the administrator to Henry Beaumont, and the recitals in that conveyance, coupled with the evidence of Beaumont and Brown in reference thereto. The plaintiff, on this point, contends that the land certificate was personal property. That the confirmation of the sale by decree or order of the probate court did by law (though not by the terms of said order) vest the property in or evidenced by said certificate in William Irvin; and that, though William Irvin might thereafter transfer it to Beaumont by delivery, that William H. Ker could not, for that it passed from Ker by the order of confirmation, and that no conveyance from him was necessary or proper, the terms of the order of confirmation to the contrary notwithstanding. By numerous decisions of the supreme court of Texas, made since these transactions occurred, land certificates, are held to be (and to have always been, of course) personal property; and by the probate law in force when this sale was made the order of confirmation of an administrator's sale of personal property (other than slaves) vested the title in the purchaser, and a written conveyance from the administrator was unnecessary. But because land certificates evidenced a right to land in the owner of the certificate, and in fact in many cases the right to land under our colonization, head-right, bounty, and donation laws existed and was the subject of sale even before the certificate issued, the practice grew up, and in the older settlements was well nigh universal, to put

contracts in reference to these rights and in reference to sales of certificates (with certain exceptions) in writing; and, while it was doubtless competent for the probate court in Bexar county to have vested the title to certificate No. 864 in William Irvin, as the purchaser by the express terms of the order of confirmation of the sale to him, and while such may have been the legal force of said order without such terms, and notwithstanding the direction to the administrator to convey, as the administrator, in obedience to the terms of the order, and in obedience—as all the parties then doubtless believed—“to the requisitions of the law,” did convey the certificates by writing in the form of a deed to land, and as this certificate No. 864 was thus conveyed to Henry Beaumont, as above shown, with the full knowledge, as I must believe from the proof, of William Irvin, and under circumstances equivalent to his express direction, I do not see how I can escape holding that this was a transfer and delivery of said certificate by Irvin to Beaumont, and that therefore no right in said certificate remained in Irvin which the plaintiff could take as the survivor at his death. The judgment of the court, therefore, must be for the defendant.

### FOTHERINGHAM v. ADAMS EXPRESS CO.

(Circuit Court, E. D. Missouri, E. D. September 24, 1888.)

#### 1. FALSE IMPRISONMENT—WHAT CONSTITUTES.

For about two weeks plaintiff was constantly guarded by defendant's detectives without any warrant, and all his movements were under their control, he being repeatedly urged to confess his guilt, and examined in regard to the robbery in such a manner as to clearly show that he was regarded as a criminal, and that, if necessary, force would be used to detain him. *Held*, that these facts warranted a finding that plaintiff was unjustifiably deprived of his liberty.

#### 2. SAME—DAMAGES—PUNITIVE—EXCESSIVE.

In such a case it is within the discretion of the jury to award punitive damages, regardless of the existence of actual malice, but a verdict for \$20,000 is excessive.<sup>1</sup>

At Law. On motion for new trial. 34 Fed. Rep. 646.

Action by D. S. Fotheringham against the Adams Express Company. Verdict for plaintiff.

C. P. & J. D. Johnson, Thomas B. Harvey, and H. M. Bryan, for plaintiff.

Martin, Laughlin & Kern, for defendant.

THAYER, J. With reference to the motion for a new trial which has been filed in this case and duly considered, it will suffice to say, that I entertain no doubt that the jury were warranted in finding that plaintiff

<sup>1</sup>As to the allowance of exemplary damages in actions for false imprisonment, and what are excessive damages in such actions, see *Clarke v. Improvement Co.*, 85 Fed. Rep. 478, and note.

was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed that during that period he was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found (as they were warranted in doing) that during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without a warrant. It is manifest that the court ought not to disturb the finding on that issue.

The most important question that arises on the motion is whether the damages assessed are so excessive that the verdict ought to be set aside on that ground. It is apparent that the damages allowed are much greater than the actual damages plaintiff can be said to have sustained, solely in consequence of the false imprisonment. The verdict therefore cannot be justified on the assumption that it was intended to be merely compensatory. Without doubt the jury intended to inflict exemplary or punitive damages. The amount of the verdict can be explained on no other hypothesis. A question has been raised as to the right of the jury to award such damages in the absence of malice. It is urged that in the matter of depriving the plaintiff of his liberty without warrant, the defendant acted without malice, and that the jury have substantially so found by finding in defendant's favor on the counts for malicious prosecution. With reference to this contention it is only necessary to say that the right of the jury to assess punitive damages in this class of cases does not necessarily depend upon the existence of malice, using that term in its ordinary sense. Punitive damages may be awarded when a wrongful act is done willfully, in a wanton or oppressive manner, or even when it is done recklessly,—that is to say, in open disregard of one's civil obligations and of the rights of others. The cases on the subject show that in the matter of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrong-doer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others. *Huckle v. Money*, 2 Wils. 205; *Beardmore v. Carrington*, Id. 244; *Merest v. Harvey*, 5 Taunt. 442; *Conrad v. Insurance Co.*, 6 Pet. 268; *Day v. Woodworth*, 13 How. 363; *Voltz v. Blackmar*, 64 N. Y. 440; *Drohn v. Brewer*, 77 Ill. 280; *Sherman v. Dutch*, 16 Ill. 283; *Mc-*



*Bride v. McLaughlin*, 5 Watts, 375; *Turnpike Co. v. Boone*, 45 Md. 344; *McWilliams v. Bragg*, 3 Wis. 424; *Green v. Craig*, 47 Mo. 90. I have no doubt that it was within the discretion of the jury in the present case to assess substantial damages as a punishment of the wrong-doer, and to deter others from committing like offenses. The plaintiff was taken into custody, originally, without a warrant, and was detained without even the color of legal process for such an unreasonable period that the wrong cannot be excused, under our system of government, by the plea that such arbitrary measures were necessary to discover the perpetrators of a great crime. Moreover, the jury probably found (as they may well have done) that the evidence disclosed some circumstances of oppression on the part of defendant's agents in the transaction, and a disposition on their part to override time-honored laws intended to protect persons from arbitrary arrests and imprisonment, as well as a reckless disregard of plaintiff's rights as a citizen. All of these considerations evidently had weight with the jury, and induced them to award exemplary damages.

While I am of the opinion that it was the right of the jury, if not their duty, to award such damages, yet I have not been able to conclude that the amount actually assessed was reasonable. The damages allowed appear to me to be excessive, notwithstanding the fact that defendant's wealth properly formed one element in assessing the same. The verdict is certainly very much larger than the verdicts that have usually been returned in this class of cases. If as large a verdict as the one now under consideration has ever been allowed to stand in an action for false imprisonment, the case has not been called to my attention, and probably no such case can be found. I am fully persuaded that in so far as the damages are concerned, the verdict would not commend itself at first blush, or on careful consideration, to the judgment of dispassionate men fully conversant with all the circumstances of the case, and for that reason I am of the opinion that it ought not to stand for the full amount assessed by the jury. But as the case consumed 15 days in the trial, and was probably conducted at great expense to the litigants, and as no exceptions, other than as to the amount of the damages, can fairly be taken to the verdict, a second trial ought to be avoided, if possible. I shall accordingly adopt the practice of permitting the plaintiff to remit a portion of the damages, if he so elects. Precedents exist for such practice, even where punitive damages are involved. *Burkett v. Lanata*, 15 La. Ann. 337. If plaintiff elects to remit at least 40 per cent. of the verdict, that is to say, the sum of \$8,000, within the next five days, the motion for a new trial on the first count will be overruled, but otherwise it will be sustained.

The motion for a new trial addressed to the second and third counts of the petition, on which a verdict was returned in defendant's favor, will in any event be overruled.

## LILLIENTHAL v. WALLACH et al.

(Circuit Court, S. D. New York. October 4, 1888.)

## JUDGMENT—RENDITION AND ENTRY—STAY PENDING NEW TRIAL.

On a motion to stay the entry of a judgment pending an application for a new trial, a decision was rendered that on plaintiff's filing security for costs he should have six weeks to make and serve his bill of exceptions or case, all proceedings for the entry of judgment except the taxation of costs to be stayed; but the order entered provided "that the defendants be stayed from entering judgment for the space of six weeks," and a resettlement of the order to make the stay coterminous with the making and service of the bill of exceptions or case was refused. *Held*, that the stay which was operative on the defendant was not that mentioned in the decision, but that prescribed by the order, and that a subsequent order extending plaintiff's time to make and file his case, "in accordance with the decision herein, and without prejudice to the stay of proceedings therein ordered," did not operate as an extension of the stay.

At Law. On motion to set aside a judgment.

*Lawrence & Waehner*, for plaintiff.

*Frank E. Blackwell*, for defendants.

LACOMBE, J. This is an action on the law side of the court. It was referred by consent, and the referee has found against the plaintiff on his claim, and in favor of the defendants upon a counter-claim set up by them. The opinion and report of the referee were filed July 12, 1888. Plaintiff wishing to move for a new trial upon a case, and wishing time within which to prepare a bill of exceptions to be used as such case, obtained on July 20, 1888, an order to show cause why all proceedings of the defendants to enter judgment or enforce the report should not be stayed until the hearing and determination of a motion by the plaintiff to vacate and set aside the report, and for a new trial in the action. This order to show cause was made returnable August 3, 1888, and all proceedings of the defendants to enter judgment or to enforce the report were stayed until the entry of the order to be made on the determination of the motion for such stay of proceedings. On August 3d the order to show cause came on for argument, and a decision was rendered that defendants might proceed to tax their costs, and that upon plaintiff's filing security for the same, leave should be given him to move for a new trial, under the rule of February 5, 1877; and that his time to make and serve the bill of exceptions or case should be extended six weeks from August 3d. The decision further provided for a stay of all proceedings of the defendants to enter judgment subsequent to taxation of costs. The order upon this decision was prepared, and its entry procured by the defendants. It provided that when the costs should have been taxed, "the defendants be and they hereby are stayed from entering judgment for the space of six weeks." The order bears date August 3, 1888. Plaintiff thereupon moved to resettle the order in several particulars; among others asking that the clause providing for the stay should be modified so as to be coterminous with the making and serving of the exceptions or

case. Motion to resettle was denied on the express ground that plaintiff would have abundant opportunity to move for an extension of the stay, as well as for an extension of his time before the six weeks expired. On September 12, 1888, plaintiff, desiring further time to make and file case and exceptions, obtained an order *ex parte* extending his time two weeks from September 15, 1888, "in accordance with the decision herein of August 4th, (*sic*,) 1888, and without prejudice to the stay of proceedings ordered therein." This order was duly served on defendants' attorney. Subsequently, and on September 21, 1888, after the expiration of six weeks from August 3d, judgment was entered.

The plaintiff now moves to set aside such judgment as having been entered in contempt of court at a time when such entry was stayed. The papers above recited do not sustain his contention. The "stays" which were operative upon the defendants were not those promised in the decision, but those prescribed by the orders. It is no doubt true that, had the order of August 3d provided for a stay coterminous with the time accorded for making and serving the case, it would have been signed as being sufficiently within the relief intended to be afforded by the decision. It did not however so provide, and when the plaintiff's subsequent effort to have it modified in order to secure the elastic stay to which he considered himself entitled was unsuccessful, he was plainly notified that he must obtain an extension of the stay in order to make it operative. The use of the words "without prejudice to the stay of proceedings ordered," (in the order of August 3d,) which were inserted in the order of September 12th, before the expiration of the six-weeks stay, is plainly not sufficient to extend such stay. The case is a very hard one for the plaintiff, but no ground is suggested upon which the judgment which the defendants regularly entered can be set aside.

The plaintiff may take an order extending his time to make and serve a bill of exceptions or case until October 13th, which is the last day of the present term. *Hunnicut v. Peyton*, 102 U. S. 333; *Muller v. Ehlers*, 91 U. S. 249. If plaintiff intends to move for a further extension and beyond the term, he must give notice of such motion; and if he prepares his case and exceptions within the time granted, and desires to apply for an order directing that it be filed *nunc pro tunc* as before the entry of judgment, he must give notice of such motion.

The motion to vacate the judgment is denied.

## UNITED STATES v. BORNEMANN.

(Circuit Court, D. California. September 24, 1888.)

**1. EMBEZZLEMENT—BY OFFICER OF UNITED STATES—INDICTMENT—DESCRIPTION OF MONEY.**

An indictment against a public officer for embezzlement of public funds need not state what kind of money was embezzled, whether coin, and, if so, whether gold or silver, or bills, or of what denominations, and how many of each.

**2. SAME—ALLEGATION OF OFFICIAL CHARACTER.**

An allegation in the indictment that defendant, "then and there being an officer of the United States, having the safe-keeping and disbursement of public moneys, \* \* \* did then and there knowingly, willfully, and feloniously convert and embezzle a portion of said public moneys intrusted to him," states defendant's official character directly, and not by way of recital merely.

**3. SAME.**

A count in the indictment, which omits to state what office defendant held, is demurrable.

**4. SAME—POSSESSION OF FUNDS.**

An allegation that the money was on deposit with the assistant treasurer does not negative defendant's possession and control in such sense as to render its appropriation an embezzlement, as, under the law, of which the court will take notice, he was an officer of the United States, and not a mere servant or agent of the assistant treasurer, and it was his duty to take charge of and handle the money.

**Demurrer to Indictment for Embezzlement.**

*John T. Carey*, U. S. Atty., for the United States.

*S. G. Hilborn* and *W. C. Belcher*, for defendant.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

SAWYER, J. Demurrer to indictment of the cashier of the United States assistant treasurer at San Francisco, for embezzling \$10,000 of the money of the United States, in his custody as cashier. It is insisted that each count is defective in not stating what kind of money, whether coin, and, if so, whether gold or silver, or bills, and of what denominations, and how many of each, etc.

It may be conceded for the purposes of this case, that at common law, it would be necessary to state these particulars in case of an embezzlement by the clerk, servant, agent, or employe of private parties. But in the case of an embezzlement of public funds by a public officer, where the funds are constantly changing, and the public has no direct personal possession or oversight, and where it would ordinarily be impracticable, if not absolutely impossible, to identify and pursue the particular coins or bills embezzled, it is held in numerous decisions that such particularity is unnecessary. *People v. McKinney*, 10 Mich. 89; *State v. Smith*, 13 Kan. 294-296; *State v. Carrick*, 16 Nev. 123-125; *State v. Walton*, 62 Me. 108-111; *State v. Flint*, 62 Mo. 396-399; *Brown v. State*, 18 Ohio St. 506; *State v. Munch*, 22 Minn. 67; *State v. Boody*, 53 N. H. 613; 2 Bish. Crim. Proc. § 319. We think the indictment good in this particular.

2. It is insisted that the several counts are bad, because the official character of the officer is not alleged directly, but only by recital. The

allegation is, "that said Bornemann—then and there being an officer of the United States having the safe-keeping and disbursement of public moneys, \* \* \* *did* then and there knowingly, willfully, and feloniously *convert* and embezzle a portion of said public moneys entrusted to him," etc. We do not regard this as a recital merely, but as a direct averment by using the participle in some clauses, instead of the verb, in connection with the following verb. It is the exact form given by Wharton in his *Precedents of Indictments* for embezzlement in each precedent found on page 406 *et seq.*, c. 7. We held a less definite form of averment of citizenship to be good in *Sharon v. Hill*, 10 Sawy. 635, 23 Fed. Rep. 353; and see authorities therein cited. This is the form of statement in some of the cases cited under the first point, and is the form of statement in the indictment involved in *U. S. v. Hartwell*, 6 Wall. 392. We think the averment sufficient.

The first count does not state what office the defendant held. Perhaps it is defective in that particular, as defendant ought to be informed in what particular character he is charged, but if so, the other counts under the same section cover the case, as all the others allege that he was "cashier of the assistant treasurer of the United States at San Francisco, Cal.," and that "he then and there had in his possession and under his control, as such cashier, a large sum of money," etc. The fact that this money of the United States is, also, alleged to have been on deposit with the assistant treasurer does not negative defendant's possession and control in such sense as to make its appropriation an embezzlement, as claimed. He was the cashier of the assistant treasurer, and it was necessarily a part of his duties under the law to take charge of and handle this money. The cashier was an officer of the United States, and not a mere servant or agent of the assistant treasurer. The court will take notice of the law applicable to his duties. *U. S. v. Hartwell*, 6 Wall. 392, covers these and all cognate points. We think all the counts are good unless it be the first, in regard to which we have strong doubts, as it is not stated what office defendant held. Let the demurrer be sustained as to the first count, and overruled as to all the others.

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STATE OF TENNESSEE *v.* JACKSON.

(*District Court, E. D. Tennessee. July, 1888.*)

**EXTRADITION—INTERSTATE—FALSE AFFIDAVIT—HABEAS CORPUS.**

Under Rev. St. U. S. § 5278, providing that "whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime certified as authoritative by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of

the state or territory to which such person has fled to cause him to be arrested and secured," etc., the person charged must be a fugitive from the state in which the crime was committed, before the executive authority can be called into action; and where he is delivered up to the authorities of that state on a requisition based on a false affidavit that he is a fugitive, he will be released on *habeas corpus*.

On Petition for *Habeas Corpus*.

*Russell, Tillow & Daniel*, for relator.

*W. L. Eakin*, for the State.

KEY, J. The facts of this case are as follows: The defendant resided in the city of Chicago, Ill. He sold the prosecutor a horse. The purchaser of the horse resided in Chattanooga, Tenn. The purchaser saw an advertisement in a Chicago newspaper offering the horse for sale, and the trade was completed by correspondence; Jackson remaining all the while in Chicago, and the purchaser in Chattanooga. The horse was shipped by rail to the purchaser, and the price remitted by mail to Jackson. After the arrival of the horse at his destination, and a trial of his abilities and qualities, the purchaser claimed that the horse was worthless, and that the price paid had been obtained by false and fraudulent pretenses; and he sued out a warrant against Jackson, which was issued by a justice of the peace in Chattanooga. The matter was placed in the hands of a detective, who made affidavit that Jackson had been charged with committing the crime of obtaining money by false pretenses against the state of Tennessee, and that he had fled from the state of Tennessee, and was in the state of Illinois; and the governor of Tennessee made requisition on the governor of Illinois for Jackson, under the provisions of section 5278, Rev. St. U. S. Armed with these papers, the detective went to Illinois, obtained a warrant from the governor of that state for the arrest of Jackson, and arrested him, and hurried him off to Tennessee, had him tried before a justice of the peace, and committed to jail. Thereupon Jackson filed a petition for a writ of *habeas corpus*, upon the ground that his arrest and confinement are unauthorized.

It is insisted for the prosecution that the mailing of the letter containing the money in the post-office here, addressed to Jackson at Chicago, was, in law, a delivery to Jackson, and that, in consequence, this state has jurisdiction, and, having such jurisdiction, and the defendant being here, no matter how, the authorities of the state have the right to retain him in custody for trial. Section 5278 provides that "whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured," etc. Accord-

ing to the provisions of this law, there must be, not only the commission of the crime, but the person charged must be a fugitive from the state in which it was committed, before the executive authority can be called into action. Jackson was not a fugitive. He had not, in all his life, been in Tennessee; had never fled from it; and his case did not fall within the positive terms of this law. The oath of the detective was false, and the governors of the two states imposed upon. The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained, the opportunities for wrong and abuse of this law will be great and wide-spread. Commercial transactions are largely conducted by mail and by telegraph. If the seller at one end of the line, and the buyer at the other, with the aid of detectives, in cases of dispute and controversy between them are to be allowed, under such proceedings as these, to have the citizens of one state carried to another state for trial under the false allegation that the person charged has fled, instances of oppression may not be few. It seems to me that the general government cannot stand by and see its laws so trifled with and abused. It is well settled, as I understand it, that where treaties between this government and a foreign nation provide for the extradition of persons charged with certain specific offenses, and where extradition has been obtained upon the ground that such an offense has been committed, the person whose custody and return has been so obtained, cannot, when brought in the jurisdiction of the court, be tried for a different offense, especially if it be not embraced in the terms of the treaty. Such a case is not altogether analogous to the one in hand, but it tends to show the good faith required between nations. Certainly the same character of faith should obtain between the executive authorities of the different states of this nation, which in many respects are foreign to each other. It seems to me that such authority should not be held to the seizure and removal of a citizen of its state when such seizure and removal were procured by fraud, falsehood, and imposition. It is ordered that the petitioner be discharged.

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**CAMPBELL v. MAYOR, ETC., OF NEW YORK.**

*(Circuit Court, S. D. New York, September 21, 1888.)*

**PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—REHEARING—NEWLY-  
DISCOVERED EVIDENCE.**

Act 1839, § 7, declares that no patent shall be invalid by reason of prior sale or use, except on proof that the sale or use had been for more than two years prior to the application. In a suit for the infringement of letters patent No. 42,920, dated May 24, 1864, to James Knibbs, for an improvement in steam fire-engine pumps, on application filed May 13, 1864, plaintiff, instead of disproving prior sale and use, directed his efforts towards disproving consent and allowance to the same, on the supposition then generally shared by the bench and bar, and recognized in the answer, that consent and allowance were necessary to defeat the patent, and the case was determined accordingly. A sale of an engine containing the invention, which was forwarded April 28,

1862, was found, and on rehearing, after the decisions of *Andrews v. Hovey*, 123 U. S. 267, 124 U. S. 694, 8 Sup. Ct. Rep. 101, 676, was held to invalidate the patent. On motion before final decree for leave to take proofs that the engine was built on an order, and was not accepted until after May 13, 1862, held that, as it is not settled that prior construction without sale will avoid the patent, and as the case had been made to turn on an issue to which plaintiff had addressed no evidence, and as the decision of the motion was not reviewable, the evidence should be admitted.

In Equity. Motion for leave to take further proofs. Other opinions in this case will be found in 9 Fed. Rep. 500; 33 Fed. Rep. 795; 35 Fed. Rep. 14, 504.

Marcus P. Norton, Horace G. Wood, and George Bliss, for plaintiff.

Frederic H. Betts, for defendant.

WHEELER, J. The bill in this case sets up as valid letters patent No. 42,920, dated May 24, 1864, and granted to James Knibbs for an improvement in steam fire-engine pumps. The answer, among other things, alleges that the patent was void, "because that the said alleged invention, with the knowledge, acquiescence, and consent of said inventor and patentees, had been in public use and on sale in this country for more than two years before the said alleged inventor's or patentee's application for their patent therefor." On traverse of the answer proofs were taken. The record shows clearly that the plaintiff's counsel understood that consent and allowance of the inventor to sale or use of the invention more than two years before the application for a patent were necessary to defeat it; and that they accordingly directed their efforts to disproving consent and allowance to such sales and use as appeared, and not to meeting the evidence of sale and use otherwise. On final hearing sale and use were found, but without consent and allowance. These were held to be essential and controlling. The other issues were found for the plaintiff, and the patent was sustained. *Campbell v. Mayor, etc.*, 20 Blatchf. 67, 9 Fed. Rep. 500. After the decisions in *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. Rep. 101; 124 U. S. 694, 8 Sup. Ct. Rep. 676, settling that consent and allowance are immaterial, and that mere sale or use, not fraudulent or surreptitious, is sufficient, the defendant moved for leave to amend the answer, if necessary, to raise the question of sale and use alone, and for a rehearing. The amendment was held to be unnecessary to form an issue as to mere sale and use. A rehearing was had, and the case was re-examined. The application for the patent was filed in the patent-office May 13, 1864. A sale of a steam fire-engine containing this invention, called the "Governor Hill," by the Amoskeag Manufacturing Company, to the city of Concord, N. H., sent on the 28th day of April, 1862, was found; and this sale was held, in view of the decisions in *Andrews v. Hovey*, to be sufficient to defeat the patent. *Campbell v. City of New York*, 35 Fed. Rep. 504. The plaintiff now, before final decree signed, moves for leave to take proofs to show that the Governor Hill was built on an order from the city of Concord, and, although forwarded before, was not accepted till after May 13, 1862; that this engine did not in fact contain this invention; and that putting the invention into any



steam fire-engine by the Amoskeag Manufacturing Company, except into the Jason C. Osgood at the request of the inventor as an experiment, was surreptitious and fraudulent with reference to his right to a patent. This motion is resisted upon the alleged grounds that the evidence is not newly-discovered, or might have been discovered by due diligence; that it is cumulative; that it would not in fact show anything fraudulent or surreptitious in the respect claimed; that it would not change the result as to putting the invention into the Governor Hill; that the effect of the sale upon the patent would not be changed; and that the construction of the Governor Hill, which was unquestionably before May 13, 1862, would, without reference to the sale, invalidate the patent, if it contained the invention. All these grounds have been considered in connection with those urged in favor of the motion. These questions of law arise upon section 7 of the act of 1839, (5 St. 354.) That section provided that a constructor or purchaser of a newly-invented machine, manufacture, or composition of matter should have the right to use and vend for use the specific thing without liability, but said nothing further about the effect of the construction. It declared that no patent should be held invalid by reason of the purchase, sale, or use prior to the application for a patent except on proof of abandonment, or that the purchase, sale, or prior use had been for more than two years prior to the application. Here is no declaration at all against the validity of the patent other than what is implied from the exception, and the construction of the patented article is left out of that. The latest reported saying of the supreme court upon the subject appears to be that at the close of the opinion in *Andrews v. Hovey*, 124 U. S. 719, 8 Sup. Ct. Rep. 686, where Mr. Justice BLATCHFORD said:

"The second clause of the seventh section seems to us to clearly intend that, where the purchase, sale, or prior use referred to in it has been for more than two years prior to the application, the patent shall be held to be invalid, without regard to the consent or allowance of the inventor."

Here is no reference to the construction, but only to purchase, sale, or use; and no reference to the first clause of the seventh section, which alone relates to the construction. The statement by the same learned justice in the opinion in the same case in 123 U. S. 274, 8 Sup. Ct. Rep. 105, that "the plain declaration of the second part of the section is that, where the purchase or construction of the machine or article took place more than two years prior to the application for the patent, or where the use or sale by the person who so purchased or constructed the machine or article took place at a time more than two years prior to the application, the patent becomes invalid," has been observed. But when that the second clause does not include construction in its declaration; and that use by the constructor more than two years prior to the application is referred to as one of the things that would defeat the patent, which would be defeated besides by the necessarily prior construction if that would have such effect, are noticed, the intention to hold and declare that construction alone of the patented article, without sale or use two years prior to the application, would defeat the patent, does not

clearly appear. At most that intention does not so clearly appear as to make the exercise of discretion not understood to be reviewable, in a matter so important as that here involved is, to properly depend upon it. This ground does not, in view of the terms of the statute, and what has been decided upon them, seem to be sufficient to control the decision of this motion. The conclusion that the bill should be dismissed was reached because of the sale merely of the Governor Hill. The argument of the defendant in respect to this is that, if what took place was what the evidence sought to be introduced would tend to show, the patent would be none the less defeated by it. The statute uses the word "sale" simply, and refers to the sale as a completed transaction, required to have been fully accomplished at least two years prior to the application, in order to defeat the patent. An order for the construction of the engine, accepted, would not make a sale of it. If the terms of the order were such that the construction, as it progressed, was for the city, and the maker merely furnished the labor, and materials which became the property of the city when used, the city itself would construct the engine, and there would be no purchase of it by, or sale of it to, the city, and nothing, in the view now taken of the effect of construction, to affect the right of the inventor to a patent until there was use of the engine by the city. And if the terms were such that the engine remained all the while the property of the maker as it was being built, a passing of the title afterwards would be necessary to make a sale to the city. This would not be done by merely forwarding the engine. It would be the property of the maker when forwarded, and delivery to and acceptance by the city would be necessary to make it the property of the city. A refusal to accept it might make the city liable for damages, but that would not affect the right to the patent. The statute did not provide that it should. The evidence would tend to show that there was no sale completed of the Governor Hill prior to May 13, 1862.

The suggestion that the evidence is cumulative does not seem to be well founded. There has been in reality no evidence on the part of the plaintiff tending to prove the facts now sought to be established; but that it is either not newly-discovered, or was not so situated but that due diligence would probably have discovered it, is clear. If the right to have the case opened depended upon that, the propriety of a denial of the motion would be plain. But the issue to which the evidence is material is, on the part of the plaintiff, newly-discovered. The decision in *Andreu's v. Hovey* has discovered it to those who took the testimony in his behalf, as well as to others. The law is not altered by that decision, but is declared to be different from what it was understood to be by them. The form of the answer appears to have aided that understanding. The case has been made to turn upon an issue of fact, to which the plaintiff has addressed no evidence. As the case now stands, the finding could not well be otherwise; but it is reached with a sense of insecurity that makes it quite unsatisfactory. The plaintiff and his counsel were in duty bound to know the law, and are liable to the consequences of misunderstanding it, and are not entitled to relief from the consequences while the misun-

derstanding was due to their own fault. That it was shared by others, and by courts as well as by counsel, is shown fully by the briefs of counsel and opinion of the court in *Andrews v. Hovey*, 124 U. S. 694, 8 Sup. Ct. Rep. 676. That it was shared to some extent by the counsel for the defendant, is shown by the form of the answer; although the present counsel for the defendant, at the first hearing in chief, strenuously contended that the law was as it was afterwards declared to be in that case. In view of all this, the rules of law do not seem to require that the plaintiff shall be tied down to the consequences of the misunderstanding; and the principles of justice would appear to be furthered by relieving him from them. As this is a matter of discretion not reviewable, the exercise of it in a manner that will admit the evidence where due weight can be given to it, seems safer than the exclusion of the evidence from any consideration would be. The plaintiff has leave hereupon to take and file testimony as to the engine the Governor Hill, and as to fraudulent and surreptitious use of the invention by the Amoskeag Manufacturing Company, within 60 days. The defendant has leave to take and file testimony to meet this, and as to any use of the invention prior to May 13, 1862, by the Amoskeag Manufacturing Company, within 60 days after. And the plaintiff has further leave to take and file testimony in rebuttal within 40 days after that.

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### THE F. & P. M. No. 2.

**CARTIER v. THE F. & P. M. No. 2.,** (FLINT & P. M. R. Co., Claimant.)

(Circuit Court, E. D. Wisconsin. October 1, 1888.)

#### 1. COLLISION—BETWEEN TUG AND STEAMER—TUGS—LIGHTS.

A tug, having in tow a raft of logs about 600 feet long, and of sufficient width to fill the channel, arrived off the harbor at about 8:30 o'clock p. m. The night was dark and rainy, a slight sea was beginning to make, and the current was running strong out of the harbor. The tug exhibited the regulation green and red lights, and two vertical white lights indicating a tow; the lights being visible only from right ahead to two points abaft the beam. There was no light upon the raft, but there was a lantern in a yawl-boat at the rear of the raft. A propeller, approaching the harbor from the same direction, saw the light at the stern of the raft, which appeared to be about a quarter of a mile from the propeller, and to be that of a schooner at anchor. The tug observed the lights of the propeller, and sounded a danger signal, which the propeller supposed to have proceeded from some vessel in the harbor. A second signal was sounded, whereupon the propeller, unable to see any lights except the light in the yawl-boat, checked its speed, and, on the sounding of a third signal, made a circle in the lake, and then entered the channel, where it collided with the raft. The mate of the propeller saw no lights ahead on entering the channel, but heard the tug's exhaust, and knew therefrom that a tug with a tow was somewhere in the channel. *Held*, that U. S. Nav. Rule No. 12, requiring rafts navigating or moored in any bay, harbor, or river to carry one or more white lights, placed in the manner prescribed by the board of supervising inspectors of steam-vessels, did not authorize the regulation made by the board, that rafts in tow should carry certain white lights, and that the tug did not violate statutory regulations in not so lighting the raft.

## 2. SAME.

Under articles 23, 24, of the act adopting the revised regulations, (23 U. S. St. at Large, c. 854, p. 442,) providing that with respect to the regulations due regard shall be had to all dangers of navigation, and to all special circumstances rendering a departure from the rules necessary to avoid immediate danger, and that nothing in the rules shall exonerate any vessel from neglect to carry lights, or of the neglect of any precaution required by the ordinary practice of seamen, the tug was negligent in not exhibiting rear lights, which would indicate to the propeller her position, and that of her tow.

## 3. SAME—OVERTAKING VESSEL.

The propeller was negligent in entering the channel after the alarm signals were given, and after it had notice of the proximity of the tug and its tow.

In Admiralty. Libel for damages caused by a collision.

*G. C. Markham* and *O. T. Williams*, for libellant.

*F. M. Hoyt*, for claimant.

JENKINS, J. On the 18th day of September, 1886, at about 5 p. m., the tug Aldrich started with a tow from Hamlin, a point on the east shore of Lake Michigan, bound for Ludington, some six miles south. This tow consisted of a raft or boom of logs of from 225,000 to 250,000 feet in quantity, indifferently called a balloon, sag, or bag boom. The boom was composed of from 40 to 48 pieces of square timber, each of the length of about 35 feet, connected with each other at the ends by chains, and attached to the tug by a hawser of 600 feet in length. The logs floated unattached within this boom, and when in motion the boom naturally assumed a balloon shape; the logs floating to the stern of the boom, which at the forward end came nearly to a point. It was about 220 feet in width at the stern, and of the length of about 600 feet. The tug was 90 feet in length. The tug, with her tow, arrived off the Ludington piers at about 8:30 o'clock p. m. of that day. The night was very dark, and rain was falling. The wind was from the south-east, a slight sea was beginning to make, and the current was running strong out of the harbor. The tug exhibited the regulation green and red lights, and two vertical white lights, indicating a tow; these lights being visible only from right ahead to two points abaft the beam. There was also claimed to have been a light in the engine-room shining out through a window in the rear of the room. As the tow approached the piers there was no light upon the raft, but a laborer, with a lantern, was in a yawl-boat at the rear of the boom; his duty being to recover logs escaping therefrom. The tug with its tow was making headway at the rate of one and one-half miles an hour, and, as it neared the pier, took in some 300 feet of the hawser; making the distance from the stern of the tug to the stern of the raft about 900 feet. At the same time the propeller approached from the north, on her usual voyage from Manistee to Milwaukee, touching at Ludington, at the speed of from 10½ to 11 miles an hour. The lights of the tug were not visible to the propeller, but her captain saw the light at the stern of the raft, on the port bow, bearing about E. N. E. At the sounding of the second danger signal, hereafter referred to, this light appeared to him to be distant about a quarter of a mile from the propeller, and some 2,000 feet or more north of the north pier; to be stationary;

and to be that of a schooner at anchor. The lights of the propeller were observed by the tug, which sounded a danger signal. At this time the propeller was about one mile north-west from the piers, the tug being also outside, nearer to the harbor, and was about one-fourth of a mile inshore from the propeller. This danger signal was heard on the propeller, and was supposed to have proceeded from some vessel in the channel, or in the Pere Marquette lake, constituting the harbor at Ludington. The propeller kept her course, headed for the beacon-light on the south pier. Shortly thereafter the tug sounded a second danger signal, upon hearing which the captain of the propeller, unable to see any lights except the white light in the yawl-boat, checked his boat down, and hauled her up S. S. E. The captain of the propeller states that between the first and second alarms he had not proceeded a quarter of a mile, and, according to the captain of the tug, was one-half mile from the piers; and the tug, by the same authority, was some 300 feet from the Ludington pier-light, and had not entered the channel. There was a third alarm sounded when the propeller was about 1,000 feet north-west from the beacon-light; the tug being at that time, according to her captain, in the channel between the piers. From the first alarm until then the tug had proceeded only from 800 to 1,200 feet, having struck the current, and making slow progress. Upon the third alarm, the propeller's engine was stopped, her wheel put hard a-port, and the ship, turned out, made a circle in the lake, and was then headed due east, and entered the harbor hugging the south pier, proceeding at the rate of four miles an hour; just sufficient, as claimed by her master, to keep her under control. The north pier is about 1,600 feet long, the south pier projects into Lake Michigan 200 feet more. The distance between the piers at the mouth is 220 feet; at the east end, 190 feet. The beacon-light is located on the south pier, 200 feet east of its outer end, and directly opposite the outer end of the north pier. The life-saving station is on the north pier, 800 feet from its outer end. While proceeding between the piers, and, according to certain of the witnesses, at the beacon-light, and according to others of the witnesses opposite to or near the life-saving station, the propeller came in collision with the raft, separating some of the timbers of the boom, thereby permitting a portion of the logs to escape into the lake, where they were lost. The libel is filed to recover the value of the logs so lost.

The inquiry first presented for consideration is as to the duty of the tug and the raft with respect to lights, and whether that duty was performed. I am satisfied, so far as concerns the tug, that she was properly lighted, unless, under the circumstances of the case, ordinary prudence required the exhibition of some light that would prove an effectual warning to the coming steamer. The tug carried the regulation colored lights forward, and two vertical white lights, indicating to vessels approaching from ahead or upon the beam that she had a tow. It would seem to have been improper in such case to exhibit the central range of two white lights provided by rule 7. *The U. S. Grant and The Tally Ho*, 7 Ben. 195, 201. It is insisted by the claimant that the raft should have been dif-

ferently lighted. Under rule 12, water-craft and rafts navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be moored in or near the channel or fair-way of any bay, harbor, or river, are required to carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels. Claiming under this authority, the inspectors have divided the rule prescribing the lights to be carried by certain water-craft navigated or moored as specified in rule 12, and apparently providing, as to rafts, in whatever manner navigated, that a raft of one and not more than two cribs in length shall carry one bright light on a pole not less than six feet high; of three or more cribs in length, shall carry one white light at each end of the raft of the same height; that rafts of more than one crib abreast (a crib being thirty-two feet in width) shall carry one white light on each outside corner of the raft, making four lights in all. Syn. Dec. Treas. Dept. 1883, p. 89. Such provision is manifestly wise; notice being thereby given to a vessel approaching from any direction of the extent and boundaries of the raft. Such or similar provisions should be made obligatory by the congress with respect to rafts in tow, as well as to rafts navigated as specified in the rule. But I am not prepared to concede the power of the board of supervising inspectors of steam-vessels to enlarge the obligations imposed by rule 12, or to enact regulations with respect to lights upon rafts not navigated as designated in the rule. The power granted is limited to the regulation of the number and location of lights upon rafts navigated or moored as specified. It is not altogether clear that the inspectors designed to extend the regulation beyond the scope of the power conferred, but the regulation as to rafts is separated from the regulation of water-craft, and is in terms unlimited. The regulation must be restricted in its application within the limits of the power granted. I therefore hold that there is no regulation of the congress prescribing the character and number of lights to be exhibited at night upon rafts in tow.

What other duty then devolved upon the tug and raft with respect to lights under the circumstances? Articles 23 and 24 of the act adopting the revised regulations (23 U. S. St. at Large, c. 354, p. 442) provide that with respect to the regulations due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the rules necessary to avoid immediate danger; and that nothing in the rules contained shall exonerate any vessel from any neglect to carry lights or signals, or of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case. This tug had in tow a raft some 600 feet in length, and at the widest part some 220 feet in width. The tow was distant from the tug some 600 feet while in the lake, and some 300 feet as she entered the piers. No lights of the tug were visible to a vessel approaching astern. I do not regard the light through the window of the engine-room as useful in any sense as a warning. If there was such light, it was necessarily low and dim, its effective power depending in large degree upon the situation of the lantern in the engine-room, and the condition of cleanliness of the

window and the lantern. The lantern was there for use in, and to light, the engine-room; not for purposes of warning. It would not cast its rays far aft, and was not seen at any time from the decks of the propeller. This tow was a wide raft of logs, partially submerged, 10 times as wide as the tug, and, floating upon the waters, was not visible at any distance in that dark and rainy night. The only light was the lantern in the yawl-boat at the stern, which, by an approaching steamer, might well be taken, at the snail pace the tow was proceeding, for a vessel at anchor. The tug was approaching the harbor at Ludington, the seat of an active commerce, and at an hour when her master knew the propeller was due. She was entering the channel with a raft of equal width of the channel, and which would necessarily obstruct the passage of any vessel entering or leaving the harbor. The master of the tug knew of the propeller's approach when the latter was at least a mile distant, and no other lights than those mentioned were exhibited. The rules of navigation provide in certain cases for lights that will show all around the horizon, (rule 7;) that vessels at anchor shall exhibit at night, at a height not exceeding 20 feet above the hull, a white light in a globular lantern, so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile, (rule 10;) and that every sail-vessel, on the approach of any steam-vessel, during the night-time, shall exhibit a lighted torch upon the point or quarter to which such steam-vessel shall be approaching, (Rev. St. § 4234.) These provisions indicate the care deemed necessary to give warning to approaching steamers. They declare and regulate, with respect to navigation, the exercise of that ordinary care for the protection of others which devolves upon every one at sea or upon land. While not obligatory with respect to rafts, they point the way to what acts should be deemed acts of ordinary caution. If, as the rule declares, prudence demands, in the case of a sailing vessel under way, that a torch should be exhibited by way of warning to a pursuing steamer, how much more is such or a similar effectual warning required in the case of a raft. A vessel is to some extent itself a signal of danger. She can be seen in ordinary weather at quite a distance. But a raft of logs floating upon the water at night gives no warning of itself, and is dangerous to navigation. Ordinary care requires that such lights should have been exhibited upon the raft as would indicate danger to a vessel approaching from any direction, and give suitable and timely warning. Failing such methods, it was incumbent upon the tug to exhibit such rear lights as would indicate to the approaching steamer her position, and give warning of her tow. Such or similar precautions in such a locality, and under the circumstances described, were, in my judgment, imperiously demanded by prudence, and their omission was negligence. *The Peshtigo*, 25 Fed. Rep. 488, 490. I am herein fortified by several expert seamen, whose testimony has been produced, and stands uncontradicted and unopposed, declaring the custom upon the Great Lakes to have for years been to have rafts in tow at night so lighted that their shape and dimensions would be exhibited to approaching vessels, and that the tugs of

such tows have been accustomed to exhibit at the stern a bright light indicating their presence to a pursuing vessel. The custom but conforms to the dictates of prudence, and emphasizes the duty which the law, in my judgment, imposes. I reach the conclusion, therefore, that the tug and raft were at fault, and that that fault was the primary and producing cause of the collision.

This finding is not, however, conclusive of the right of the libellant. The disregard of duty by the tug and raft did not warrant the propeller to neglect any reasonable precaution to avoid a collision; and if, notwithstanding non-compliance with duty by the tug and raft, the propeller might have avoided the collision by ordinary skill and seamanship, then both vessels were in fault, and the damage must be equally apportioned. *The Continental*, 14 Wall. 345. The record discloses, as to the location and acts of the vessels at and preceding the collision, the usual bewildering conflict in the evidence. Much of it is mere guess-work, self-contradictory, and unreliable. Some of it is evidently the offspring of imagination, stimulated by the excitement of the event. It would serve no useful purpose, however, to analyze this evidence. It is sufficient to state the conclusions to which my mind is impelled by a careful scrutiny of the testimony. If the master of the propeller miscarried in judgment in locating the signal, that was not of itself a fault, (*The Lepanto*, 21 Fed. Rep. 651;) and having, upon nearing the piers, reduced his speed to four miles an hour, so that the steamer could be stopped when the danger became apparent, he was not so far at fault. *The Scotia*, 14 Wall. 181; *The Sarmatian*, 2 Fed. Rep. 911. The danger signal was a warning that a vessel was ahead. No lights being observable, the propeller was bound to assume that the vessel was not approaching. She was, therefore, as to the tug, the overtaking vessel, and bound at her peril to keep out of the way. The warning, however, did not require the propeller to stop; there being more than sufficient sea-room in the channel to pass. It was only required that she should proceed slowly, and with caution, sounding proper signals. In fact, there was no collision with the tug. The signal was not, however, notice to the propeller that the tug had a tow that was to be avoided. The obligation to avoid collision with the tow did not become operative until notice that there was a tow to be avoided. (*The Leland*, 19 Fed. Rep. 771.) In entering the channel the tug made her course to the south pier, thence towards the north pier, so as to swing her tow into the channel, and avoid contact with the end of the north pier. The collision occurred at or very near the beacon-light on the south pier; the propeller striking the boom at or forward of its center. This must have been so, for the captain of the tug states that when the propeller was coming in after making her circle the tug was 500 feet from the end of the south pier. The tug was 90 feet in length, the hawser 300 feet, and the raft 600 feet. This would leave the entire raft outside of the north pier. When the propeller entered the channel the tug was 600 feet ahead of her. The stern of the tow was then necessarily astern of the propeller. The yawl-boat was at that time outside the pier, and the light was nearly 200 feet to the north-west of



the propeller. Upon the collision the propeller immediately reversed her engine, and began to back, which threw her stern over to port, and further into the raft. It is manifest she did not strike the tow astern, for in that event the steamer would not have encountered the raft with her propeller as she backed, and would have met serious difficulty, and probable disaster, in forcing her way through a compact body of logs filling the entire width of the channel, whereas she proceeded after the collision without difficulty. I find no act of negligence in the conduct of the propeller at the immediate moment of collision.

Was the propeller in fault in attempting to enter the channel at the time and under the circumstances disclosed? Three alarm signals had been sounded, which the captain of the propeller was unable to locate. He states these alarms to have been sounded before he put his wheel hard a-port, and turned out into the lake. There is great contradiction in the evidence of the location of the vessels at the times of these different signals, but I shall assume the fact to be as stated by the captain of the propeller. His object in turning into the lake was cautionary, and to locate the danger signal. The first alarm appeared to him to come from the little lake inside the piers in the vicinity of the railroad dock and ferry. The second alarm sounded nearer to him, ahead of him; but he could not say whether in the channel or not. At the third alarm the propeller was 1,000 feet away from the beacon-light. It sounded close, and from 600 to 1,000 feet away, a little on her port bow. The propeller being only 800 feet from the north pier, and the signal sounding not over 1,000 feet away, the captain, in the exercise of ordinary caution, was bound to assume that the alarm proceeded from a vessel at or near the mouth of the channel. Since he could discern no lights then, or after he had turned in the lake and headed for the channel, he was bound to assume that the vessel was not approaching him, but was ahead of him, passing up the channel. He was therefore, as to the tug, imposed with the responsibility of an overtaking vessel. All this, however, disconnected with other circumstances, was no notice of the tow, and, there being ample sea-room to pass, there was no fault in proceeding at cautious speed, if the propeller is not otherwise chargeable with notice of the tow. The captain of the propeller heard the tug exhausting, but, he claims, not before the collision. He asserts that he sounded one whistle to indicate to the tug that he would pass to starboard, but that this was done after the collision. The mate of the propeller, however, asserts that this signal was given just as the propeller started ahead after coming around, before the beacon-light was reached. In this he is corroborated by the evidence for the libellant. It was a proper signal to have been given before entering the channel, the exact location of the tug being unascertained. The mate also states that he could see no lights ahead, but that he heard the tug's exhaust, and therefrom knew that a tug with a tow was somewhere in the channel. He knew this before the beacon-light was reached. He knew it before the propeller entered the channel. He knew it when the propeller headed to enter the channel, and was nearly 1,000 feet away from the beacon-light. The propeller, then, had

timely warning of danger. That warning is located by her captain as just within the channel piers. When the propeller rounded to and headed into the channel, no lights could be seen, so that he ought to have presumed that the danger was not approaching. The known absence of lights imposed upon him the greater caution. The exhaust of the tug, indicating a tow, was heard by the mate as the propeller started ahead after coming around. The captain, in the exercise of diligent caution, should have heard that exhaust, if he did not. Notice to the mate was, however, notice to the vessel. If he failed to communicate the fact to his superior officer, he violated his duty; but the propeller is none the less responsible. Knowing, then, or chargeable with knowledge, that a tug with a tow was ahead; that no lights were exhibited indicating the character or dimensions of the tow,—the propeller was placed in the situation, as to the tow, of an overtaking vessel, and bound to keep out of the way. Rule 22; *The Charles Morgan*, 6 Fed. Rep. 913; *Whitridge v. Dill*, 23 How. 448, 454. I think that, under the circumstances, diligent caution required the propeller to stop. The captain had reasonable cause to apprehend danger. He knew that it was near. Notwithstanding the neglect of lights by the tug and tow, the propeller had no right to proceed, apprehending a near danger. I have not overlooked the evidence of expert seamen testifying for the claimant. I should lay great stress upon their opinions if founded on the whole evidence; but in the case propounded to them, the fact of the exhaust of the tug being heard on the propeller when headed for the channel, and indicating an unlighted tow near at hand, was not a stated factor in the problem submitted for their judgment. I cannot think they would approve the entering of the harbor, upon such a night, with a known but unseen danger just ahead. The propeller should have been stopped until the channel was known to be clear. A steamer moving in narrow waters, especially on a dark and rainy night, should exercise great caution and vigilance. She proceeds at her peril in the face of a known danger. Both vessels being in fault, the damages must be divided.

## THE PHOENIX.

## LOWNDES v. THE PHOENIX.

(District Court, D. South Carolina. March, 1888.)

**ADMIRALTY—PRACTICE—BOND FOR COSTS—JURATORY CAUTION.**

In admiralty, under a strict rule that a stipulation for costs must be filed with the libel, upon a proper showing one may be allowed to sue upon "a juratory caution," and, when a libel has been filed, with security, which is shown to be bad, upon a motion to file additional security the court will not order an absolute dismissal upon failure to file such security.

In Admiralty. Motion for additional security for costs.

*Inglesby & Miller* and *J. P. K. Bryan*, for libellant.

*I. N. Nathan*, for claimant.

SIMONTON, J. The libel is for personal injuries to one of a gang of stevedores engaged in loading the steam-ship. When libellant filed his libel, he gave the stipulation for costs, with one Gardner as surety. The claimant has filed a certificate from the state court showing that there are entered against Gardner several judgments yet unsatisfied. Upon this he moves an order that libellant give additional security on pain of dismissal of his libel. The proctors for libellant state that probably he cannot give additional security, and in this event they ask that the privilege of a juratory caution be reserved to him. Suits *in forma pauperis*, or, using the technical words in admiralty, upon "a juratory caution," are recognized in the district courts of the United States. *Bradford v. Bradford*, 2 Flip, 281; *Polydore v. Prince*, Ware, 410; *Thomas v. Thorwegan*, 27 Fed. Rep. 400. And this in courts in which there is an imperative rule requiring security for costs. We have such a rule, (25). There is much to commend this indulgence to poor suitors. It would be abhorrent to a sense of justice to refuse the remedy for a clear right on the only ground that the suitor cannot give a bond for costs. But it may be abused. In a port filled with shipping the temptation may be very strong to libel a ship just about to sail and force the payment of a groundless or extravagant claim. If there be no check in the shape of a stipulation for costs, this may lead to irreparable loss, or intolerable wrong. No final rule on this subject will be made. Let an order be taken, requiring additional security, to be put in within five days. If at the expiration of this time no security be put in, and if it be established in a proper way that none can be put in, the merits of the case *prima facie* will be examined.

CONNOR *et al.* v. VICKSBURG & M. R. Co.

(Circuit Court, E. D. Missouri, E. T. October 5, 1888.)

1. COURTS—FEDERAL COURTS—JURISDICTION—NON-RESIDENT CORPORATION.

Under the provision of act of March 3, 1887, that no civil suit shall be brought in the federal courts in any district other than that whereof defendant is an "inhabitant," but that, where jurisdiction is founded only on diverse citizenship, suit shall be brought only in the district of the residence of one of the parties, a circuit court in Missouri has no jurisdiction of an action against a corporation created by the state of Mississippi, and having its principal office there, for damages for acts amounting to a violation of the interstate commerce law, though defendant has an office and agent in Missouri, and plaintiff resides there, and though the petition shows a cause of action at common law.

2. SAME—OBJECTIONS TO JURISDICTION—MOTION TO DISMISS.

Where the petition shows on its face that the court has not jurisdiction of the cause, the action may be dismissed on motion. The objection need not be first raised by demurrer.

**At Law.** Motion to set aside the return, and to dismiss the suit.

*Minor Meriwether and Henry W. Bond*, for plaintiffs.

*Pollard & Werner*, for defendant.

THAYER, J. In this case plaintiffs are citizens of Missouri, and the defendant is a corporation created by the laws of the state of Mississippi, and has its chief office and place of business in that state. The petition avers that defendant also has an office in the city of St. Louis, and has an agent in this city for the transaction of its business. Process has been served on the alleged agent, in accordance with the laws of Missouri regulating service upon foreign corporations. Defendant appears specially, and moves to set aside the marshal's return of service, and to dismiss the suit on two grounds: *First.* Because the petition shows that the cause of action is of such character that defendant can only be sued thereon in a federal court, in the district where it was incorporated and has its chief office,—that is, in Mississippi. *Second.* Because (as it is claimed) the person on whom process was served was not its agent at the time of service. An objection is raised to any consideration of the first point of the motion, for the reason that it is not raised by demurrer. With reference to that objection it is only necessary to say that, where it is claimed that a petition shows on its face that the court is without jurisdiction of the cause, I can conceive of no substantial reason why the defendant should not be permitted to move a dismissal of the same on that ground. In such case it is, in my opinion, wholly immaterial whether the jurisdictional question is raised by demurrer or by motion to dismiss. I accordingly proceed to consider whether the first point of the motion is well taken.

The first section of the act of March 3, 1887, regulating the jurisdiction of federal courts, provides that "no civil suit shall be brought before either of said courts (district or circuit) against any person \* \* \*

in any other district than that whereof he is an inhabitant; but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In the present case it is obvious that the jurisdiction of this court (if it has jurisdiction) does not depend "only on the fact" that plaintiff and defendant are citizens of different states. The action is brought to recover damages sustained by reason of violations of an act of congress approved February 4, 1887, (24 U. S. St. at Large, 379,) commonly called the "Interstate Commerce Law." The petition is drawn with special reference to the provisions of that law, and states a cause of action over which the federal courts are expressly given jurisdiction by the ninth section of the act, without reference to the citizenship of the parties. It has been suggested that the petition states a cause of action at common law as well as under the statute, but it is unnecessary to determine that question on this motion, for, even if the acts complained of do give a right of action at common law, it is also true that they amount to a violation of the interstate commerce act; and the federal courts have been given jurisdiction of suits brought to recover damages growing out of violations of that act, without reference to the citizenship of the parties litigant. *Vide* § 9, *supra*. In any view of the case made by the petition, it is clear that the jurisdiction of this court is not dependent "only on the fact" of diverse citizenship; therefore, if jurisdiction of the cause is retained, it must be on the ground that the defendant is an "inhabitant" of this district within the meaning of the act of March 3, 1887.

For the purpose of determining whether defendant is an "inhabitant" of the district, I shall assume that the averments of the petition are true; that is, that it keeps an office and an agent in this district, for the purpose of making freight contracts, but that its chief office, as well as its railroad, is located in the state of Mississippi. Does the fact, then, that it has an office and an agent here constitute it an "inhabitant" of the district? This precise question, for reasons that appear to me to be sound, has been decided in the negative by the circuit court of the United States for the Southern district of New York and Northern district of Illinois. *Halstead v. Manning*, 34 Fed. Rep. 565; *Manufacturing Co. v. Manufacturing Co.*, Id. 818. See, also, *Reinstadler v. Reeves*, 33 Fed. Rep. 308. It has long been the settled rule, that a corporation created by a certain state, by virtue of that fact is to be deemed a citizen of that state for the purpose of determining questions of federal jurisdiction dependent on citizenship. For the same reason that entitles it to be regarded as a citizen of the state that creates it, it may also be said to be an inhabitant of such state, especially if (as in this case) its chief office and place of business is there located. In one case, at least, a corporation has been termed an inhabitant as well as a citizen of the state under whose laws it was incorporated. Thus in the case of *Railroad Co. v. Letson*, 2 How. 556, the court say:

"A corporation created by a state \* \* \* seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore

entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."

If an artificial person like a corporation may be an "inhabitant" of a state or district, it can with most propriety be said to be an inhabitant of the state that created it, or of the state where it keeps its records and principal office, and where its chief officers reside, or may most usually be found. These, in my judgment, are the tests which should determine the domicile of a corporation; and, tried by such tests, the defendant is clearly an inhabitant of the district of Mississippi. No other rule, indeed, seems to be applicable to the determination of the question of domicile, unless it be held that a corporation is an inhabitant of any and every state where it has an office and transacts business. But if the latter position be assumed, no reason is perceived why it might not with as good reason be held that a corporation is likewise a citizen of each state where it maintains an office and transacts business. That, however, is a doctrine at variance with all of the decisions respecting the citizenship of corporations. On the assumption that the defendant has an office and agent in this state, it goes without saying that it might have been sued in this district under the act of March 3, 1875, to determine the jurisdiction of the United States courts, as that act permitted suits to be brought against a defendant, not only in the district of his residence, but wherever he might "be found at the time of serving \* \* \* process." These latter words, permitting service where a defendant may be found, have been dropped in the amendatory act of March 3, 1887, for the manifest purpose of requiring all suits to be brought in the district of the defendant's residence, excepting those suits in which jurisdiction is dependent solely on the fact of diverse citizenship. The authorities cited by plaintiffs' counsel in opposition to the motion (being all decisions under the act of March 3, 1875) are therefore not in point. The motion to dismiss the suit for want of jurisdiction over the person of the defendant (it being an inhabitant of the district of Mississippi) is therefore sustained, and the suit is dismissed.

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ARMSTRONG v. TRAUTMAN *et al.*

(Circuit Court, S. D. Ohio, W. D. May 31, 1888.)

COURTS—FEDERAL JURISDICTION—ACTIONS BY RECEIVERS OF NATIONAL BANKS  
—ACT MARCH 3, 1887.

Act Cong. March 3, 1887, § 4. declares that national banking associations are, for the purpose of all actions by or against them, at law or in equity, to be deemed citizens of the states in which they are respectively located, but "the provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." *Held*, that a receiver of a national bank may still maintain a suit in the United States circuit court, without reference to the citizenship of the parties or to the amount involved, to recover a claim due the bank.

At Law. On motion to dismiss.

JACKSON, J. This case is before the court on the motion of defendants Frank Haffner and Christian Haffner to dismiss the petition for want of jurisdiction in this court to entertain the suit. The motion is based on two grounds, viz.: *First*, that the petitioner is a citizen of the same state with the defendants; and, *secondly*, that the amount claimed (being only \$1,333.58) is insufficient to confer jurisdiction upon the court under the act of March 3, 1887. The petition shows that David Armstrong, a citizen of the Southern district of Ohio, is the duly appointed and qualified receiver of the Fidelity National Bank, of Cincinnati, Ohio, which was lately a corporation organized under the banking laws of the United States, and became the holder and owner of a certain check for \$1,333.58, having date June 20, 1887, drawn by Trautman & Fischer on the German National Bank of Cincinnati to the order of the defendants Frank and Christian Haffner, under the firm name of F. & C. Haffner, and by them indorsed; that said check, which was the property of said Fidelity National Bank and a part of its assets which came into the possession of said receiver by virtue of his appointment, was duly presented at said German National Bank for payment; that the same was not paid; and that said drawers and indorsers had due notice thereof. The question presented by the motion of the defendants Frank and Christian Haffner to dismiss the petition for want of jurisdiction is whether, under the act of March 3, 1887, a receiver of a national bank may maintain a suit in this court, without reference to the citizenship of the parties and of the amount involved, to recover a claim or demand due the national bank, whose assets have been transferred or assigned to him by operation of law under his appointment.

Prior to the act of March 3, 1887, this was not an open question. It was well settled by several decisions on the circuit, under the act of March 3, 1875, and prior acts, that receivers of national banks, being officers of the United States, could maintain such actions without regard to the citizenship of the parties or the amount involved in the suit. *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395; *Price v. Abbott*, 17 Fed. Rep. 506. In this last case the subject was fully reviewed by Mr. Justice GRAY, and the jurisdiction of the circuit court was maintained. In the case of *Armstrong v. Ettlesohn*, ante, 209, (very recently decided,) Judge BLODGETT has sustained the jurisdiction of the court, without regard to the amount involved, under the act of March 3, 1887; citing *Price v. Abbott*, 17 Fed. Rep. 506, as applicable to the latter act. While by the fourth section of the act of March 3, 1887, national banking associations are, for the purpose of all actions by or against them, real, personal, or mixed, and in all suits in equity, to be deemed citizens of the states in which they are respectively located, and while the jurisdiction of the federal courts in suits by or against those associations is only such as they would have in cases between individual citizens, it is, however, expressly provided that "the provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases com-

menced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." It seems clear that under this provision the jurisdiction of this court is preserved in cases like the present, where the receiver is engaged in winding up the affairs of the national banking association, and invokes the aid of this court in collecting the assets of the bank.

The court is of the opinion that defendants' motion is not well taken, and should be disallowed. It is accordingly so ordered, with costs, and the defendants are allowed 30 days to answer the petition.

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McCONVILLE v. GILMOUR *et al.*

(Circuit Court, S. D. Ohio. August 17, 1888.)

1. COURTS—FEDERAL COURTS—JURISDICTION—NATIONAL BANKS—INSOLVENCY—AGENTS.

The federal courts have the same jurisdiction of suits by and against the "agents" of national banks appointed under the national banking acts of congress, when the "receivers" of an insolvent bank have been displaced by such "agents," as they have of suits by and against the "receivers" of such banks, each being in the same sense officers of the United States, and each representing in precisely the same relation the bank in its corporate capacity; and this jurisdiction attaches without regard to any diversity of citizenship of the parties or the amounts involved.

2. PARTIES—SUBSTITUTION.

When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, upon motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter.

At Law. Motion by James McConville, who commenced this suit as the "receiver" of the Metropolitan National Bank of Cincinnati, to substitute himself as the "agent" of the said bank, appointed under the provisions of the third section of the act of June 30, 1876, c. 156, as the party plaintiff entitled to continue the suit in the latter capacity against the defendants.

*William B. Burnet and J. E. Bruce*, for plaintiff.

*Champion & Williams and Logan & Slattery*, for defendants.

HAMMOND, J. It having been established, especially by the judgment of this court in the case of *Armstrong v. Trautman*, ante, 275, that we have jurisdiction of cases brought by the receiver of a national bank, without regard to diversity of citizenship or the amount involved, I do not see why we have not the same jurisdiction of suits brought by the "agent," appointed under the provisions of the national banking act to take the place of the receiver under certain circumstances named in the act. Act June 30, 1876, c. 156, (1 Supp. Rev. St. 216; 19 St. 63;) *Armstrong v. Trautman*, supra; *Armstrong v. Ellersohn*, ante, 209; *Price v. Abbott*, 17 Fed. Rep. 506; *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395.



This "agent" is an officer of the United States in every sense that the "receiver" is, albeit he is somewhat differently appointed, and his duties are precisely the same, and although he takes up the business at a somewhat later stage of the winding-up proceedings; and, so far as I can see, every argument used in the reasoning of these cases to support the jurisdiction applies with equal force to the "agent" as to the "receiver." Indeed, the "agent" is only the "receiver" under another name. By the very terms of the act itself, defining the powers of the "agent," he may apply to this court for authority to sell, compromise, or compound the debts, and may sue and be sued in his own name or that of the association, and the general scope of his duties and powers as there defined are those of the receiver and of all receivers winding up an insolvent corporation. The argument against the jurisdiction proceeds on the notion that after the depositors and creditors are paid, the United States has no further interest in the matter, and that the whole administration, being turned over to the shareholders through this "agent," the concern relapses into the condition existing before insolvency, and that the jurisdiction of the federal courts is thereby ousted. But this would be an unnecessary and possibly disastrous separation and division of the jurisdiction over an insolvency proceeding, that should not be permitted upon any mere implication or inference, and only submitted to upon an express command of the statute. It would be a reversal of the general rule, which concentrates the jurisdiction over insolvency proceedings rather than disperses it. Moreover, the United States has no more interest in the matter before than after the appointment of this "agent." The legislation contemplates a more independent and exclusive control by the United States of the assets before than after this "agent" is appointed, in the interest of creditors and depositors, no doubt, and for obvious reasons. It also contemplates a somewhat exclusive control by the shareholders of the remnants of the insolvent assets, also for obvious reasons. Nevertheless, the interest of the United States in the matter is precisely the same, and, in both situations of the assets, is based solely on grounds of public policy equally applicable to either. Having established this national banking system upon the faith of federal supervision and control in certain cases, among which are these useful and necessary provisions for winding up a concern, in the event of insolvency, it induces depositors to place their money in them, creditors to deal with and trust them, the people at large to accept their circulating notes as money, and shareholders to invest in the shares of stock. Now, the latter are as much entitled to the protection arising out of the public policy manifested by the acts of congress for the federal scrutiny and control in their dealings *inter sese*, in case of insolvency, as creditors are entitled to that protection, and for the same reason precisely. The method of dealing with the assets in the one case or the other may be widely different, but this cannot affect the question of jurisdiction and the reason for it. The conclusion of the argument is in itself a *non sequitur*, and it does not follow because the act of congress grants the shareholders the privilege of controlling the further proceedings in insolvency after the debts are paid, that the fed-

eral jurisdiction does or should cease, but on the contrary the reason for continuing it is the same.

The jurisdiction being thus established for the "agent," who is the successor of the "receiver," there can be no doubt about the right to substitute him as a new party to a suit commenced by the "receiver," during his existence as such. It is the common right and practice of substituting as a new party to the record any successor in interest and representation whenever a change occurs by death or otherwise. Each of these administrative officials—the "receiver" and the "agent"—represent the bank in its corporate capacity, and neither of them is more or less than the other such a representative. The "agent" is in no sense a purchaser from the "receiver," and occupies no relation analogous to that of one who takes from another by purchase, but is only a successor in interest and office to the same right or title as that held by the "receiver," and so falls within the general rule of substitution of one such representative for another whenever there shall be a change. Indeed, here there is scarcely any necessity for a substitution, except for the bare purpose of technical conformity, since the "receiver" and the "agent" are one and the same person, and either may, under the privileges of the statute, sue in his own name as "receiver" or "agent."

Motion granted.

### WEDEKIND v. SOUTHERN PAC. CO.

(Circuit Court, D. Nevada. October 1, 1888.)

#### REMOVAL OF CAUSES—TIME OF APPLICATION.

In an action begun in a state court defendant was by state statute required to answer the complaint on or before May 1, 1888. On May 1st defendant appeared specially in the case, and moved to set aside the service of summons, but neither sought nor obtained any rule or order of court extending its time to plead to the complaint. The motion to quash the service of summons was heard, and taken under advisement by the court, May 28th. While the same was so under advisement, on May 31st, defendant filed its general answer to the complaint, and at the same time filed its petition and bond on removal to this court. On motion to remand, *held*, that the case must be remanded; the petition and bond not having been filed in the state court at the time defendant was by law required to answer or plead to the complaint; no extension of time having been granted by any rule or order of said state court.<sup>1</sup>

(Syllabus by the Court.)

On Motion to Remand.

John F. Alexander and R. H. Lindsay, for motion.

J. B. Marshall and Baker & Wines, *contra*.

SABIN, J. The plaintiff in this action is a citizen and resident of the state of Nevada. The defendant is a corporation organized under the laws of the state of Kentucky, and is the lessee of the Central Pacific Rail-

<sup>1</sup>As to what is the proper time for filing an application for removal of a cause from a state to a federal court, see *Whelan v. Railroad Co.*, 35 Fed. Rep. 849, and note.

road; a line of road extending from San Francisco, Cal., to Ogden, Utah. The action is brought by plaintiff to recover from defendant the sum of \$77,000 damages alleged to have been sustained by plaintiff on account of injuries by him received December 22, 1887, by reason of defendant's negligence and carelessness in transporting plaintiff as a passenger over said railroad, in Washoe county, state of Nevada. The action was begun in the proper state court, in Washoe county, April 21, 1888, by the filing of a complaint and the issuance of summons thereon on said day. On the same day, the sheriff of said county personally served said summons, together with a certified copy of the complaint, on H. W. Higgins, "agent of defendant," at said county, as appears by the sheriff's return upon said summons. Higgins was defendant's freight agent at Reno, in said county. The summons, and statute of Nevada applicable thereto, required the defendant to answer said complaint within 10 days after the date of service thereof, exclusive of the day of service. This would have required the defendant to appear and plead to said complaint on or before May 1, 1888. On said May 1st defendant appeared specially in said court, by motion to set aside the service of the summons as insufficient. This motion was supported by affidavits. On May 28th this motion was heard by the court, both parties being present by their attorneys, and was taken under advisement by the court. It is conceded that this motion was never decided by the court. On May 31st, and while said motion was still pending, defendant filed, in said court, its general answer to the complaint, and at the same time filed a petition and bond for the removal of the cause to this court. The ground of removal relied upon is that of the citizenship of the parties, plaintiff being a citizen of Nevada, defendant of Kentucky. Defendant failing to produce a perfect record of the case in this court, the plaintiff caused the same to be filed here, and now moves the court to remand the case to the state court for trial, under the provisions of section 3 of the act of congress of March 3, 1887, relative to removal of causes. The portion of said section, applicable to this motion, reads:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such state court at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending; and shall make and file therewith a bond," etc.

In this case, as we have seen, the state statute required the defendant to plead to the complaint on or before May 1, 1888. It is true that on that day the defendant specially appeared in the state court, and moved to set aside the service of the summons. But this, in itself, in no wise extended defendant's time to answer or plead to the complaint, without an order or rule of court extending such time. The record does not show that any such rule or order was asked or obtained, nor is it sug-

gested that there is any error in the record in this respect. We have carefully examined the rules prescribed and adopted by the district judges of this state for the conduct of business in their courts, and nowhere in the 35 rules by them adopted can we find any suggestion that a motion of this kind has the force or effect of extending indefinitely, or at all, the moving party's time to plead. Doubtless, in any proper case, the court would, upon motion, grant an extension of time to plead, pending the consideration of an important preliminary motion. But in this case no such request was made, or extension obtained, and we know of no reason why plaintiff might not have entered defendant's default on May 2d for want of a plea, answer, or demurrer. Were we to consider defendant's motion as a special plea, or in the nature of a special plea to the jurisdiction of the court, then defendant's position is no better, as the petition and bond for removal should have been filed contemporaneously with such plea.

We do not, however, consider this motion as a plea. It was simply a motion. It might have been made and heard in the state court, or in this court, just as defendant may have preferred. It was preferred that it be heard in the state court, and the petition for removal was not filed until 30 days after the date of motion, and no extension of time to plead was sought or obtained, and that time expired May 1st, unless extended by order of court, or by stipulation of parties. The object of this provision of section 3 is obvious. It was intended to compel parties to decide, *in limine*, in what court they wish the trial of the case to be had, and to make them abide by such decision. It would seem unnecessary to review at any length the rulings of the courts, supreme or circuit, upon the removal of causes either under the act of 1875 or that of 1887. They are uniform in holding parties to a strict compliance with the terms of the statutes. The jurisdiction of the circuit court is special, and it must clearly appear in all cases, affirmatively; not presumptively. The record in this case falls far short of this. It is not clear how the answer came to be filed May 31st, while the court was still considering the motion to quash the service of the summons; nor is it explained in the arguments submitted. The record should show affirmatively that it was filed within the statutory time.

We have been strongly urged by defendant's counsel to consider, upon its merits, this motion, made in the state court, to quash the service of the summons in this action; and a large part of their brief is devoted to that subject,—the sufficiency of the service upon the agent Higgins. We cannot consider this matter at all upon this motion to remand. The motion to quash the service of summons was never before us. It was argued and submitted in the state court. And its decision now is wholly immaterial, for defendant has voluntarily appeared in the case, without reserve, and filed its general answer to all of the issues tendered by the complaint. This waives any irregularity of service of summons, if any there was, and the motion to quash the service has now no significance. The motion to remand the case to the state court must be granted, and it is so ordered, with costs.

NORTHERN PAC. R. CO. v. UNITED STATES *et al.**(Circuit Court, D. Minnesota. October 17, 1888.)*

## PUBLIC LANDS—NORTHERN PACIFIC GRANT—SECOND INDEMNITY BELT.

Act Cong. July 2, 1864, organizing the Northern Pacific Railroad Company, and granting to it a certain number of alternate sections of land on each side of its line of road, provided that, whenever, prior to the definite location of its line, any of such sections should have been sold or pre-empted, other lands might be selected in lieu thereof, not more than 10 miles beyond the limits of said alternate sections. Resolution of May 31, 1870, provided that in case there should not be, in any state or territory, at the time of the final location of the road, "the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter," the company should be entitled to receive so many alternate sections of land "in such state or territory, within 10 miles on each side of the said road beyond the limits prescribed in said charter, as will make up such deficiency \* \* \* to the amount of the lands that have been granted," etc., "subsequent to the passage of the act of July 2, 1864." *Held*, that the resolution gave the company an additional 10-mile indemnity limit, and was not intended merely to restrict indemnity to losses occurring subsequent to the original act, and to lands situated in the state or territory in which such losses occurred.

In Equity. On bill and demurrer.

Action by the Northern Pacific Railroad Company against the United States, Peter Johnson, Andrew Johnson, Thomas M. Libby, August Lindbloom, L. M. Fawsette, and C. D. Bush.

*James McNaught*, and *John C. Bullitt, Jr.*, for complainant.

*Kerr & Richardson*, for defendants.

BREWER, J. The single question in this case is whether the joint resolution of congress of May 31, 1870, gave to the plaintiff an additional 10-mile indemnity limit. In an opinion filed August 15, 1887, Mr. Secretary Lamar, then secretary of the interior, held that it did not. The recognized ability of the distinguished secretary, now one of the justices of the supreme court, compels a careful consideration of his views and reasons. The Northern Pacific Railroad Company, complainant herein, was organized by an act of congress of July 2, 1864. Section 3 of that act provided for a grant of lands to aid in the construction of the road. So much of that section as is pertinent to the question reads as follows:

"Sec. 3. And be it further enacted that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the

line of said railroad is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The first section of the joint resolution of May 31, 1870, is as follows:

"Resolved, by the senate and house of representatives of the United States of America in congress assembled, that the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property, and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the secretary of the interior; and also to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of the said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral or other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864; and that twenty-five miles of said main line between its western terminus and the city of Portland, in the state of Oregon, shall be completed by the 1st day of January, *Anno Domini*, eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: provided, that all the lands hereby granted to said company, which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like all other lands, at a price to be paid to said company, not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the states and territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or sub-divisions thereof, to the highest and best bidder: provided, further, that, in the construction of said railroad, American iron and steel only shall be used, the same to be manufactured from American ores exclusively."

The reasoning of the learned secretary runs along this line; that all government grants are to be construed strictly in favor of the grantor,

and against the grantee; that it is unreasonable to suppose that congress intended to establish two indemnity belts side by side; that the expression "lands granted," found in the resolution as ordinarily used, refers strictly to lands in place, and should therefore be construed as having that meaning here; and that it was the evident intention of congress to simply make definite and certain the place of the selection of indemnity lands, in view of the fact that, in the original act there was no express limitation to the state or territory in which any granted lands might be lost. I quote the language of his opinion:

"A careful consideration of the granting act and the joint resolution irresistibly forces me to the conclusion that congress did not establish another and second indemnity belt, but defined more clearly its purpose in relation to the indemnity provisions to said company, and in doing this repealed the first provision wherein it differs or conflicts with the last; the power to add to, alter, amend, or repeal the granting act being expressly reserved to congress in section 20, *supra*. Section 3 of the granting act shows that indemnity is allowed for lands lost 'prior' to the time of filing the map of definite location. No limit of time is fixed within which the loss must have occurred, only it must have been 'prior' to the definite location, and must have been from the enumerated causes. The joint resolution changed this, and provided that, if at the time of the definite location, any loss was ascertained, indemnity was to be obtained therefor, if it had occurred 'subsequent to the passage of' the granting act, and must be taken in the state or territory where it occurred. If the contention of the company be correct, we would have the extraordinary spectacle of congress establishing side by side two indemnity belts, in one of which selections could be made for losses sustained anywhere, at any time, prior to the definite location of the road; and in the other and furthestest one from the road a belt in which indemnity could be obtained for losses sustained, in the particular state or territory, between the date of this grant and the definite location of the road. The fact is that by its charter the company was prohibited from issuing bonds or mortgages, and was seeking to, and did, have such prohibition removed by the passage of the joint resolution. Though congress had twice extended the time for commencing and completing the road, at that time no work had been done towards the actual building. It was simply a road upon paper. There was, then, no existing reason for an extension of its indemnity limits, and no knowledge that the former were insufficient, but there was reason why, asking a right before denied, congress should then modify, restrict, and make more specific the indemnity provisions, which, as is illustrated by the claim made, were framed in language not as specific as was desired. Hence, in passing the joint resolution, and thereby granting the right to issue bonds and mortgages, the granting power restricted the indemnity to losses occurring between the date of the original act and the date of the definite location, and specified what was before clearly implied, but not said, that the indemnity selections should be restricted to the particular states or territories in which the losses might be sustained. The joint resolution says, if the company cannot get the amount of land granted, within the limits 'prescribed by its charter,' then it shall have lieu lands 'within ten miles on each side of said road beyond the limits prescribed in its charter.' It is very clear to my mind that the limits here referred to are the granted limits prescribed by the charter, so that the indemnity belt spoken of in the joint resolution covers the same lands as in the indemnity limits of the act of 1864. Hence, there is but one indemnity belt, and that for ten miles, just beyond the granted limits, as defined by the map of definite location."

After a careful examination, I am constrained to differ with the learned secretary, and to hold that that resolution did create a second indem-

nity belt, and for these reasons: In the first place, the existence of a second indemnity belt was expressly recognized by the land department in the year after the passage of the resolution in response to an application from the complainant for a withdrawal of lands. Such recognition was unchallenged until the opinion filed in August, 1887, a period of more than 16 years. Lands had been selected and sold in reliance upon such action of the department. The existence of such a belt was during that time accepted without question in the department, and was frequently spoken of in proceedings in congress as an undoubted fact, so that it may fairly be said that contemporary construction running through a period of many years, so far as it is potent, has determined that the resolution of 1870 did create such second indemnity belt. In the case of the *U. S. v. Railway Co.*, 98 U. S. 341, the supreme court uses this language:

"It was the intention of congress, both in the original and amendatory act, to place the Union Pacific Company and all its branch companies upon the same footing as to lands, privileges, and duties to the extent of their respective roads, except when it was otherwise specifically stated. Such has been the uniform construction given the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called into question."

And in *U. S. v. Philbrick*, 120 U. S. 59, 7 Sup. Ct. Rep. 413, it also says:

"A contemporaneous construction by the officers upon whom was imposed the duty of executing these statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned."

See, also, *U. S. v. Graham*, 110 U. S. 221, 3 Sup. Ct. Rep. 582; *Railroad Co. v. Railroad Co.*, 112 U. S. 414, 5 Sup. Ct. Rep. 208, and *The Laura*, 114 U. S. 416, 5 Sup. Ct. Rep. 881.

To similar effect has been the frequent expression of the attorneys general of the United States in their official opinions. I shall not burden this opinion with a citation of these opinions or the various instances in which in the department and in congress the existence of this belt was recognized. Whoever is interested therein will find in the carefully prepared brief of counsel these matters collated. In the second place, when this resolution was pending in congress, it appears from the speeches of those who supported as well as those who opposed, that it was understood by them that the effect of the resolution was to create a second indemnity belt. Extracts from these speeches can also be found in the brief of counsel, but these extracts, like the illustrations above referred to, are too lengthy to be incorporated into any opinion or report. So that we have in support whatever weight may come from contemporary construction, and the express opinions of members of congress in the debate upon the passage of the resolution. But I do not care to rest my conclusion upon these matters. Independent of them it is apparent to my mind that the resolution did provide for such indemnity belt. Though the complainant was chartered in 1864,



up to the time of the passage of this resolution no work had been done in the construction of the road. Twice had the time been extended by congress. In this contingency the complainant applied to congress, by the introduction of a resolution for leave to mortgage its franchise and property, and for the right to make up any loss in the lands in place anywhere on the public lands. The outcome of this application was the resolution as amended and finally passed. While no one doubts the rule that government grants are construed strictly in favor of the grantor, yet such rule does not nullify other well-established rules of statutory construction. Among them is the familiar one that, in the absence of express words of repeal or limitation, a later statute does not repeal by implication an earlier unless there be an absolute inconsistency between them, or unless it be apparent that the legislature was intending a revision of the whole subject-matter. If, by any fair and reasonable construction, force can be given to each, both will stand. It being possible to reconcile two statutes, the one will not repeal the other. Repeals by implication must be by necessary implication. *Wood v. U. S.*, 16 Pet. 342. "If it is possible to reconcile two statutes, one will not be repealed by the other." *McCool v. Smith*, 1 Black, 459; *U. S. v. Tynen*, 11 Wall. 88. "The result of the authorities cited is that, when an affirmative act contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier, and is clearly intended as a substitute for it; and the intention of the legislature to repeal must be clear and manifest." *Red Rock v. Henry*, 106 U. S. 601, 1 Sup. Ct. Rep. 434; *Sedg. St. & Const. Law*, (2d Ed.) 98. Now, the third clause in the resolution, the clause upon which the question depends, contains no express words of repeal or limitation or intention to amend the act of 1864. Therefore, if, with any fair and reasonable construction, force can be given to each, both must stand. Obviously there was no intent to revise the whole subject-matter, for this clause contains no grant of lands, and even with the construction placed by the learned secretary only affects the minor matter of the place of selection of indemnity lands. Again, the lost lands to which the indemnity provision in the act of 1870 applies are not the same as those within the indemnity provision of the original act. That applied to lands disposed of prior to the date of the definite location of the line of the road. This applies to lands disposed of subsequent to the passage of the act of 1864; so that, although some lands might fall within the provisions of both the act and the resolution, yet the test of the right to indemnity lands was different in the two, and the intention of congress was in the resolution obviously directed to a different body of lands than those provided for in the act. Again, notice the opening words of this clause, "and in the event of there not being, [the amount of lands per mile granted by congress to said company,] then said company shall be entitled \* \* \* to receive so many sections," etc. Now, the very form of expression, the train of thought suggested thereby, indicate, not a modification, but an addition, as though something more was being

given rather than a limitation upon what had previously been granted. Further, the second clause in this resolution, which has reference to the location of the road, authorizes the company to "locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road," etc. This seems to carry an affirmation of all the rights and grants made by the original act, and before any part of this resolution should be held to modify or restrict such rights and grants the language should be clear. Again, with reference to the suggestion that the expression "lands granted" ordinarily refer in land legislation to lands in place, the truth is, that the expression has a double meaning. Its narrower one is, of course, lands in place; but it is frequently used to include all lands donated by the government, whether lands in place or indemnity lands. *Barney v. Railroad Co.*, 24 Fed. Rep. 889; *Railroad Co. v. Railroad Co.*, 112 U. S. 730, 5 Sup. Ct. Rep. 334. Indeed, in this very resolution, the words are used in the larger sense. Thus the proviso is "provided, that all lands hereby granted to said company which shall not be sold or disposed of \* \* \* at the expiration of five years, after the completion of the entire road, shall be subject to settlement and pre-emption, like all other lands," etc. Obviously this refers to all the lands which had passed to the company, whether lands in place or indemnity lands. Further, and in the same clause, appears the same word "granted" in manifestly the same sense, so that in the very resolution the words "granted lands" or "lands granted" are used in the larger sense, and it naturally enforces the conviction that they were used in the same broad sense in this clause. Further, as defining the lands, is the expression, "within the limits prescribed by its charter," and as defining the location of the indemnity belt, this expression, "beyond the limits prescribed in such charter." Now, turning to the act of 1864, we find there are two limits provided for,—place limits and indemnity limits. The word "place" must be interpolated before the word "limits" in order to make it express the meaning claimed. Of course it is familiar learning that a word may be interpolated or suppressed if it be necessary to make the language harmonize with the obvious intent of the law-maker. But I know of no rule of construction which permits us to beg the intent, and then interpolate or suppress a word to carry out such intent. Rather is it to be presumed that the very language was used which expresses the intent; and where the phrase is "beyond the limits prescribed in its charter," it is presumed to mean beyond all the limits so prescribed, and if any particular limit had been contemplated, that particular limit would have been named. For these reasons I conclude that the resolution of 1870 did provide for a second indemnity belt. I am happy to add that Judge SLEEPER, judge of the district court of the Fifteenth judicial district of the state of Minnesota, has reached the same conclusion as shown by his opinion, in the case of *Morrison v. Benson*. A decree will be entered in favor of the complainant as prayed for.

**BOSTON SAFE-DEPOSIT & TRUST CO. v. BANKERS' & MERCHANTS' TEL.  
Co. et al.**

(*Circuit Court, S. D. New York. September 17, 1888.*)

**1. CORPORATIONS—CONSOLIDATION—MORTGAGES—LIEN—PRIORITY.**

In order to effect an amalgamation of the two telegraph corporations, two agreements were entered into, by one of which the B. & M. Co. covenanted to construct and deliver to the R. Co. certain systems of telegraph lines, (among them one connecting Buffalo by a northerly route with Chicago,) and the R. Co. agreed to create its bonds for \$3,000,000, to be secured by a mortgage of all its franchises and property, including the property to be thereafter acquired from the B. & M. Co. The other agreement was between the B. & M. Co. and one B., by which B. was to act as trustee for the B. & M. Co. to exchange the \$3,000,000 of bonds, dollar for dollar, for the stock of the R. Co.; and deliver to the B. & M. Co. the stock received by him in exchange for the bonds as soon as 51 per cent. of the whole stock of the R. Co. was received by him. The two agreements contemplated that the B. & M. Co. should obtain the property and control of the R. Co. by obtaining all or the majority of its stock, giving the stockholders of the R. Co. the option to transfer their shares for bonds secured by a mortgage upon all the existing and to be acquired property of the R. Co. The scheme was carried out, and the B. & M. Co. acquired a majority of the stock of the R. Co., and while in control of the latter corporation reconstructed and rebuilt some of its telegraph lines, and acquired new rights of way in the name of the R. Co. to straighten the lines, and strung new and additional wires upon the poles. It also constructed one of the new lines which it had agreed to build, and connected the wires with the existing system of the R. Co., and operated them as part of the general system; and partially constructed some of the other new lines which it had agreed to build. It also strung additional wires upon other lines of the R. Co. pursuant to an agreement between the two companies by which each was to have the right to string wires on the poles of the other at a specified rental. Soon after the B. & M. Co. acquired control of the R. Co. it created a mortgage of \$10,000,000 upon all its existing property, which also conveyed all the property of the B. & M. Co. to be thereafter acquired. The new line built by it was paid for out of the proceeds of this mortgage; and it became insolvent before it had completed the building of any of the other new lines. The \$10,000,000 mortgage was foreclosed, and all the property of the B. & M. Co. was purchased by the U. L. Co. at the sale under the foreclosure decree. At the time of the purchase the U. L. Co. had notice of the terms of the \$3,000,000 mortgage. In a suit brought in aid of a suit to foreclose the \$3,000,000 mortgage, to subject to the operation of the decree property claimed by the W. U. Co. as a purchaser at the foreclosure sale of the \$10,000,000 mortgage, *held*, (a) There being no questions arising under the registry acts, and the U. L. Co. being a purchaser with notice of the terms of the \$3,000,000 mortgage, the rights of the bondholders of the \$3,000,000 mortgage were paramount to those of the U. L. Co.

**2. SAME—PROPERTY SUBJECT TO.**

(b) That the reconstructed lines were subject to the lien of the \$3,000,000 mortgage, because the improvements upon the mortgaged property became part of the realty.

**3. SAME—TELEGRAPH COMPANIES—STRUNG WIRES.**

(c) That the strung wires did not become part of the realty by annexation, because the two companies had agreed in effect that they should remain personalty; and that it was competent for the two companies by such an agreement to determine the character of the property annexed, as against an existing mortgage.

**4. SAME—NEW LINES.**

(d) That the new line built by the B. & M. Co. for the R. Co. under the agreement between the two companies became in equity the property of the R. Co. as soon as completed, without any transfer from the B. & M. Co., and being described in the mortgage of the R. Co. as part of the after-acquired property included in it, inured to the security of the bondholders; and that the com-

plainant as trustee for the bondholders succeeded to the right of the R. Co. to compel a conveyance of the new line by the B. & M. Co. and those claiming under that company.

5. SAME—AFTER-ACQUIRED PROPERTY.

(e) That a mortgage of property to be thereafter acquired takes effect as a valid lien immediately when the property is acquired by the mortgagor; and that, as between successive mortgages of after-acquired property, priority of lien is determined by priority of time; the mortgage first in point of time being the senior lien

In Equity. Bill ancillary to a bill for foreclosure of mortgage.

*Marsh, Wilson & Wallis*, for complainant.

*R. G. Ingersoll*, for defendants.

WALLACE, J. The complainant is the trustee named in a mortgage made by the American Rapid Telegraph Company, bearing date September 1, 1883, to secure \$3,000,000 of bonds, for \$1,000 each, with interest, payable semi-annually, from March 1, 1884, and maturing September 1, 1893. This mortgage was created by the American Rapid Telegraph Company pursuant to an agreement made August 28, 1883, with the Bankers' & Merchants' Telegraph Company. It is expressed, in terms, to cover all the existing lines and property of the American Rapid Telegraph Company, "together with the lines of telegraph intended to be shortly constructed or acquired for the party of the first part, (the mortgagor,) so as to connect the following points: Buffalo, N. Y., by a northerly route, with Chicago, Ill.; Pittsburgh, Pa., via Columbus, Ohio, Indianapolis, and Terre Haute, Ind., with St. Louis, Mo.; Columbus, Ohio, with Cincinnati, Ohio, and Louisville, Ky.; and Terre Haute, Ind., with Chicago, Ill." Default having been made in the payment of the interest upon the bonds, the complainant filed a bill for the foreclosure of the mortgage in the circuit court of the United States for the district of Connecticut, the mortgagor being a Connecticut corporation; and an ancillary bill was filed in this court. The present suit is brought in aid of the foreclosure suit, the defendants being in this jurisdiction, to subject to the operation of the decree certain telegraph property to which some of the defendants claim title. Relief is prayed, in substance, that this property be adjudged to be subject to the lien of the mortgage, and, when sold under the decree in the foreclosure suit, that the claims of the defendants be barred and cut off. Relief is also prayed that the defendants be required to convey the property to the complainants.

The Bankers' & Merchants' Telegraph Company created a mortgage, bearing date November 24, 1883, to secure bonds to the amount of \$10,000,000, in which the Farmers' Loan & Trust Company was named as the trustee; and the claim of the defendant the United Lines Telegraph Company to the property in question is founded upon this mortgage, being derived by purchase upon a decree of foreclosure thereof, under which it asserts a title paramount to the complainant's title. No other defendant sets up any adverse claim or title to the property except the defendant Stokes. He answers jointly with the United Lines Telegraph Company, and his answer alleges that a part of the property in contro-

versy was sold upon a judgment of the court of common pleas of Cuyahoga county, Ohio, and he became the purchaser at the sale. As it appears in the proofs that this sale was set aside and vacated as void by an appellate court having jurisdiction, and the suit in which the judgment was obtained dismissed, and as Stokes sets up no other right or claim by his answer, the controversy is reduced to the single question of title as between the complainant and the United Lines Telegraph Company to the property in dispute. The complainant is entitled to a decree if the mortgage made by the American Rapid Telegraph Company is a prior lien to the mortgage made by the Bankers' & Merchants' Telegraph Company upon the property described in the bill and known as (1) the "Reconstructed Lines;" (2) the "Western Lines;" and (3) the "Strung Wires." Although the bill alleges the priority of complainant's title to certain lines of telegraph extending from Indianapolis to Richmond, thence to Cincinnati and Newark, and from Newark to Pittsburgh, this contention was abandoned at the hearing, and the only part of the "Western Lines" now involved is the line between Cleveland and Chicago.

In August, 1883, those who respectively controlled the Rapid Company and the Bankers' & Merchants' Company concerted a scheme by which the Bankers' & Merchants' Company was to acquire the control and property of the Rapid Company, and the stockholders of the Rapid Company were to transfer their stock to the Bankers' & Merchants' Company, and become mortgage bondholders of the Rapid Company, instead of stockholders. At that time the Rapid Company owned and was operating a telegraph system extending from Boston in the east to Cleveland in the west and Washington in the south, having stations in the more important places between these points. It had been constructing its lines for several years, and stations were established at those points between which the lines were completed. It had a line from New York, through New Haven, Hartford, and Providence, to Boston; one from Hartford to Springfield; one from Albany to Buffalo, with branches running to Saratoga and Albany, and to the stockyards at West Albany; one from Buffalo to the oil regions, and Newcastle to Pittsburgh; one from Newcastle to Cleveland; one from Canton, through Cleveland, to Coshocton; one from Canton to Sherredsville, Ohio; one from Philadelphia, through Harrisburg, to Pittsburgh; one from Harrisburg to Baltimore; and there were several "loop lines." Its system was incomplete, and those in control of the corporation believed that the extension and completion of the system was essential to the prosperity of the company. The company had been doing business at a loss, but its business was increasing. It had no bonded debt, and its property represented an expenditure of between \$2,000,000 and \$3,000,000. The Bankers' & Merchants' Telegraph Company owned and was operating a line from New York to Washington. Its business was profitable, and its stock was selling considerably above par. Those who controlled it contemplated extending its system to the New England states, and in the south and west. It was in a good financial condition, and, with a view of extending its system, had created a mortgage upon its property for \$300,000, and was in a position to realize about \$1,000,000 by the sale of its unissued capital

stock. In this situation those in control of the two corporations came to an understanding by which the two concerns were to be practically merged in one, with the Bankers' & Merchants' Company as the owner and manager. To effect this object, and to induce the stockholders of the Rapid Company to transfer their stock to the Bankers' & Merchants', two contracts were executed, bearing date, respectively, August 28, 1883, and August 29, 1883. The first was a contract between the Bankers' & Merchants' Company and the Rapid Company, by which the former covenanted to construct or acquire and deliver to the latter a system of four-wire telegraph lines connecting Buffalo by a northerly route with Chicago; Pittsburg with St. Louis, via Columbus, Indianapolis, and Terre Haute; and Columbus, Louisville, and Terre Haute with Chicago; and in consideration thereof the Rapid Company agreed to create its bonds for the amount of \$3,000,000, to be secured by a mortgage covering all its franchises and property, including the telegraph lines which were to be built or acquired for it by the Bankers' & Merchants' Company, and deliver them to the Bankers' & Merchants' Company. The second contract was entered into between the Bankers' & Merchants' Company and one Bullens, and by its terms Bullens agreed to act as a trustee, to whom the Bankers' & Merchants' Company was to deliver the \$3,000,000 of bonds for exchange, dollar for dollar, for the stock of the Rapid Company. By this contract Bullens was to deliver to the Bankers' & Merchants' Company 51 per centum of the stock of the Rapid Company, as soon as the same was received by him from the holders of such stock, and was to retain the balance of such stock received by him in exchange for bonds, and the balance of the bonds not exchanged, until the completion of the lines of telegraph agreed to be built or acquired for the Rapid Company by the Bankers' & Merchants' Company, and then to deliver the balance to the latter. The two contracts are to be regarded as executed simultaneously. Viewed in the light of the testimony and read in connection with a third contract made at the same time by the Bankers' & Merchants' Company, to which particular reference is unnecessary, it is plain that it was the understanding on the part of all concerned that the Bankers' & Merchants' Company was to acquire the property and control of the Rapid Company by acquiring all or a majority of the stock of that company, and that the stockholders of the Rapid Company, as an inducement to their consent, were to receive the bonds, dollar for dollar, in exchange for their stock, secured by a mortgage which was to cover not only all the property which was then owned by the Rapid Company but also the new lines which the Bankers' & Merchants' Company was to construct and deliver according to contract. Pursuant to this scheme, the bonds and the \$3,000,000 mortgage were created by the Rapid Company; the bonds were placed by the mortgagee in the hands of Bullens; the stockholders of the Rapid Company delivered to Bullens more than 28,000 of the 30,000 shares of which the capital stock of that company consisted; and Bullens transferred to the Bankers' & Merchants' Company the 51 per centum of the whole capital stock, pursuant to the agreement by which he became trustee. Shortly afterwards officers and directors of the Bankers' & Merchants' Company

were made officers and directors of the Rapid Company, and the Bankers' & Merchants' Company assumed and exercised control and administration of the affairs of the Rapid Company; the leases of the offices theretofore occupied by the Rapid Company were transferred to the Bankers' & Merchants' Company; the wires belonging to the Rapid Company were connected with the offices of the Bankers' & Merchants' Company; and the business of both corporations was practically merged together, although distinct organizations were maintained. Soon after this change of control was effected, the managers proceeded to repair and reconstruct some of the existing lines of the Rapid Company, and to build or acquire the new lines which, by the contract between the two companies, were to be built or acquired for the Rapid Company by the Bankers' & Merchants' Company. The line extending from Meriden, Conn., to Boston, via Hartford and Providence, and the line in the state of New York extending from the Harlem river to Portchester, were substantially rebuilt on the original lines of the Rapid Company. The lines were straightened, and, when necessary for this purpose, new rights of way were obtained in the name of the Rapid Company. Many of the old poles were discarded, and new ones put in their places, additional wires were strung, and such was the character of the repairs and improvements that these lines were practically reconstructed, and adapted to carry a larger number of wires than the original lines. These lines are the "reconstructed lines" in controversy.

In the early part of 1884 a new line of telegraph was built by the Bankers' & Merchants' Company, connecting the system of the Rapid Company at Cleveland with Chicago. This line extended from Cleveland to Freeport, and from Freeport to Hammond, near Chicago, until it met an underground telegraph system leading into the city of Chicago. The system of the Rapid Company reached Cleveland from Buffalo by the way of Newcastle, in Pennsylvania, and Streetsboro, in Ohio. The new line from Cleveland to Chicago was built upon rights of way secured in the name of the Bankers' & Merchants' Company, or subordinate corporations of which that company was the owner, and through which it acted. Mr. May, who represented the Rapid Company, was requested by the officers of the Bankers' & Merchants' Company to supervise the selection of the route, and did so. While the line was in process of construction it was understood by those who represented the Bankers' & Merchants' Company and the Rapid Company that it was being built to form a part of the line which was to be a connected system with the Rapid Company, at Buffalo, by a northerly route with Chicago. The portion of the new line, which was to extend from Cleveland to Buffalo by a northerly route, was not commenced. The new line from Chicago to Cleveland was inspected and accepted by the Bankers' & Merchants' Company, and was connected with the Rapid system at Cleveland, and the wires run into the office of the Rapid Company there. As early as in July, 1884, the line was used as an adjunct of the Rapid system. There was no formal transfer or delivery of this line by the Bankers' & Merchants' Company to the Rapid Company. The com-

plainant insists that the \$3,000,000 mortgage is a lien upon this line paramount to that of the \$10,000,000 mortgage and the rights acquired under it by the United Lines Telegraph Company at foreclosure sale.

The contemplated new lines for extending the system of the Rapid Company from Pittsburgh, by way of Indianapolis and Terre Haute, with St. Louis, Columbus with Cincinnati and Louisville, and Terre Haute with Chicago, which, by the August agreement, the Bankers' & Merchants' Company promised to build or acquire for the Rapid Company, were not completed. Detached portions of these lines were built, but before the lines were completed the Bankers' & Merchants' Company became insolvent, a receiver of its property and effects having been appointed in September, 1884. As has been said, it was not insisted on at the hearing that the \$3,000,000 mortgage became a lien upon these uncompleted lines, and it is therefore unnecessary to consider the question whether it did or not; but it is proper to state that there seem to be quite satisfactory reasons why the claim, if urged, could not prevail.

The property known as the "Strung Wires" consists of lines of wire strung by the Bankers' & Merchants' Company upon the poles of the Rapid Company, and which were used and employed, in conjunction with the other wires of the two companies, as part of the general system, while the Bankers' & Merchants' Company was in control of both companies, and before it became insolvent. As to this property the case involves the question of fact whether a contract was made between the two companies by which each was to have the right to string wires and maintain them on the poles of the other on payment of a rental of four dollars per mile per wire, annually, the wires to become the property of the lessee if not removed within six months after notice to do so. The evidence that such a contract was made consists (1) of an entry in the minute book of the executive committee of each company, as of the date of October 18, 1883, showing that a resolution was that day adopted by the committee to enter into such a contract; (2) an agreement in writing between the two companies embodying the agreement referred to in the minutes of the two committees, which purports to have been made on October 18, 1883, and is signed for the Bankers' & Merchants' Company by its then president and for the Rapid Company by its then general manager; and (3) a resolution of the board of directors of the Rapid Company, adopted August 14, 1884, ratifying and approving the previous contract. The bill asserts that the contract was an afterthought, and that the entries in the minute-book of the executive committee of the respective companies were fabricated, and that the written agreement was not executed until it was made in contemplation of the insolvency of the Bankers' & Merchants' Company. In support of this theory testimony is given by several of the persons who principally represented the interests of the bondholders of the Rapid Company while the two companies were amalgamated, one of whom was a member of the executive committee of the Rapid Company, to the effect that they did not hear of any such resolution, and had no information about such a contract prior to the meeting of the board of directors in August, 1884. It will not be profitable



to consider in detail the testimony upon the issue whether the contract was really made. If it was not made it should have been, in justice to the interests of the stockholders of the Bankers' & Merchants' Company; because what was about to be done involved a large expenditure of their money, and they should have been protected as far as practicable against just such a contingency as has arisen. The terms were fair for all the parties interested, and there is not the slightest reason to suppose that any of those who represented the bondholders of the Rapid Company would have objected if they had been consulted. It was not necessary to consult them, because the managers of the Bankers' & Merchants' Company had full power to commit them by the control of the majority of stock of the Rapid Company and a majority vote in its executive committee and board of directors. An omission to provide for such a contract, and to have it properly authenticated, would have been inconsistent with the methods which prevailed at the time in the management of the companies of keeping the relations between them formally distinct, and their transactions as those of separate concerns acting through their respective agents. Such entries as appear in the minute-books of the executive committees do not, upon inspection of the books, appear to have been interpolated, but appear in their regular, chronological order, and seem to be in all respects regular; and there is nothing to indicate that the books have been tampered with. It is much more reasonable to conclude that what took place with reference to the contract was not impressed upon the attention of Mr. May and the others, because it was proper and reasonable, and a matter of course, than to suppose that the evidence has been fabricated.

It has been urged against the validity of the mortgage made by the Rapid Company that it was created merely as a device to enable the Bankers' & Merchants' Company to acquire the property of the Rapid Company; that the scheme was a fraud upon the stockholders of the respective companies, and intended to be a fraud upon the public; and that the agreement between the two companies, under which the mortgage was created, was *ultra vires* as to each corporation. Without considering at present what the effect would be upon the legal rights of the parties if this contention were maintainable upon the proofs, it is proper to consider whether there is any foundation in fact for the charge of bad faith. As has been stated, the \$3,000,000 mortgage was doubtless made in order that the Bankers' & Merchants' Company could acquire the shares of the stockholders of the Rapid Company in exchange for the bonds. It was intended as an instrumentality to effect that object, and to give the stockholders of the Rapid Company the option of transferring their shares to the Bankers' & Merchants' Company, and taking bonds in exchange for their stock. All concerned understood that if the Bankers' & Merchants' Company could acquire all the shares of stock in the Rapid Company, or practically all, it would acquire the control and substantial ownership of the property of that corporation. What the stockholders of the Rapid Company would get for their stock would depend upon the value of the \$3,000,000 mortgage as security for the bonds. As a considera-

tion for surrendering their control of their own property, and virtually transferring it to the Bankers' & Merchants' Company, they relied upon the understanding that their bonds were to be fortified by the additional security of the new lines which were to be built by the Bankers' & Merchants' Company, and when built or acquired were to be covered by the lien of the mortgage. They took the chances of the good faith of the Bankers' & Merchants' Company in carrying out the agreement, and of its financial ability to fulfill. It is impossible to discover anything immoral or dishonest in the transaction upon the part of the Rapid Company, or of its stockholders. It was entirely legitimate for the stockholders to obtain all they could for their property. It may be that they expected to get more for their shares than the shares were really worth, but they were only to get such a consideration as the purchaser was willing to give; and they knew what they would ultimately receive was largely contingent upon the success of the purchaser in carrying out its enterprises. On the other hand, the purchaser, or the persons who were in control of the Bankers' & Merchants' Company, doubtless considered that the acquisition of the property of the Rapid Company was worth all it would cost. Probably they could have duplicated the property at the time for much less than \$3,000,000. But they were to get by the purchase, besides the property, an established business, and good will, and at the same time remove a rival whose competition would impair the profits of their business. Whatever they might expend upon the property, by way of improvements, or by way of extending the existing system, would ultimately be to the advantage of the Bankers' & Merchants' Company. There is nothing in the proofs to denote that those in control of the Bankers' & Merchants' Company were not acting in good faith towards the stockholders of the Rapid Company, or their own company, or the public; or that there was any plan or purpose in view on their part except to promote and consummate the legitimate business scheme of merging the two companies together, and building up an extensive telegraph business by extending and consolidating the existing systems. It is very probably true that some of the persons concerned expected to make money for themselves by marketing their shares and trading in the securities; and if this were so it would not militate against any rules of law or necessarily of ethics. There is no fair reason to doubt that the promoters would have honestly carried out their enterprise, and that their expectations would have been measurably realized if it had not become financially crippled at an early stage in its progress. Although the Bankers' & Merchants' Company created a mortgage of \$10,000,000 very soon after it acquired control of the Rapid Company, which covered all its own property and the property of the Rapid Company, and was to cover all the property to be thereafter acquired by the Bankers' & Merchants' Company, and although the bonds of this mortgage were floated at what now seems an extravagant price, the proofs do not show that the parties to the August agreement, either those who represented the Rapid Company or those who represented the Bankers' & Merchants' Company, had any fraudulent design upon the public which were to be carried out

by means of this mortgage. It cannot be assumed that they supposed the public would buy the bonds without some investigation into the merits of the enterprise and the value of the securities; and if they intended to put the bonds off upon the public by any fraudulent concealment or misrepresentation, the evidence fails to furnish a foundation for the theory. It has been argued that this mortgage was created to enable the Bankers' & Merchants' Company to build the new lines which it had agreed to build by its contract with the Rapid Company; that those who controlled the Bankers' & Merchants' Company intended to raise the money by deluding the public in the belief that the mortgage would be a first lien upon all new lines which were to be built, when in fact the lien would be subordinate to that of the \$3,000,000 mortgage; and that those who represented the Rapid Company, when the August agreement was made, understood at the time that this was the scheme contemplated, and thereby became participants in misleading those who invested in the bonds of the \$10,000,000 mortgage. In this argument the fact is ignored, which has already been referred to, that when the August agreement was made the Bankers' & Merchants' Company had in its treasury, or available, the sum of about \$1,000,000, and was supposed by those who represented the Rapid Company to be financially able to carry out its undertaking. The case is destitute of evidence to justify the assumption that those who represented the Rapid Company supposed that the contract of the Bankers' & Merchants' Company was to be carried out at the expense of third persons, much less to be carried out by defrauding third persons. The fact that the Bankers' & Merchants' Company did use the bonds of the \$10,000,000 mortgage to get the means for building the new line is not inconsistent with the good faith of its officers. By doing this they were enabled to use its other resources for other legitimate objects. But whatever may have been the design of those who controlled the Bankers' & Merchants' Company, whether honest and legitimate, or the contrary, the bondholders represented by the complainant are not shown to have been implicated in any fraudulent scheme. The organic law of the corporations permitted them to do what was provided for by the August agreements, and there is no ground upon which to assail the \$3,000,000 mortgage as *ultra vires*. Laws N. Y. 1870, c. 568. It is not obvious how any such considerations as have been suggested would be pertinent in the present suit, if there were any foundation for them in fact. The Rapid Company does not assert any objection to the mortgage. Those who were stockholders of that company, and became bondholders, do not, and the Bankers' & Merchants' Company, after receiving the mortgage and exchanging the bonds for stock, cannot be heard to allege want of consideration or a fraudulent consideration, or that its acts in acquiring and transferring the bonds were without legal validity, while it retains the stock which it received as the fruits of the transaction. Nor can the Bankers' & Merchants' Company be permitted to assert that the August agreement was *ultra vires* while retaining the fruits. *Mining Co. v. Bank*, 96 U. S. 640; *Bank v. Matthews*, 98 U. S. 621; *Arms Co. v. Barlow*, 63 N. Y. 62; *Railroad Co. v. Transportation Co.*, 83 Pa. St. 160; *Bly v. Bank*,

79 Pa. St. 453. And it is equally clear that the bondholders of the \$10,000,000 mortgage, who became creditors of the Bankers' & Merchants' Company after all these transactions took place, cannot be heard to impeach the consideration of the complainant's mortgage. *Graham v. Railroad Co.*, 102 U. S. 148.

No good reason having been suggested why the mortgage is not valid, and why it should not be enforced, the question as to the rights of the parties in the property in controversy is merely whether it is covered by the lien of the mortgage, or equitably belongs to the complainant, and whether the rights of the complainant therein are paramount to those acquired under the \$10,000,000 mortgage. No satisfactory reason is assigned why the lien of the \$3,000,000 mortgage should not include the reconstructed lines. The mortgage was duly recorded before the \$10,000,000 mortgage of the Bankers' & Merchants' Company was recorded, and no question arises under the registry act as to the priority of lien of the respective mortgages. If it should be conceded that the money of the Bankers' & Merchants' Company was exclusively used in the improvement and reconstruction of these lines, and that the improved value of the property represents nothing except what was put into it by that corporation, there is nothing to distinguish the case from the ordinary one where a mortgagor or his vendee of the mortgaged property makes repairs and improvements of a permanent character. Such improvements as become a part of the realty always inure to the security of the mortgage. Illustrations of the application of the rule in somewhat analogous cases are found in *U. S. v. Railroad Co.*, 12 Wall. 362; *Butler v. Page*, 7 Metc. 40; and *Snedeker v. Warring*, 12 N. Y. 170. But the strung wires do not fall under the operation of this rule. Inasmuch as they can be removed without material injury to the structure, they do not lose their character as personalty, and become a part of the realty, if it was the intention and contract of the two companies, at the time they were affixed to the poles of the Rapid Company, that they should retain their original character. With respect to this class of property the parties in interest may agree that it shall remain personalty, subject to be removed; and such an agreement determines the real character as against an existing mortgage. The effect of such an agreement, where the subject was the annexation of telegraph wires to telegraph poles, was considered in *Telegraph Co. v. Railroad Co.*, 11 Fed. Rep. 1, and it was ruled that the wires did not pass under an existing mortgage. The general doctrine is so well established that it is unnecessary to cite authorities.

The line from Cleveland to Chicago was constructed "to connect Buffalo by a northerly route with Chicago," pursuant to the agreement of August 28, 1883, and is the same property described and conveyed in the mortgage as one of the lines "to be shortly constructed or acquired" for the Rapid Company. The circumstance that there was no formal delivery or transfer of this property to the Rapid Company by the Bankers' & Merchants' Company is not material. Equity regards that as done which ought to have been done; and as soon as the property was acquired by the Bankers' & Merchants' Company it became in equity the

property of the Rapid Company. The complainant, at that time, by reason of the conveyance in the mortgage deed, succeeded to the right of the Rapid Company to enforce a specific performance of the contract against the Bankers' & Merchants' Company. It was competent for the Rapid Company to mortgage the lines which were not in existence at the date of the instrument, but which by the contract of the Bankers' & Merchants' Company were thereafter to be built or acquired by that company for the Rapid Company, and by the terms of the mortgage were to inure to the security of the bondholders. Such a mortgage, although ineffectual as a conveyance *in presenti*, takes effect as an equitable transfer, and attaches to the after-acquired property as soon as the title of the mortgagor accrues. *Pennock v. Coe*, 23 How. 117; *Dunham v. Railway Co.*, 1 Wall. 254; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Butt v. Ellett*, 19 Wall. 544; *Holroyd v. Marshall*, 10 H. L. Cas. 209. The case is exceptional only because it presents a question of priority as between two mortgages of after-acquired property. Although the \$10,000,000 mortgage was not, like the \$3,000,000 mortgage, expressed to cover the specific property to be thereafter acquired, there is nothing in this feature alone to postpone it to the latter. Upon the principle that, as between equal equities, priority of time will prevail, the lien of the \$3,000,000 mortgage is paramount to that of the \$10,000,000 mortgage subsequently created. Grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, because the purchaser of an equitable title takes it subject to all prior equities, and the grantor or assignor cannot transfer a greater interest than he himself possesses. In the attempt to avoid the application of this rule, in the present case, much stress has been laid upon the circumstance that the line in question was paid for in bonds of the \$10,000,000 mortgage, or with the proceeds of such bonds at the time it was built; but this fact is of no legal significance. Those who bought the bonds secured by that mortgage have no higher claim for consideration than the bondholders of the \$3,000,000 mortgage who parted with their property upon the promise that this line should stand as a security for the payment of their bonds. In *Railroad Co. v. Cowdrey*, 11 Wall. 459, similar considerations were urged, but were not countenanced by the court. The United Lines Telegraph Company does not occupy the position of a *bona fide* purchaser of the property. Full notice of the equities and claim of the complainant was given it before it purchased the property at the foreclosure sale. It acquired the rights of the bondholders in the \$10,000,000 mortgage, and nothing more. It has been suggested in argument for the defendants that receivers' certificates were created pursuant to the order of the court in suits brought in the courts of the state of New York and Ohio, in which receivers of the property of the Bankers' and Merchants' Company were appointed, which certificates were declared by the orders to be first liens on all the property of the company; and it is urged that the lien of the \$3,000,000 mortgage cannot have precedence of these certificates. As the complainant was not a party to these suits, the orders by which their certificates were created are nuga-

tory as an adjudication upon its equities. No judgment in these suits could bind complainant by a declaration that the certificates should outrank its equitable lien. It is entirely clear that a purchaser of such certificates would not acquire a lien prior to the \$3,000,000 mortgage upon the property included in it when it was recorded, or upon the accessorial improvements and additions. It is not so clear that a purchaser without notice, and for value, would not obtain a paramount lien upon the western lines, assuming that the certificates were authorized by the order or decree of a competent court in possession of the property at the time by its receivers. But these questions are not properly here, and cannot be considered under the issues made by the pleadings. The defendants do not assert in the answer that they are *bona fide* purchasers of such certificates, but, as has been mentioned, one of them, the United Lines Telegraph Company, sets up title under the foreclosure of the \$10,000,000 mortgage, and the other, the defendant Stokes, founds his claim upon the sale by the Ohio court, which has been set aside. It may be gathered from the record that the certificates which were issued by the receivers were subsequently used as cash, and applied towards the purchase money at the sale in the foreclosure of the \$10,000,000 mortgage. If this were so, the certificate holders would not require any protection, and this is probably the reason why no attempt has been made to present the defendants as certificate holders in the answer. It is no obstacle to the relief prayed for by the bill that the real estate sought to be subjected to the decree lies in another state. It suffices that the court has jurisdiction of the persons of the defendants, and can compel them to observe its decree. *Muller v. Dows*, 94 U. S. 444. A decree is ordered for the complainant, conformably to the conclusions which have been expressed. If necessary there will be a reference to a master to ascertain what property is to be included in the description of the "reconstructed lines" in the decree.

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GOFF'S ADM'R v. NORFOLK & W. R. Co.

(Circuit Court, W. D. Virginia. February 11, 1888.)

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL.

After an administrator appointed by a Virginia county court had qualified by giving bond without security, the court, in term, made an order permitting him to resign, and on the following day appointed a new administrator, who qualified by giving bond with security. *Held*, that the second appointment was regular.

2. SAME—ACTION—COURTS—FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

The fact that a citizen of another state is selected as administrator for the purpose of conferring on the United States circuit court jurisdiction of an action to be brought by him, does not defeat that jurisdiction.

3. MASTER AND SERVANT—RISKS OF EMPLOYMENT—INFANCY.

It is an act of negligence on the part of a railroad company to take into its employment as a brakeman a minor of such tender years as not to know the

risks of the service, if the agent of the company making the contract knows that he is a minor, and that the contract is made without the consent of the parents, but not if the agent believes from his statements and his general appearance that he is not a minor.

4. SAME.

Where plaintiff's intestate enters the employment of defendant as brakeman, with knowledge of the fact that there are overhead bridges on the road, which are dangerous, and of the bridge which caused his death, and, being possessed of sufficient intelligence as to the danger, and how to avoid it, is struck by the bridge while standing upright on the top of a car, plaintiff cannot recover, although his intestate was a minor.<sup>1</sup>

At Law.

*Daniel Trigg, F. S. Blair and D. F. Bailey, for plaintiff.*

*Fulkerson & Page, for defendant.*

PAUL, J. This is an action of trespass, brought by J. G. Queesenbury, administrator of Walter Goff, deceased, and commenced August 29, 1887, which is the date of the summons sued out at the institution of the suit. The declaration alleges that the said J. G. Queesenbury is a citizen of the state of Maryland, while it is admitted that his intestate was a citizen of the state of Virginia. The defendant files three pleas in abatement; two of them going to the capacity of the plaintiff to sue, the third to the jurisdiction of the court. Two of the pleas allege that at the time this action was instituted the plaintiff was not the administrator of the deceased, Goff. The third plea is that said administrator is not a resident of the state of Maryland. The evidence shows that at the April term, 1887, of the county court of Wythe county, one Painter qualified as administrator of the estate of said decedent, giving bond as such administrator, but without security. On the 12th day of August, 1887, said county court, in term, made the following order, shown by a certified copy produced in evidence here now, to-wit:

"*Virginia.* At a court continued and held for Wythe county at the courthouse, on Friday, 12th August, 1887,—present the same judge as on yesterday,—upon motion of Henry Painter he has leave to resign the administration of Walter Goff, decd., heretofore committed to him, it appearing that no funds of any kind have come to his hands. Ordered that court be adjourned until to-morrow morning, 10 o'clock.

G. J. HOLBROOK.

"A copy. Teste: E. H. UMBARGER, D. Clerk. For WM. B. FOSTER, Clerk of the County Court of Wythe County, Virginia."

On the following day of said court the plaintiff was appointed administrator of said Walter Goff, and duly qualified as such by giving bond with security. The court is of opinion that at the time the plaintiff was appointed administrator the powers of the former administrator had been revoked, and that the appointment of the plaintiff was regular and legal, and that he was the legally qualified representative of the deceased at the date of the institution of this suit.

Another objection to the jurisdiction of the court is based on the allegation by the defendant, and the facts admitted by the counsel for the

<sup>1</sup>As to the risks of employment assumed by railroad employes, see *Railroad Co. v. Wright*, (Ind.) 17 N. E. Rep. 584; *Scanlon v. Railroad Co.*, (Mass.) 18 N. E. Rep. 209, and

plaintiff, that the plaintiff, a citizen of the state of Maryland, was selected by the friends of the deceased, and requested to qualify as administrator of his estate, in order to give this court jurisdiction of this suit. The court has carefully examined all of the authorities cited by counsel. Those chiefly relied on by counsel for the plaintiff are *Childress v. Emory*, 8 Wheat. 642; *Bonafée v. Williams*, 3 How. 574; *Coal Co. v. Blatchford*, 11 Wall. 172; *Rice v. Houston*, 13 Wall. 66. These cases really have no bearing upon this question, but they all bear upon the question as to the power of a foreign administrator to maintain a suit in a federal court, where the beneficiary and the defendant live in the same state; a question which was decided by this court at the November term, 1886, in *Harper v. Railroad Co.*, ante, 102. It is not necessary to discuss these authorities further. The authorities relied upon by the defendant are *Jones v. League*, 18 How. 76; *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. Rep. 176; *New York v. Louisiana*, Id. In the case of *Jones v. League* it was shown that the plaintiff was not a resident of a state different from that in which the defendants lived. It was a question of the *bona fide* citizenship of the plaintiff; a very different question from the one now under discussion. The cases of *New Hampshire and New York v. Louisiana* were cases arising on statutes authorizing citizens of the former states to sue a state in the name of their respective states; the question being, as Chief Justice WARRE puts it: "Whether a state can allow the use of its name in such a suit for the benefit of one of its citizens?"—the object plainly being to evade the eleventh amendment to the constitution of the United States, which forbids a citizen suing a state. And it was held the state had no such power. The court fails to see any analogy of that case to the question under consideration. In the case before us it is conceded that the plaintiff is a citizen of the state of Maryland. By reason of his citizenship he has a right to resort to the jurisdiction of this court. This right is conferred by the constitution and laws of the United States, and this right cannot be annulled by any agreement or understanding on the part of the relatives of the decedent and the plaintiff that he should qualify as such administrator with a purpose, by reason of his citizenship, to give this court jurisdiction of this suit. The reasons and motives actuating the real beneficiaries and the administrator in bringing his suit in this court are immaterial. He is authorized by the Virginia statute (chapter 145, Code Va. 1873) to bring this suit. He is the only party that could maintain it. He is officially responsible for the administration of the estate committed to his hands. He is here in accordance with the provisions of the constitution and laws defining the jurisdiction of this court, and he has a right to have his case heard here, and the objection to the jurisdiction cannot be sustained. The plea in abatement must be overruled.

The case being called for trial, the witnesses examined, upon motion of plaintiff's counsel the court gave the following instruction:

"If the jury believe from the evidence that the defendant railroad company, through its agent, contracted with Walter Goff, the deceased, to work as a brakeman on said railroad; that said Walter Goff, at the time of said contract,



was a minor of such tender years as not to know the hazards and risks of the service on which he was to enter, and that the fact of his being a minor was known to said agent of said company, and that said contract was made without the consent of the mother of said Walter Goff, which want of consent on the part of the mother was known to said railroad agent,—then the taking of said Walter Goff into the service of said company in pursuance of said contract was an act of negligence on the part of said company, and the plaintiff is entitled to recover in this action."

And upon motion of defendant's counsel the court gave the following instructions, to-wit:

"The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. He who enters the services of another, with the machinery, implements, and fixtures of the employer's business in a given condition, waives any claim upon the employer to furnish other or greater safeguards. If, therefore, the jury believe from the evidence that the deceased entered into the service of the defendant with knowledge of the fact that there were overhead bridges upon the road of defendant, which were dangerous; and if they further believe from the evidence that the deceased knew of the bridge in question; and if they further believe from the evidence that the deceased possessed sufficient intelligence to know the danger of such bridge, and to know how to avoid said danger, then they must find for the defendant.

"(2) The court further instructs the jury that if they believe from the evidence that Walter Goff, the deceased, was of years of discretion, while learning the duties of a brakeman passed through the bridge in question, and that he knew the danger of coming in contact with the top of said bridge, and that his attention had been called to the danger of injury from the lowness of the bridge, and that, with this knowledge, he stood upright on the top of the car, and while so standing was struck by the bridge and killed, then the said deceased was guilty of contributory negligence, and the plaintiff is not entitled to recover.

"(3) If the deceased knew of the exposure to danger in serving as a brakeman for defendant upon a train having to pass bridges not sufficiently high to permit him to pass under them while standing at full height on the top of a car; and if he had sufficient intelligence to understand the danger, and know how to avoid it; and with such knowledge of the danger consented to enter the service of the defendant as such brakeman, and was killed by coming in contact with the top of one of said bridges,—then the plaintiff cannot recover from the defendant by reason of the construction of said bridge.

"(4) The court further instructs the jury that, even if they believe from the evidence that the deceased was a minor under the age of twenty-one years, yet that a minor who takes employment in a hazardous position or business is held by the law to have assumed the risks incident to the service in which he engages of which he has notice or knowledge; and therefore, if the jury believe from the evidence that Walter Goff, the deceased, knew the dangers incident to the employment as a brakeman upon defendant's trains; and if they further believe that said Walter Goff possessed sufficient intelligence to comprehend the dangers incident to said service; and if they further believe that said Walter Goff was informed of the danger of passing through the bridge in question,—then the fact that he was a minor does not vary the law, and his administrator is not entitled to recover for his death caused by the bridge in question.

"(5) The court further instructs the jury that if they believe from the evidence that Walter Goff was employed by the conductor of the train upon which the accident occurred as a brakeman upon said train, and that at the time of said employment the said conductor did not know that the said Walter Goff was under twenty-one years of age; and if they further believe from the evidence that said conductor believed from the statements of said Walter Goff, and from his appearance, that he was 21 years of age,—then the defendant company is not chargeable with negligence by reason of employing the said Walter Goff as a brakeman, even if such employment was without the consent of the parents of the said Walter Goff; and the plaintiff is not entitled to recover by reasons of the employment of said Walter Goff without obtaining the consent of his parents.

"(6) The court instructs the jury that the contract for service made by the deceased W. Goff, if he were a minor, with the N. & W. R. R. Co., through its conductor, Johnston, was not void but only voidable, at the election of the said deceased or his mother; and until the said contract was so avoided it was as valid and binding upon the deceased as if he had been an adult at the time he entered into it; and the plaintiff is not entitled to recover, simply because the said contract was made with a minor."

After argument of counsel, the case was submitted to the jury, and there was a verdict for the defendant.

## UNITED STATES v. RECTOR, ETC., OF THE CHURCH OF THE HOLY TRINITY.

(Circuit Court, S. D. New York. May 21, 1888.)

### 1. IMMIGRATION—PERSONS UNDER CONTRACT TO LABOR—CLERGYMEN.

The statute entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States" prohibits the encouragement of migration of aliens under contract or agreement previously made "to perform labor or service of any kind in the United States," imposes a penalty on any person or corporation encouraging migration of an alien under a contract or agreement previously made "to perform labor or service of any kind," and contains a proviso exempting from its provisions "professional actors, artists, lecturers, or singers." The defendant, a religious corporation, engaged an alien residing in England to come here and take charge of its church as pastor. *Held*, that the corporation was liable to the penalty prescribed.

### 2. SAME.

The words "labor or service" of any kind cannot be given a restricted meaning, so as to exclude the vocation of a minister of the gospel, in view of the proviso, which plainly signifies that they are intended to apply to all who labor in any professional callings not specially exempted.

At Law. On demurrer to complaint.

*Seaman Miller*, for the demurrer.

*Stephen A. Walker*, U. S. Atty., *contra*.

WALLACE, J. This suit is brought to recover a penalty of \$1,000 imposed by the act of congress of February 26, 1885, (23 St. at Large, 332,)

upon every person or corporation offending against its provisions by knowingly encouraging the migration of any alien into the United States "to perform labor or service of any kind under contract or agreement, express or implied," previously made with such alien. The defendant, a religious corporation, engaged one Warren, an alien residing in England, to come here and take charge of its church as a pastor. The act makes it the duty of the United States district attorney to bring suit to enforce the penalty prescribed. The demurrer interposed to the complaint raises the single question whether such a contract as was made in this case is within the terms of the act. In other words, the question is whether congress intended to prohibit the migration here of an alien who comes pursuant to a contract with a religious society to perform the functions of a minister of the gospel, and to subject to the penalty the religious society making the contract and encouraging the migration of the alien minister. The act is entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States." It was, no doubt, primarily the object of the act to prohibit the introduction of assisted immigrants, brought here under contracts previously made by corporations and capitalists to prepay their passage and obtain their services at low wages for limited periods of time. It was a measure introduced and advocated by the trades union and labor associations, designed to shield the interests represented by such organizations from the effects of the competition in the labor market of foreigners brought here under contracts having a tendency to stimulate immigration and reduce the rates of wages. Except from the language of the statute there is no reason to suppose a contract like the present to be within the evils which the law was designed to suppress; and, indeed, it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present. Nevertheless, where the terms of a statute are plain, unambiguous, and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of congress. Whenever the will of congress is declared in ample and unequivocal language, that will must be absolutely followed, and it is not admissible to resort to speculations of policy, nor even to the views of members of congress in debate, to find reasons to control or modify the statute. *U. S. v. Railroad Co.*, 91 U. S. 72. If it were permissible to narrow the provisions of the act to correspond with the purport of the title, and restrain its operation to cases in which the alien is assisted to come here under contract "to perform labor," there might be room for interpretation; and the restricted meaning might possibly be given to the word "labor" which signifies the manual work of the laborer, as distinguished from the work of the skilled artisan, or the professional man. But no rule in the construction of statutes is more familiar than the one to the effect that the title cannot be used to extend or restrain positive provisions in the body of the act. In *Had-*

*den v. Collector*, 5 Wall. 107, it is said: "The title of an act furnishes little aid in the construction of its provisions." The encouragement of migration prohibited by the first section is of aliens under contract or agreement previously made "to perform labor or service of any kind in the United States." The contracts which are declared to be void by the second section are contracts "having reference to the performance of labor or service by any person in the United States" previous to the migration of the alien. The penalty imposed by the third section is imposed on the person or corporation encouraging the migration of the alien under a contract or agreement previously made "to perform labor or service of any kind." No more comprehensive terms could have been employed to include every conceivable kind of labor or avocation, whether of the hand or brain, in the class of prohibited contracts; and, as if to emphasize and make more explicit the intention that the words "labor or service" should not be taken in any restricted sense, they are followed by the words "of any kind." Every kind of industry, and every employment, manual or intellectual, is embraced within the language used. If it were possible to import a narrower meaning than the natural and ordinary one to the language of these sections, the terms of the fifth section would forbid the attempt. That section is a proviso withdrawing from the operation of the act several classes of persons and contracts. Foreigners residing here temporarily, who may engage private secretaries; persons desirous of establishing a new industry not then existing in the United States, who employ skilled workmen therein; domestic servants; and a limited professional class, are thereby exempted from its provisions. The last clause of the proviso is: "Nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants." If, without this exemption, the act would apply to this class of persons, because such persons come here under contracts for labor or service, then clearly it must apply to ministers, lawyers, surgeons, architects, and all others who labor in any professional calling. Unless congress supposed the act to apply to the excepted classes, there was no necessity for the proviso. The office of a proviso is generally to restrain an enacting clause, and to except something which would otherwise have been within it. *Wayman v. Southard*, 10 Wheat. 30; *Minis v. U. S.*, 15 Pet. 423. In the language of the authorities: "A proviso carves special exemptions only out of the enacting clauses." *U. S. v. Dickson*, 15 Pet. 165; *Ryan v. Carter*, 93 U. S. 83. Giving effect to this well-settled rule of statutory interpretation, the proviso is equivalent to a declaration that contracts to perform professional services except those of actors, artists, lecturers, or singers, are within the prohibition of the preceding sections.

The argument based upon the fourth section of the act has not been overlooked. That section subjects to fine and imprisonment any master of a vessel who knowingly brings within the United States any alien "laborer, mechanic, or artisan," who has previously entered into any contract to perform labor or service in the United States. This section is wholly independent of the others, and the difference in the persons de-

scribed may reasonably be referred to an intention to mitigate the severity of the act in its application to masters of vessels. The demurrer is overruled.

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*In re* LETTERS ROGATORY FROM FIRST DISTRICT JUDGE OF VERA CRUZ.

(*Circuit Court, S. D. New York. August 1, 1888.*)

DEPOSITION—LETTERS ROGATORY—REV. ST. U. S. § 4071.

Letters rogatory from the first district judge of Vera Cruz, Mexico, stating that for the purpose of clearing up the details of a certain importation, he has made a decree directing the issue of letters rogatory, which decree purports to have been made in proceedings relating to an investigation as to the smuggling of certain cotton, do not show that the "proceedings" amount to a "suit for the recovery of money or property" within the meaning of Rev. St. U. S. § 4071, providing that the testimony of any witness residing in the United States may be obtained by commission or letters rogatory, to be used in a suit for the recovery of money or property depending in any court in a foreign country when the government of that country is a party, or interested in the suit, and do not warrant an order directing the attendance of a witness to answer the interrogatories.

On Motion to Set Aside an Order directing the attendance of a witness.

*Olcott, Mestre & Gonzalez*, for Mexican Government.

*Louis Sanders*, for witness.

LACOMBE, J. The order heretofore made for the attendance of the witness was based on letters rogatory from the first district judge of Vera Cruz, stating that, "for the purpose of clearing up the details of" a certain importation, he has made a decree directing the issue of letters rogatory to the federal judge at the city of New York. This decree purports to have been made "in the proceedings relating to the investigation that [he is] making as to the smuggling of some cases of cotton." A motion is now made to set aside the order. The only authority for directing the attendance of the witness to which attention has been called is found in section 4071 of the Revised Statutes of the United States. It is therein provided that the testimony of any witness residing in the United States may be obtained by commission or letters rogatory, to be used (a) in a suit for the recovery of money or property; (b) depending in any court in a foreign country, with which the United States are at peace; (c) where the government of that country is a party to such suit, or interested therein. It does not appear, either by the letters, the petition of the Mexican consul general, or even the cablegram read upon the argument, that the "proceedings relating to the investigation as to the smuggling" above described in fact amount to "a suit for the recovery of money or property." The order must therefore be set aside. Section 875 of the Revised Statutes does not help the petitioner; it only provides for the procedure when letters rogatory are addressed and commissioner appointed; it does not extend the cases in which examination of witnesses will be ordered.

STEWART *et al.* v. THE SUN.

SAME v. THE TRIBUNE.

(Circuit Court, S. D. New York. August 31, 1888.)

## COSTS—SECURITY FOR COSTS—TIME OF MOTION.

The federal courts may require security for costs from solvent non-resident plaintiffs at any time when no prejudice to plaintiffs' rights is shown to have resulted from defendant's delay in moving.

On Motion for Security for Costs.

*R. D. Benedict*, for complainants.

*Sackett & Bennett*, for Tribune Association.

*Franklin & Clifford* and *A. H. Bartlett*, for the Sun.

LACOMBE, J. The state courts which refuse to require security for costs from a non-resident plaintiff, where defendant has delayed moving until after answer is served, also hold that impecunious non-residents may not sue *in forma pauperis*. In this court such plaintiffs are allowed this privilege; and an equitable application of the doctrine of *Heckman v. Mackey*, 32 Fed. Rep. 574, would seem to warrant the court in requiring security from solvent non-resident plaintiffs at any time,—at least when no special prejudice to plaintiffs' rights is shown to have resulted from defendant's delay in moving. Defendant in each case may take an order requiring plaintiffs to file security in the amount of \$500.

SOUTH COVINGTON &amp; C. ST. RY. CO. v. GEST.

(Circuit Court, S. D. Ohio, W. D. September 11, 1888.)

Motion for New Trial and for modification of findings of fact. For findings, see 34 Fed. Rep. 628.

*John C. Benton* and *Simrall & Mack*, for plaintiff.

*Headly, Johnson & Colston* and *Reemlin & Reemlin*, for defendant.

JACKSON, J. The court has carefully reviewed the evidence in this case, and fully considered the several grounds on which the motion for a new trial, and for a modification of the court's findings of fact, are made on behalf of defendant. Without reviewing these grounds in detail, the result of this re-examination is the conclusion that said motions should be denied. The court adheres to its former conclusion that the cause of action based upon the fraudulent representations made by defendant in respect to the 768 coupons was not barred by the statute of limitations. In the findings of fact heretofore filed the court found

that "this fraud was not discovered by plaintiff until the fall of 1883, when the testimony of said Gest and others was taken in the foreclosure proceedings." By this statement the court meant that the plaintiff was not in possession of the facts which were calculated to give them notice of the fraud until after the evidence had been concluded, and the report of the master was made, in the fall of 1883. The court considered that report made in November, 1883, based upon the testimony of Kellogg and Gest, as the earliest date at which plaintiff was in possession of facts calculated to excite its suspicion that Gest had made untrue and fraudulent representations about the coupons. Gest's deposition, given in the foreclosure proceeding in February, 1883, did not disclose the fact that he had knowingly made false and fraudulent representations about the coupons. Neither did the affidavit of Wier. Kellogg's testimony, taken in the fall of 1883, made the first disclosures that were calculated to excite suspicion and inquiry. But the first actual discovery of the fraud which defendant committed in his representations about the coupons was made in the fall of 1885, when Gest's deposition was given in this case, and when he stated that he "really didn't believe that they [the said coupons] were a first lien, but were only a valid indebtedness, good in connection with other floating debts of the company." When he made this statement as to what his actual belief was at the time of making his representations about the coupons, he disclosed for the first time an essential ingredient of the fraud with which he is charged in and by the amended count filed in February, 1887. If necessary, the court would hold that the fraud was not actually discovered till the fall of 1885. But as the facts found by the master in his report under the foreclosure proceedings, and those stated in the deposition of Kellogg under that reference, were calculated to excite plaintiff's suspicion, and induce inquiry, the court in the findings already filed computed the running of the statute of limitations from the fall (November) of 1883. Upon a re-examination of the matter, the court is satisfied that this is the earliest date at which plaintiff should be charged with a discovery of the fraud. The other material and controlling facts of the case are as found by the court in the findings heretofore filed, and they are adhered to, with the legal conclusions deduced therefrom. It is not deemed proper, nor is it in conformity with the usual practice in such cases, to set out in detail the evidence on which these findings were based. The motion to modify the findings of fact and for a new trial are both overruled and disallowed, with costs to be taxed against defendant. An order will be accordingly so entered.

BALL GLOVE FASTENING CO. v. BALL & SOCKET FASTENER CO.

(Circuit Court, D. Massachusetts. August 16, 1888.)

1. PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—EQUITY—JURISDICTION.

Equity has jurisdiction of a bill by the owner of a patent to obtain an account of royalties due from a licensee, and an injunction against using the patent in defiance of the agreement of license.

2. SAME—INFRINGEMENT—GLOVE FASTENERS.

Claims 2 and 4 of letters patent Nos. 290,067 and 306,021, for improvements in glove fasteners, consisting of the combination of a stud formed into a ball at its upper end, and extending through and connecting two disks, one above and one below the flap of the glove, with a ring having two elastic flanges or jaws, and a separate hood having two ears extending from its base ring, are infringed by a device having the same button member, and substantially the same button-hole member, with only immaterial differences in connecting the hood and flanged ring, and in the position of the flanges or jaws.

In Equity. On bill for an injunction and account.

John R. Bennett and W. B. H. Dowse, for complainant. T. W. Clarke, for defendant.

COLT, J. The bill in this case prays for an injunction, as well as an account against the defendant. It seems to me that this is sufficient to give a court of equity jurisdiction, though the defendant is a mere licensee; and it has been so held. *McKay v. Smith*, 29 Fed. Rep. 295; *Hat Sweat Co. v. Porter*, 34 Fed. Rep. 745; *Seibert Co. v. Manning*, 32 Fed. Rep. 625. The defendant company is the sole licensee of the complainant of three patents granted to Edwin J. Kraetzer for improvements in glove fasteners. The license contract was dated March 21, 1885, and is still in force. The present suit is for an account of the royalties due under the agreement, and an injunction, meantime, to restrain the defendant from using the patents in defiance of the agreement. Under these circumstances, the defendant cannot and does not deny the validity of the Kraetzer patents, but the defense of non-infringement is brought forward and relied upon.

The complainant insists that the defendant's fastener is an infringement of the second claim of Kraetzer patent No. 290,067, and the fourth claim of Kraetzer patent No. 306,021. These claims are as follows:

"(2) The combination of a catch, consisting of an inner and an outer plate, a stud connecting said plates, and a shank attached to the outer plate provided with a ball and a spring-flanged eyelet, adapted to receive the ball of said catch, substantially as described."

"(4) The combination of the two disks, B, and C, and the knob, A, having its shank extended through them and upset at its end against the lower of them, with an entire ring provided with two elastic flanges or jaws, and with a separate hood having two ears extending from its base-ring, as described, and between the said flanges or jaws, and bent against the ring, all being substantially as set forth."

The complainant's fastener, made under the Kraetzer patents, is composed of two parts,—a button member secured to the under flap of a



glove, and a flexible button-hole member secured to the upper flap, and adapted to be pressed down upon the stud of the button member, which it grasps in the jaws of its flanged ring socket. The button member consists of three parts,—a solid stud or knob formed into a ball at its upper end, and having a shank extending through two disks, one above and one below the flap of the glove, the shank being upset at its lower end upon the lower disk. The button-hole member consists of a cap or hood separate from the socket proper, and having two projections or ears, a flanged ring having two elastic flanges or jaws, adapted to yield or spring over the enlarged head or stud, and clasp it around its neck. The button member of defendant's device seems almost identical with the Kraetzer. The button-hole member of defendant's device is substantially like that of Kraetzer. It has a separate cap or hood on the upper surface of the flap, and a flanged ring on the under surface, having two projecting jaws to slip over and embrace the head of the knob or stud in the same place described by Kraetzer. The differences of connection in the two devices of the hood and the flanged ring, or the different positions of the flanges or jaws, are immaterial. The whole substance of the Kraetzer invention is found in defendant's device. Nor does the prior state of the art so limit the Kraetzer patents that the defendant should go free, because the Kraetzer patents should not be limited to the exact forms found described in the specifications; and the defendant should not be permitted to escape by making colorable or immaterial changes in construction while retaining all the vital parts of Kraetzer's improvements. Motion for injunction is granted.

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LOCKE v. SMITH *et al.*

(Circuit Court, D. Massachusetts. August 27, 1888.)

**PATENTS FOR INVENTIONS—INFRINGEMENTS—DAMPER REGULATORS.**

Letters patent No. 335,080, granted January 26, 1886, to Nathaniel C. Locke, for an improvement in damper regulators, consists of a combination of a diaphragm motor, a damper motor, and a valve so combined as to produce a damper regulator of great sensitiveness. *Held*, in view of the prior state of the art, that the only novelty is the mechanism of the valve which controls the supply of actuating fluid to the damper motor, the valve being separate and distinct from the piston of the damper motor, and that the patent is not infringed by a device constructed under the Spencer patents of September 29, 1885, and March 23, 1886, in which the valve-casing is part of the piston; such piston being double acting, receiving the fluid at its center, and delivering it at either end, with a fluid-controlling valve arranged in its axis.

*In Equity.* Suit for infringement of patent.

*James E. Maynadier*, for complainant.

*Thomas W. Porter*, for defendants.

COLT, J. This suit is brought upon two patents issued to the complainant. Patent No. 335,080, dated January 26, 1886, is for improve-

ments in damper regulators, and patent No. 335,033 bearing the same date, is for an improved form of diaphragm for pressure regulators. The main controversy is directed to the question whether the defendants' apparatus, which is constructed after two patents granted to J. E. Spencer, dated September 29, 1885, and March 23, 1886, embodies the improvements described in the Locke patent for damper regulators. The Locke patent is dated January 26, 1886, but the application was filed April 24, 1883. To determine the question of infringement, we must see what Locke's invention is, as set forth in his patent. The specification says:

"My invention relates to that class of automatic damper regulators which have a motor with a movable piston connected with the damper, for operating the same, and have a pipe leading to said motor in which is a valve for opening and closing the passage. \* \* \* The object of my invention is to provide a regulator which shall possess the requisite power to move the heaviest dampers with the least possible variation of steam-pressure in the boilers; and it consists—*First*, in a damper motor operated by fluid under pressure, the flow and exhaust whereof is controlled by a supplemental motor or regulator sensitive to variations of pressure in the generator; *secondly*, in a damper motor actuated in one direction by fluid under pressure, and, on exhaustion thereof, moved in the other direction by a weight, the employment of water as a motive power admitted to the damper operating motor through a suitable valve to be operated by the changing pressure of the steam in the boilers to be controlled, said steam pressure acting upon a suitable motor with which said valve is connected; and, *thirdly*, in a peculiar construction of the said valve, and various other devices and details of construction to be hereinafter described. \* \* \* Before describing in detail the apparatus shown in the drawings which embodies my invention, I desire to point out in a general way the mechanical conditions under which these machines are required to operate, and the difficulties heretofore encountered, which are overcome by my invention. *First*, It is required to move the damper through an arc varying from forty-five to ninety degrees, or thereabout, and, as the damper is frequently very heavy, a considerable power and range of motion is necessary. At the same time it is necessary to control the application of this motor power by an apparatus of great sensitiveness, and therefore of short range of motion. \* \* \* I prefer to employ a diaphragm motor subjected to pressure from the generator having a very short range of motion, and with a corresponding sensitiveness. This motor acts upon, and is counterpoised by, the ordinary scale-beam lever, with an adjustable weight. A balance controlling valve is coupled to said scale-beam, preferably at a distance from the motor connection therewith, so that the motion of said motor will be multiplied at said valve. Said valve is placed in the pipe, whereby fluid under pressure is conveyed from its source to the damper motor, and controls the flow and exhaust thereof. \* \* \* Heretofore it has been customary to employ flat diaphragms, usually cut from rubber fabric, such as sheet packing. It is a matter of experience that such diaphragms vary in sensitiveness inversely as the pressure, \* \* \* but I have discovered that by providing the diaphragm with a deep annular corrugation or fold, \* \* \* so that the free parts of the diaphragm constitute two concentric parallel surfaces, with slight space between to be filled and lubricated by the motor fluid, there is no variation in sensitiveness with variation in pressure. \* \* \* I do not claim as new the operation of a steam damper and motor by an auxiliary valve placed in a line of pipe for the admission of steam to said motor, when said valve has no mechanical auxiliary appliance attached thereto for operating the same inde-

pendent of the steam-pressure acting directly upon the valve itself. What I claim as my invention, and desire to secure by letters patent, is: (1) The combination, in a draft-regulating mechanism, consisting of a damper and a motor for operating the same, and having a valve controlling said motor, of the supplemental motor, R, attached to said valve, having pipes, G and K, and pipe, H, and reservoir, F, all substantially as shown and described, and for the purpose specified."

Thirteen other claims for combinations of mechanism described in the specification and shown in the drawings of the patent follow the first claim. The invention of Locke embraced a combination of three general elements, a diaphragm motor, a damper motor, and a valve. These elements were so combined as to produce a damper regulator of great sensitiveness, or one in which a slight motion of the diaphragm produced a much greater movement of the piston of the valve which controls the damper motor. An examination of the prior state of the art makes it clear, as it seems to me, that the only novel feature in Locke's combination is the construction of the valve. By the admission of his own experts, the diaphragm motor of Locke is substantially the old diaphragm motor of Clarke's patent of 1854, and the damper regulator of Locke is substantially the old and well-known damper motor of Hallock's earlier patent. Livermore, complainant's chief expert, testifies as follows:

"*Cross-Interrogatory 96. Answer.* I do not think that the element cold water is itself patentable; nor does any element of the entire Locke apparatus, except the valve, occur to me, which is, in my judgment, patentable in itself." "*Cross-Int. 39.* Leaving out of consideration, for the present, differences of construction of the parts, do you think the Kipp patent embodies a damper motor, a valve for controlling the supply of fluid to the damper motor, with suitable conduits therefor, and a pressure device for controlling the supply of fluid to the damper motor, in the sense in which such parts are employed in Locke's patent damper regulator? *A.* I do. *Cross-Int. 40.* In so far as relates to the damper motor, Locke has made no advance upon Kipp, except to substitute one old and well-known kind of motor for another, has he? *A.* No." "*Cross-Int. 43.* In so far as relates to the pressure device, Locke has made no advance upon Kipp, except to substitute a different, but old and well-known, pressure device (diaphragm-motor) for that shown in Kipp's, unless it be in the diaphragm. Is this so, or not? *A.* Regarded merely as a pressure device, independent of its relations to the other parts, he has not."

Nor is there anything new in Locke's method of attachment of the lever of the diaphragm motor to the valve-stem outside the piston, so as to give a multiplied motion to the valve. On this point Locke testifies as follows:

"*Cross-Interrogatory 93.* How long have you known a valve-actuating device, operating like that shown in your patent, the lever, J, of which is attached to the valve outside the piston, to give a multiplied motion to the valve? *Answer.* I cannot say precisely; quite a number of years. *Cross-Int. 94.* State as nearly as you can. *A.* Perhaps twelve or fourteen years. *Cross-Int. 95.* Have they been in public use during that time? *A.* They have for certain purposes, but not in connection with damper motors. *Cross-Int. 96.* Has not this kind of valve-actuating device been in use during the time you have specified for actuating valves of both steam and water apparatus? *A.*

They have. *Cross-Int.* 97. Please examine the catalogue or pamphlet now shown you, (put in evidence and marked 'Defendants' Exhibit Locke Catalogue,') and state whether there is not shown, on page 21, a valve-actuating device substantially like that shown in your patent, No. 335,080. A. There is."

He then testifies, from dates contained in the circular, that it was issued prior to 1879, and that the valve-actuating device of the patent performs the same duty as did those earlier devices. It thus appears that, however great the merit of Locke's invention, the elements which go to make up the patented combination were all old, except the valve, B. The valve, B, forms an element of all the claims of the patent which the defendants are charged with infringing. The chief ground of defense is, that the defendants do not use the valve, B, or its equivalent, and it seems to me that this position is sustained by the evidence. Claim 8 is for the combination of mechanism which makes the valve. Locke's expert, Livermore, testifies as follows:

"*Cross-Interrogatory* 25. In your opinion, does the defendants' machine embody the combination specified in said claim 8 of Locke's patent, 335,080? *Answer.* In my opinion, it does not." "*Cross-Int.* 207. Can you find anywhere in your researches in this art a machine substantially resembling Spencer's, which has a cylinder and piston that may be of any desired diameter, according as the resistance of the damper may render desirable, such piston being double-acting, receiving the actuating fluid at its center, delivering it at either end as required, and with a fluid-controlling valve arranged in its axis? A. I can find no machine having the features mentioned."

When Locke himself was asked (*Cross-Interrogatory* 212) to compare his valve with Spencer's, he replied:

"I cannot compare the two—the Spencer patents and the patent of my own referred to—in this respect, because, while in the Spencer patents the valve-casing is part of the piston, in my patents the valve is entirely separate and distinct from the piston of the damper motor."

This is the evidence of complainant, and it is, of course, reinforced in still stronger language by the testimony of the defendants. Indeed, it is apparent, on comparison, that the combined valve and damper motor of Spencer does not embody the essential features of the Locke valve. It also appears that the operation of the two regulators is quite different. In the Locke machine, when the damper governor acts, it entirely shuts the damper, or nearly so; while in the Spencer machine the damper closes gradually, as the pressure increases. It is only by ignoring the question of the difference of mechanism, and by giving a breadth of construction to the Locke patent which the law does not permit, that the defendants can be held as infringers.

As to patent No. 335,033 for a diaphragm, assuming the patent to be valid in view of the prior state of the art, upon which my mind is not free from doubt, I do not think the complainant has made out with sufficient clearness the charge of infringement. The defendants now use the Clarke patent diaphragm, and their slight use of the Locke diaphragm seems to have been more experimental than anything else. And

upon this point the positive testimony of Spencer that he never used a Locke diaphragm after the Locke patent was applied for is not met or overcome by complainant's evidence. The bill should be dismissed.

### MARVIN v. GOTSCHALL.

(Circuit Court, D. Minnesota. September 25, 1888.)

#### PATENTS FOR INVENTIONS—NOVELTY—DRAFT EQUALIZER.

Patent No. 172,756. January 25, 1876, to Richard M. Marvin for a draft equalizer, used in the attachment of three horses to harvesters and other machinery, consists of an evener and two levers pivoted, the former at its center, and the latter at their ends to the tongue. The first lever is attached to the end of the evener and the single horse is attached to the end of the lever. The second lever is on the opposite side of the tongue, and its free end is fastened to that of the evener, and the two horses are attached to its end. The first-named lever is pivoted to the tongue in front of the second. A patent issued to Edwin F. Toof, December 19, 1865, was for an invention for the same purpose, consisting of a short evener pivoted at one-third its length, the one horse drawing on its long end. A lever is attached to the same side in front of the evener, and is attached to it. On the free end of the lever the single horse is attached. On the other side another lever is attached twice as long as the former, also attached to the evener, and to the end of this lever the two horses are attached. The length and place of pivoting these levers may be varied to give the one horse greater or less advantage over the others, or the first lever may be pivoted in the second for the same purpose. No use was made of Marvin's combination until he obtained his patent, and since then manufacturers have used his combination instead of that of Toof, upon which the patent expired in 1882. The patent to Marvin was issued after a careful comparison with the Toof patent. *Held*, that the Marvin patent was not void for want of novelty, and that it was not anticipated by the Toof patent.

At Law. Action for damages for infringement of letters patent.

Action by Richard M. Marvin against Charles J. Gotschall for damages for the infringement of letters patent.

*Frackelton & Careins*, for plaintiff.

*Woods, Hahn & Kingman*, for defendant.

SHIRAS, J. On the 25th day of January, 1876, letters patent No. 172,756 were issued to the plaintiff for an improvement in draft equalizers, which invention related to the means of attaching three horses to a harvester or other machine, in which the pivot of torsion is outside the line of draft; two horses being placed on one side of the tongue or pole and one on the other, so that the labor of drawing the machine should be equally distributed, while the side draft or torsion exercised on the tongue should be equalized. The means used to accomplish these ends consist of a lever or evener, marked C upon the drawing attached to the patent, which is pivoted at its center point on the tongue, a lever, marked F, pivoted at one end to the tongue and attached to one end of the lever, C, it being intended that the single horse shall be attached to the lever, F, and a spreader attached at one end to the tongue and

extending a sufficient distance to permit the attaching two horses to the end thereof, the spreader marked D being also attached to the end of the lever, C. The lever, C, spreader, D, and lever, F, are attached in the same line in the order named to the tongue. That this mode of attaching horses to harvesters and like machines is useful and valuable is not questioned.

The defense is that plaintiff's patent in all essential particulars is anticipated by one issued to Edwin J. Toof, under date of December 19, 1865. In the specifications attached to this patent it is said:

"It is often desirable in the case of gang plows, harvesters, and other machines and vehicles having a heavy draft, that three horses should be arranged abreast of each other; in which case two horses must be placed upon one side of the guide or draft-pole, while one only is placed upon the other side, which arrangement, by ordinary draft attachments, renders the draft very unequal, and prevents the successful employment of horses in the manner proposed. My invention consists in a novel and simple arrangement of levers of suitable proportions, whereby the draft is so applied to a short lever or double tree, one of the arms of which is twice as long as the other, that the two horses arranged on one side of the guide or draft-pole draw upon the shorter arm of said double tree or lever, while the one horse upon the opposite side of the draft-pole or guide draws upon the longer arm of said short double tree, thus keeping a uniform and equal draft upon both sides."

The specifications and drawing accompanying the same show that the arrangement proposed by Toof consisted of a lever attached to the tongue at a point distant one-third of the length of the lever from its end, thus making the lever project twice as far beyond the point of junction with the tongue on one side than upon the other. In front of this lever marked B on the drawing was attached another lever marked C, projecting on the same side with the longer arm of the lever, B, and to the free end of lever, C, the single horse was attached. On the other side of the tongue was attached a lever, D, twice the length of the lever, C, to the free end of which the two horses were attached. In the drawing the levers, C and D, are attached to the same point in the tongue. The attachments of the several levers were so made that the power exerted by the one horse would be equal to that exerted by the two horses on the lever, B, thus equalizing the draft. It is also stated in the specifications that the exact proportions specified may be varied to accommodate the arrangement to the varied powers of different horses, and also that the short lever, C, to which the single horse is attached, may be pivoted to the guide or draft-pole either before or behind the point at which the lever, D, to which the two horses are attached, is pivoted thereto; or, if it is desired to give the one horse still greater advantage over the two horses, the lever, C, may have its pivoted connection in the short arm of the lever, D.

In attaching three horses to a harvester, two matters are important in securing a practicable and useful mode of attachment. The first is that the attachment shall be such that none of the horses shall be required to walk through or over the standing grain, and the second is that the side draft between the two horses and the one shall be so equalized that the single

horse shall not be placed at a disadvantage. In accomplishing the first requirement, both Toof and the plaintiff place the single horse on the side towards the grain. In the Toof combination the evener or lever, B, is so attached to the pole that the longer arm thereof projects upon the side towards the grain, thus giving an advantage to the single horse, it being stated that this arm should be double the length of the one projecting on the side to which the two horses are attached. In the Toof combination, it is intended that when the horses are abreast and exerting through the lever, B, the same effect, that lever will stand at right angles with the tongue. In the Toof combination the arm, D, to which the horses are attached must be of sufficient length to give space for attaching the two horses, and it operates both as a spreader for the purpose of affording this space and also as a lever operating on the short end of the lever, B. In this combination, therefore, to equalize the draft the combined effect of the combined levers, D, and the short arm of B operated by two horses must be offset by the effect of the combined levers, C, and the long arm of B operated by the single horse.

In the plaintiff's combination, the evener is attached to the tongue at its center point. The spreader to which the two horses are attached does not operate as a lever, as the point of attachment of the horses and of the link or rod connected with the end of the evener are the same. The two horses operate, therefore, through the single lever, to-wit, the one-half of the evener, and the effect thereof is offset by the operation of the single horse upon the combined levers, F, and the one-half of the evener. When the horses are abreast, the evener, C, is not at right angles with the tongue, but it is so arranged that when the spreader, D, and lever, F, are at right angles with the tongue, the angles formed by the rods connecting the spreader, D, and the lever, F, with the ends of the evener are equal obtuse angles. And it is claimed that thereby an advantage is secured, in that if the horses, on the respective sides, fall out of line, the pole of the one falling behind upon the lever, C, will be more nearly at right angles, and by the increase of power thus acquired the equilibrium will be more readily restored. By reason of the pivoting the lever, F, to which the single horse is attached, to the tongue at a point in advance of the attachment of the spreader, D, an additional advantage is secured to the single horse in preventing the tongue from turning out of a straight line.

The contention on the part of the defense is that the essentials of the plaintiff's combination are clearly indicated in the specifications and drawing attached to the Toof patent, and therefore the latter anticipates the former; the rule being that, where the prior publication or description sets forth the essentials of the invention in such clear and exact terms that a person skilled in the art could, by the aid of the prior description, construct the machine or combination covered by the subsequent patent, without calling into play inventive as distinguished from mechanical skill, then the prior description or patent is held to have anticipated the subsequent patent. I am free to confess that I am greatly in doubt as to the true solution of the question at issue. It is hard to

escape the conclusion that the plaintiff's patent is merely a modification of the combination shown in the Toof patent, and if the plaintiff had not the benefit of certain presumptions in his favor the scale might incline against him. The fact, however, that he has a patent, and that it appears that the same was issued to him after a careful comparison in the patent-office of his combination with that shown in the Toof specifications, makes out a *prima facie* case in his favor, and the court is not justified in reversing the action of the patent-office unless it fairly appears that there is a lack of invention in the combination covered by the patent. In aid of this legal presumption is the fact that the Toof patent was granted in December, 1865, and it is not shown that the combination appearing in the plaintiff's patent was made use of by any one until the plaintiff devised it in 1876, nearly 12 years later. If, according to the theory of the defense, the changes from the Toof combination to that of plaintiff are merely mechanical, and such that they would readily suggest themselves to any skilled mechanic or operator, why is it that the same were not more promptly brought about? The fact of the long lapse of time after the Toof combination was made public before that of the plaintiff was discovered, tends strongly to support the claim that it required invention to produce it. The further fact that manufacturers are using the combination patented by plaintiff at the risk of suits for infringement, instead of the Toof combination, the patent on which expired in 1882, strongly points to the conclusion that they recognize a superior merit in the plaintiff's combination. Under these circumstances it must be held that the defendant has failed to sustain the defense of want of patentable novelty in plaintiff's combination, and as it is admitted that the defendant has been engaged in the sale of machines in which the plaintiff's combination is used, it follows that the plaintiff is entitled to a judgment for damages.

It appearing, however, that the number of machines sold by defendant is but small, the plaintiff does not ask judgment for more than a nominal sum, and the recovery therefore will be for one dollar and costs.

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## NATIONAL HAT-POUNCING MACH. CO. v. BROWN.

SAME v. HEDDEN *et al.*

(Circuit Court, D. New Jersey. September 25, 1888.)

### 1. PATENTS FOR INVENTIONS—ANTICIPATION—HAT-POUNCING MACHINES.

Claim 2 of letters patent No. 97,178, granted to Rudolph Eickemeyer, for an improvement in hat-pouncing machines, claiming the arrangement and combination of a rotating pouncing cylinder, with a vertical supporting horn of such small size that the hat may be freely turned thereon, and the tip, side crown, and rim pounced in a single operation, is not anticipated by practical use by the act of pouncing in one operation on the Nougaret machine, which



employs a long horn, on which the hat cannot be freely turned and pounced in a single operation, unless by twisting and stretching it out of shape, in a manner for which the machine was not intended.

3. SAME.

Claim 2 of the Eickemeyer patent anticipated claim 5 of patent No. 220,889, granted to E. B. Taylor, describing the combination of the supporting horn and the self-feeding pouncing cylinder, whereby the hat is drawn over the support in the direction of the motion of the cylinder, restrained by the hand, assisted by a guard or pressing pin, as the former patent is for the combination by which the whole hat can be pounced in a single operation; and, though feed-rollers are used, drawing the hat in the opposite direction from the motion of the cylinder, yet the Taylor patent simply restores the direction in which the hat would be carried by the cylinder without the feed-rollers, which is immaterial to the principle of the invention.

In Equity.

*Eugene Treadwell and John R. Bennett*, for complainant.

*A. Q. Keasbey and E. Q. Keasbey*, for defendants.

BRADLEY, Justice. These suits are each brought on two patents owned by the complainants,—one granted to Rudolph Eickemeyer, November 23, 1869, and the other granted to Edmund B. Taylor, October 21, 1879,—each for improvements in machines for pouncing hats. The claims which are at issue are the second claim in the Eickemeyer patent, and the fifth in the Taylor patent. Pouncing hats is much the same thing as shearing cloth; consisting in the removal of the fuzz or rough surface of wool or fur which remains on the fabric after it is felted or woven, as the case may be. It was formerly done by hand, by rubbing the surface of the hat body with sand-paper or emery while holding the brim firmly on the table, and stretching the crown on a block. The irrepressible genius of the inventor has, of course, produced machinery that does the same thing, and does it better, almost automatically. A horizontal cylinder or cone, covered with emery or some other cutting or grinding substance, is attached to a spindle, and made to revolve with great rapidity, and the surface of the hat is brought into contact with it. This accomplishes the object. The principal difficulty lay in bringing every part of the hat body, which has a very irregular shape, into equal and perfect contact with the emery cylinder. For a long time separate machines had to be employed for the brim and the crown. The former was drawn by separate conical rollers, so shaped as to give the hat a circular movement, between the revolving cutting cylinder and a rest or support, which, being operated by a treadle, or fixed in proper position by a set-screw, kept the brim in contact with the cylinder. The movement of the hat was somewhat regulated by the hand. The crown was stretched on a revolving block, and thus exposed to the pouncer. The object of the machines which are the subjects of the patents sued on is to pounce the whole hat, both brim and crown, by one operation, without the use of separate machines. This is effected by constructing the rest by which the hat is supported in contact with the cutting cylinder in such a form, and adapting it to such an operation, that all parts of the hat body may be brought into the desired contact. The rest, instead of being a long roller, or fixed bearing, like that of a lathe, parallel with the sides of the

cutting cylinder, is more like a horn with a nob, or short bearing, which will support the brim, the crown, and the tip successively against the cylinder, manipulated and turned about, in part by hand, and in part by an accessory roller or rollers. This could not be done successfully on the old machines, because the crown could not be slipped over the elongated rest, and, if this could have been done, there was no room for the brim between the rest and the body of the machine. Eickemeyer's patent comprehends other matters besides that which forms the particular subject of the second claim, and they do not require notice. The invention in question is described in the specification as follows:

"My invention further consists in an arrangement of the pouncing cylinder and a rest or supporting horn for the hat body, which can be introduced within the crown to support it against the cutting action of the pouncing cylinder during the operation of pouncing, the arrangement being such as to dispense with the use of a hat block in pouncing the tips and side crown of the hats."

The specification describes in detail the mode of attaching and adjusting the supporting horn so as to adapt it to the pouncing of the different parts of the hat, and adds this important suggestion:

"The essential part of the arrangement of the supporting horn being the space left between it and the lathe-head to give room for the brim while it is supporting the tip in the operation of pouncing."

The second claim of the patent is in the words following, to-wit:

"I claim (2.) The arrangement and combination of a rotating pouncing cylinder with a vertical supporting horn, substantially as described, whereby the supporting horn may be used to support the tip, side crown, or brim during the operation of pouncing the hat."

It cannot be denied that the improvement was a great advance in the art of manufacturing hats. The patent was the subject of consideration in a suit brought by the complainant against one Thom *et al.* in the circuit court for the district of Massachusetts, and was sustained in an able opinion delivered by Judge COLT. 25 Fed. Rep. 496. The defendants in that case contended that the Eickemeyer patent was void for want of utility; that the machine never came into market, etc. It was also contended that the invention was substantially anticipated by the Nougaret machines, which had been patented in 1866, and that the whole hat body could be, and had been, pounced on those machines. The judge disposed of these objections as follows:

"The defendants contend at the outset that the Eickemeyer patent is void for want of utility. The Eickemeyer machine never came into the market. It appears that the only machines built were those used in this suit. In view of the fact, however, that the evidence shows that a machine made after the Eickemeyer patent is practically operative for pouncing hats in the manner described, this defense falls to the ground. The Taylor machine may be an improvement on Eickemeyer's, by reason of avoiding the necessity of feed-rollers, and by reason of its simplicity of construction; and it may, in consequence, be very valuable commercially, and the best pouncing machine in use; but this will not protect Taylor or the defendants in the use of the specific mechanism described in the specification, and embodied in the claims of the Eickemeyer patent; provided, as has been shown, that the Eickemeyer ma-

chine is operative for the purpose it was designed. But the main controversy is over the second claim of the Eickemeyer patent, which described the combination of a rotating pouncing cylinder with a vertical supporting horn, wherein the horn is used to support the whole hat body during the operation of pouncing. It is said that the Nougaret machines anticipate, in substance, this claim. It is apparent, however, that the Nougaret machines employ a long horn. They do not make use of a supporting horn of such a small size that the hat may be freely turned thereon, and so supported in the machine as to leave the space described in the patent, in order that the hat may be freely turned, so as to pounce all parts of the surface thereof; and we find no prior machine so organized. This is not a formal, but a material, difference, and this difference is the essence of the Eickemeyer invention. It is further urged that you could pounce the whole hat body in a Nougaret machine; that it has been done repeatedly; and that consequently the second claim of the Eickemeyer patent should receive a narrower construction than if Eickemeyer had been the first to accomplish such a result. Admitting that, to a limited extent, the Nougaret brim-machine has been employed to pounce the whole hat body, yet such was not its ordinary use. Before the invention of Eickemeyer it was generally understood that it required two sets of mechanism to pounce a hat. But, however this may be, the complainant has demonstrated that the employment of a short rest, with the vertical space for the brim of the hat while the tip is being pounced, which we find in Eickemeyer's machine, is a great improvement over the long rest as used in machines of the Nougaret type. This is not the case of a trifling improvement, but, in view of what had been before accomplished, of a substantial advance in the art; and consequently no mere changes in the details of construction should relieve a party from the charge of infringement."

The decision in the Massachusetts case goes far to decide the present cases. I am entirely satisfied with the reasoning of the learned judge, and consider that the essential facts relied on by the court are established in the cases now before us. In that case the defendants, in addition to the grounds disposed of in the above extract, placed themselves upon the Taylor patent, (since acquired by the complainant, and now sued on,) under which they claimed to be acting, and contended that they did not infringe the patent of Eickemeyer. This defense was also overruled, and it was held that the diversities in the modes of operation in the two machines did not relieve the defendants from the charge of infringement. In the one machine (Eickemeyer's) the hat, by the action of the feed-rollers, is pulled through the machine in the opposite direction to the rotation of the pouncing cylinder, while in the Taylor machine it moves in the direction of the rotation of the pouncing cylinder. Other variations in the modes of operation of the two machines were relied on, but the court did not deem these variations as material, so long as the defendants used the essential elements of a short rest, and space for the brim, as shown in Eickemeyer's patent. Taylor might have made improvements, but he used Eickemeyer's invention.

In the present case the great effort on the part of the defendants has been to show that, so far as the defendants can be charged with any infringement of the patents sued on, the defendant Brown anticipated the inventions by practical use; and that, if this be not proved to the satisfaction of the court, still the fifth claim of Taylor's patent is identical

with the second claim of Eickemeyer's, and is therefore void, and no injunction should be decreed, because Eickemeyer's patent expired two years ago. There can be no doubt that the machines used by the defendants do infringe the second claim of the Eickemeyer patent. They have a supporting horn surmounted by a short rest, situated sufficiently far from the body of the machine to give room for the brim, and on which the hat body, in all its parts successively, is supported against the cutting cylinder. This is as clear an infringement as could well be described. The question is, did Brown use any such device for pouncing hats prior to the 15th day of July, 1869? the date of the jurat affixed to Eickemeyer's application for a patent. The application was filed in the patent-office on the 17th of July, and contained the same description of the invention and second claim as they appear in the patent itself. We do not hesitate to say that there is no proof of any such use. The most that can be said is that Brown, according to his testimony, sometimes stretched out a hat body over the long rest of the Nougaret machine, which he used, so as to pounce nearly the whole surface, tip and all. But suppose he did this; it was not the process of pouncing the whole hat body in one operation that was patented by Eickemeyer, but the machine for doing it. Brown never made any such machine. And if he succeeded, as he says, in pouncing hat bodies in one operation on the Nougaret machine, he must have stretched them much out of shape; and, as Judge COLT says, such was not the ordinary use of the machine.

On the Taylor patent several questions arise: *First*. Was the fifth claim void by reason of being anticipated by the second claim of the Eickemeyer patent? If not, was it void for not being patentable? If not, was it anticipated by Brown? If not, has it been infringed by the defendants? (1) Was it anticipated by the second claim of the Eickemeyer patent? In order to answer this question satisfactorily it will be necessary to examine carefully the purport of the Taylor patent, and what invention, in view of the prior Eickemeyer patent, it was intended to secure to the patentee. The object of the invention is stated as follows:

"The object of my invention is to dispense with feed-rolls and hat-blocks in machines for pouncing hats, to make the cutting or pouncing cylinder self-feeding, to enable the operator to control the speed and direction in which the hats to be pounced pass over the cutting or pouncing surface by the hand with the assistance of a guard and presser pin, and to cause the material to be pounced to move in the same direction as the surface of the self-feeding cutter in contact with it, thereby avoiding the injurious strain to which it is subjected in ordinary hat-pouncing machines with feed-rolls or their equivalents."

The specification then goes on to describe the machine in detail by the aid of the drawings attached to the patent; from which it appears that the short rest of Eickemeyer is used, and the hat body is allowed to be drawn through between the rest and the pouncing cylinder by the force of the latter, being held back and guided by the hand, the hand being protected by a guard, and the guard being furnished with a pin attached to a spring, which pin may be pressed down upon the hat to hold or re-

tard it at the point of pressure, and cause it to move in a circle around the pin as a center, when required for pouncing different parts of the hat body. All these parts are secured by separate claims. The fifth claim is as follows: I claim:

"(5) The combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn over the support in the direction of the motion of the pouncing cylinder."

It is manifest that this claim is for the support and the self-feeding pouncing cylinder, independent of the guard and presser pin. It is equally manifest, in view of the Eickemeyer patent, which is not to be repeated if a different construction is admissible, that the claim is not for the combination of a short support and a cutting cylinder generally, (which would clearly be a repetition of Eickemeyer's second claim,) but is for the combination of the support and a self-feeding pouncing cylinder; that is, a machine without feed-rollers, or any other feeding device except the pouncing cylinder itself. Is not this, after all, Eickemeyer's machine without the feed-rollers; and is it not precisely what is contained in Eickemeyer's second claim, except that the latter covers both kinds—self-feeding and non-self-feeding pouncing cylinders? It is not an improvement on Eickemeyer's invention; it is the same thing. Eickemeyer's second claim is for the support and the pouncing cylinder independent of feed-rollers. This was so decided in *Thom's Case*, before cited. That is, it was for the combination of the support and the pouncing cylinder, whether you used feed-rollers or not. If you did not use them, your machine would be a self-feeding machine, of necessity; for the pouncing cylinder, if not interfered with, will always carry the hat body with it. The very object of the feed-rollers was to counteract this tendency, and thus secure a more effective operation of the cutting or pouncing instrument. If some resistance were not interposed to the force of the revolving cylinder, it would carry the hat body with itself so rapidly that the rough surface would not be cut away, or would be only partially cut away. Hence, in the absence of feed-rollers, the hat body must necessarily be held back by hand. It was partially controlled by the hand even with the feed-rollers. Without them, it must be wholly so controlled. So that Taylor's supposed invention, as embodied in his fifth claim, is but one of the necessary forms of Eickemeyer's, as embodied in his second claim; not only one of the necessary forms, but having the same mode of operation involved in the latter. The counsel for the complainant endeavor to meet this view by contending that Taylor's fifth claim is for a process. But there is no pretense of that kind in the patent itself, nor in the language of the claim. The claim is for a machine having a certain necessary mode of operation. The result is that the complainant is entitled to decrees for profits and damages for the infringement by the defendants of the Eickemeyer patent while it continued in force, and the bills must be dismissed so far as regards the Taylor patent, and the injunctions must be dissolved. We think that each party should pay their own costs.

OTLEY v. WATKINS *et al.*

(Circuit Court, N. D. Illinois. October 8, 1888.)

## PATENTS FOR INVENTIONS—COMPOSITION PATENTS—INFRINGEMENT.

A patent for a composition of matter is not infringed by another composition into which one of the ingredients, named without restriction in complainant's claim, does not enter, though in the specifications the use of such ingredient is stated to be for a particular case only.

In Equity. On motion for preliminary injunction.

*D. T. Duncombe*, for plaintiff.

*West & Bond*, for defendants.

BLODGETT, J., (*orally*.) This case is now before the court upon a motion on the part of the complainant for a preliminary injunction, and also on motion on the part of the defendant to set aside a restraining order entered in the case on the 19th of July last. The defendants are charged by the bill with the infringement of a patent granted to complainant Otley for a cement for stopping steam and water joints. Upon presentation of the bill, the court granted an *ex parte* order restraining the defendants from the use of the device covered by the patent. The patent is for a composition of matter, and the specifications set out this composition in the following words:

"The ingredients of which my cement is composed and the proportions of each are: Mineral oil, (also commonly known as 'Ohio mud,') 1 part; yellow ocher, 1 part; Paris white, 1 part; plumbago, 1 part; brick dust, 1 part; litharge, 1½ parts. My method of preparing this cement is to unite the herein-before mentioned substances in powder form, and in the proportions set forth, in any convenient vessel, and stir the same until thoroughly mixed, and then add a sufficient quantity of boiled linseed oil to render the mass of the consistency of stiff paste. It may then be put up in cans or other suitable receptacles for use. When it is desirable to use the cement upon rough or uneven surfaces, I work into the mass, before applying, a small quantity of fine cut hemp, the amount of which must be left to the judgment of the person using it. This serves to make the particles adhere together more strongly, and also tends to make the cement adhere more firmly to the part to which it may be applied."

And the claim of the patent is:

"The cement for steam joints herein described, consisting of mineral paint, yellow ocher, Paris white, plumbago, brick dust, litharge, combined with fine cut hemp and boiled linseed oil, as herein set forth and described."

The affidavits filed on behalf of the defendants show that the defendants make a steam-fitting cement, in which they use several other ingredients, or different ingredients, from those used by the complainant, or called for by the patent, and the contention on the part of the complainant is that those other ingredients, such as red lead, barytes, etc., which are used in the defendants' composition, are the equivalents of the elements which are used by the complainant. But the defendants, also, by their affidavits, show that they do not use, and never have used, cut

hemp in any form. That being the case, I do not see how the defendants can be charged or held liable for the infringement of this patent, because, while the patentee, in his specifications, states that fine cut hemp is only occasionally used upon uneven joints or surfaces, yet he makes his claim for the combination of the various ingredients named with fine cut hemp and boiled linseed oil, so that it appears to me the complainant has limited himself to a combination in which cut hemp must be used. The law upon the subject, I think, is very well stated by Mr. Walker, in his work on patents, at section 349:

"Omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all the parts of a combination material when he claims them in combination, and not separately."

Now, it is not for the court to inquire for the purposes of this case why this complainant saw fit to make cut hemp an essential ingredient of his patent. His cement may be just as useful, and for certain purposes may be even more so, with the cut hemp omitted, but he has taken his patent for the combination of these chemical ingredients with cut hemp, and hence must stand or fall by that combination. Why he so took it, whether because the patent-office insisted upon his taking his claim in that form, or otherwise, the court is not at present advised. It is enough to say he has so limited himself. The former restraining order is therefore set aside, and the motion for an injunction *pendente lite* is overruled.

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COATS *et al.* v. MERRICK THREAD CO. *et al.*

Circuit Court, S. D. New York. September 28, 1888.)

TRADE-MARKS—PATENTED DESIGN—EXPIRATION OF PATENT.

Plaintiffs sell their six-cord sewing thread on spools of light-colored wood, holding 200 yards each, each spool-head bearing a smaller circular label of a light gold color with a dark center and margin. On the gold ground are the firm name, and the words "Best Six Cord," and on the center are the number of the thread and the figures and letters "200 yds." in light gold color. Since 1873 they have embossed the number on the wood in the space around the label, under a patent granted in 1870 for seven years, and acquired and exclusively used by them since 1873. Defendants have sold their six-cord thread on spools holding 200 yards, and bearing substantially the same label, with their names substituted; the figures and letters "200 yds." omitted; a star in the center, and the number at one side, and with similar embossed numbers. Others had used black and gilt labels nearly or quite as early as plaintiffs; and labels on spools of six-cord thread holding 200 yards, with the makers' names in place of plaintiffs' names, were used from 1854 to 1874; and from 1868 to 1878, labels with a like substitution of names, and without the words and figures "Best Six Cord" and "200 yds." were used on spools of other than six-cord thread. *Held*, that the defendants' label does not amount to a repre-

sensation that the thread is that of plaintiffs, and that, after the expiration of the patent, the use of the embossed numbers became common to all, and plaintiffs were not entitled to relief from any misrepresentation as to the origin of the thread incidentally resulting from plaintiffs' prior monopoly.

In Equity. On final hearing.

*Frederic H. Betts and Benjamin F. Thurston*, for plaintiffs.

*W. C. Witter*, for defendants.

WHEELER, J. After issue joined and proofs taken, the plaintiffs moved to further amend their bill. The motion was denied, with leave to renew it at the hearing. It has been renewed, and is now granted, to make the case symmetrical. The plaintiffs' firm have for a very long time made six-cord sewing thread, and sold it on spools of light-colored wood, holding 200 yards each; and since about 1842 have used on each spool-head a circular label, smaller than the head, of light gold color around a dark center, having a dark line around near the margin, and the firm name and the words "Best Six Cord" in a circle inside the line on the gold ground, and the number of the thread with the figures and letters "200 yds." in light gold color on the dark ground of the center, leaving the wood of the spool bare around the label. On April 5, 1870, design letters patent No. 3,949 were granted to Hezekiah Conant for embossing the number of the thread in figures on the wood of spools in spaces around the label, to run seven years, and were acquired by the plaintiffs. Since about 1873 they have used these embossed numbers on their spool-heads in connection with the label. The defendants make six-cord sewing thread, and sell it on spools holding 200 yards each, and since 1878 have used substantially such a label with the name of the Merrick Thread Company substituted for that of the plaintiffs, the figures and letters "200 yds." omitted, a star in place of the number in the center, and the number at one side, in connection with similar embossed numbers on the margin of the spool-head. The bill is brought, as it stands amended, for relief against such use of these labels and embossed numbers.

The plaintiffs have no monopoly of six-cord thread, or of the sale of it in lengths of 200 yards on spools. All others have a right to manufacture it, put it up in that form, describe it, and dispose of it. They have an exclusive right to the reputation acquired by their thread, and to have the thread pass current in trade as theirs, and no one has the right to give currency to other thread than theirs as theirs. *McLean v. Fleming*, 96 U. S. 245; *Trade-Mark Cases*, 100 U. S. 82. The words "Best Six Cord" are merely descriptive of the quality, and the figures merely denote the size of the thread. These are all the statements that are common to both labels, and these could not be appropriated by the plaintiffs to the exclusion of others for these purposes. *Manufacturing Co. v. Trainer*, 101 U. S. 51. When the patent expired the use of the embossed numbers for all lawful purposes became free to all. *Grant v. Raymond*, 6 Pet. 218. These principles are not much controverted, but the plaintiffs insist that their long use of these words and figures, dis-



played in these forms and colors upon their labels on the central parts of their spool-heads of light-colored wood, has made the mere appearance of the spools, without reading the labels, a representation that the thread is of their manufacture; and that their use of the embossed numbers with the label has made that combination by its mere appearance a still stronger representation to that effect. Whether the appearance amounts to such a representation is a question of fact to be determined on the evidence. Black and gilt labels appear to have been used by others on spools of thread nearly and perhaps quite as early as by the plaintiffs. Some similar to the plaintiffs', with the names of the makers of the thread in place of the plaintiffs' names, were used to some extent on six-cord thread in lengths of 200 yards on each spool from 1854 to 1874; and some without the words and figures "Best Six Cord" and "200 yds.," with a like substitution of names, were used on spools of 200 yards of six-cord and other thread by predecessors of the defendants from 1868 to 1878. The use by these others was less than that by the plaintiffs, but was sufficient to make their thread with these labels known in the markets. The appearance of the spools would, to some extent, indicate the origin of the thread, without reading the names of the makers; and as more of it was the plaintiffs', would more often so represent than that it was thread of others; but the rights claimed by these others in the markets were not resisted, and appear to have become well established. When the defendants entered the markets with their label, it was comparatively as much a representation that their thread was the thread of the others as that it was the thread of the plaintiffs; and they appear to have had as good right there with their labels as the others would have to continue there with theirs. The fact is not found, upon all the evidence, that the use of the label on the plain spool-head by the defendants amounts to a representation that the thread came from the plaintiffs. The embossed numbers do not of themselves indicate origin at all; but the long and exclusive use of them by the plaintiffs may have so associated them with their label and thread that the use of them by the defendants in connection with their label might lead ordinary customers, to some extent, to think that the thread was from the plaintiffs. If so, the use of them in that manner by the defendants would amount to a representation so far that the thread of the defendants was that of the plaintiffs. However this may be, but for the patent the defendants might with equal right have used the numbers as the plaintiffs did. When the patent expired, the use became common to all, as if there had never been any patent covering them. The plaintiffs held the monopoly during the term of the patent, subject to the consequences of its expiration. The incidental effect upon the plaintiffs' trade of the use of the numbers by the defendants is one of these consequences. It does not arise from any wrongful invasion of the plaintiffs' rights; but from the rightful exercise of the defendants' rights. The plaintiffs' mode of exercising their monopoly, by using the numbers exclusively themselves, exposed their trade to what might be inferred from that when the use should become common. The law does not extend the patent beyond its term to protect them from such results. *Fairbanks*

v. *Jacobus*, 14 Blatchf. 337; *Filley v. Child*, 16 Blatchf. 376; *Sewing-Machine Co. v. Frame*, 21 Blatchf. 431, 17 Fed. Rep. 623; *Gally v. Fire-Arms Co.*, 30 Fed. Rep. 118. The facts of this case, as they appear from the proofs, do not bring it within the principles of *McLean v. Fleming*, 96 U. S. 245; *Frese v. Bachof*, 14 Blatchf. 432; *Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Kinney v. Basch*, 16 Amer. Law Reg. (N. S.) 596, and note; and others of the same nature, —relied upon for the plaintiffs. Much and repeated consideration of this case discloses no apparent ground upon which the bill can be maintained. Let a decree be entered dismissing the bill of complaint, with costs.

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WEBSTER *et al.* v. ELLSWORTH.

(Circuit Court, E. D. Michigan. February 21, 1888.)

**COPYRIGHT—EXCLUSIVE RIGHT TO SELL BOOK—CONSTRUCTION.**

The grant of an "exclusive right to take orders for and sell" a book within a certain territory will not be construed as a covenant that no other person shall sell the book in competition with the grantee, but only as a covenant that this shall not be done with the consent or connivance of the grantor.

**At Law.** On motion for new trial.

This was an action for books sold and delivered. Defendant set up in defense the following state of facts: On October 3, 1884, plaintiff and defendant entered into a written contract, by which plaintiff agreed "to grant to defendant the exclusive right to take orders for and sell in the territory above mentioned" (the state of Michigan) a certain book called "Huckleberry Finn," and defendant agreed to sell said book by subscription, and to pay for all books so ordered at a specified price. This book was published by the plaintiffs, and published only by them. Defendant got his prospectuses out in the fall of 1884, and at once engaged canvassers, and set them at work. The book was ready for delivery the latter part of February, 1885, and at that time defendant commenced to deliver it to his subscribers. About this time the book appeared in the book-stores of several cities of Michigan, and was, both by advertisement and otherwise, offered for sale, and sold at a price much lower than defendant had bound himself to sell them. In consequence of this, defendant's monopoly under the contract was practically destroyed. He lost the profits that would have arisen from the sale of the book, and also lost the value of his time expended in preparing for the canvass. The book-dealers, who purchased and sold in Michigan, bought at regular supply stores of the trade, and had no notice of defendant's claim. There was no evidence tending to show that plaintiffs were privy to the circulation of the book, or that they knew it was being sold in this state to the prejudice of defendant's rights under his contract. The court held this to be no defense, and directed a verdict for the plaintiffs. Defendant moved for a new trial.

*S. M. Cutcheon*, for plaintiffs.

*W. L. Carpenter* and *H. H. Swan*, for defendant.

BROWN, J., (*after stating the facts as above.*) Upon the trial of this case it was assumed by the court that if defendant's territory was invaded by others, who were selling in competition with him, it might be possible for him to maintain a suit against them, either in his own name or that of the plaintiff, to enjoin such sale. Upon reflection we are satisfied that this assumption was not well founded. Defendant was a mere licensee, with a privilege of selling, but with no proprietary rights in the copyright, and it is clear that as such licensee he would have no power to enjoin an unlawful sale of the books. *Drone*, Copyr. 305; *Walk. Pat.* § 400; *Gayler v. Wilder*, 10 How. 477; *Hill v. Whitcomb*, 1 Holmes, 317; *Sanford v. Messer*, 2 O. G. 470. The better opinion seems to be that the owner of the copyright himself could not enjoin sales of the books lawfully purchased elsewhere, without notice of the defendant's rights. These dealers had bought the books in the regular course of trade, in an eastern city, of a person who had the legal right to sell them, and they had brought them in good faith within defendant's territory for the purpose of disposing of them at retail, without knowing of defendant's exclusive right to sell them here. Having thus lawfully purchased the books in good faith, they had the right to sell them wherever they chose, and could not be restrained in the enjoyment of such right; in other words, they are not bound by any private agreement between the owner of the copyright and his licensee, of which they had no knowledge. *Hill v. Whitcomb*, 1 Holmes, 317; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Clemens v. Estes*, 22 Fed. Rep. 899; *May v. Chaffee*, 2 Dill. 385; *Hawley v. Mitchell*, 4 Fish. Pat. Cas. 388. The case turns then upon the construction to be given to plaintiffs' grant of the exclusive right to take orders for and sell the work in the territory above mentioned. These words clearly negative the right of the plaintiffs to authorize the sale of such books by any other persons within this state, but in terms they do not go beyond that. Defendant, however, seeks to import into this contract a guaranty that no other person shall obtain copies of the same work, and sell them in competition with him. If these sales were made by the connivance or consent of plaintiffs, it would undoubtedly be a good defense to this action, but there is no evidence tending in this direction. There is no evidence even that plaintiffs knew that the books were being sold here in competition with defendant, or at a less price than defendant was authorized to sell them. It was doubtless contemplated by both parties that the book should be sold only by subscription; but in some way or other, probably through the fault of some of plaintiffs' vendees, the books got into general circulation, and defendant's market was spoiled. Had this been the fault of the plaintiffs themselves, defendant would have had his remedy; but as they appear to have been entirely innocent in the matter, it is difficult to see how they can be held liable. They did not guarantee that the defendant should have the exclusive sale of the books within his territory, or that no copy should be sold by other persons, but merely that

he should have the exclusive right to sell so far as they could control it, and that he still has. The cases cited by plaintiffs' counsel prove too much. They not only show that defendant is powerless, but that plaintiffs are equally so. To enable him to set up this defense we think it should appear either that plaintiffs expressly stipulated that the defendant should encounter no competition in the sale of the work, or that they were guilty of some fault or negligence in connection with such sales. The two cases of *Sims v. Marryat*, 17 Q. B. 291, and *Faulks v. Kamp*, 3 Fed. Rep. 898, tend to establish the proposition that plaintiffs impliedly warranted that they had the exclusive right to sell, but they have no tendency to prove a guaranty by them that defendant should not be interfered with. The motion for a new trial must be denied, and judgment will be entered upon the verdict.

NOTE. Upon a rehearing before the circuit and district judge this case was affirmed.

### THE MARION W. PAGE AND THE MISSOURI.

(District Court, E. D. Michigan. January 18, 1888.)

#### 1. COLLISION—BETWEEN SAILER AND STEAMER WITH TOW.

A propeller, with five barges in tow, bound down Lake Huron, upon a course nearly south, met a schooner bound up the lake, with a free wind, upon an opposite course. The schooner passed the propeller upon the port hand, at a safe distance, but, instead of keeping off, as she might have done, suddenly put her helm hard down, and endeavored to cut across the tow between the fourth and fifth barges. *Held*, that the schooner was solely in fault.

#### 2. SAME.

Where a schooner, sailing with a free wind, meets a propeller incumbered with a long tow, the duty of avoiding a collision does not devolve wholly upon the propeller. The schooner is also bound to look out for herself, and take such precautions as the circumstances seem to require.

In Admiralty. Libel for damages.

This was a libel for collision between the barge Saginaw, then in tow of the propeller Missouri, and the schooner Marion W. Page, which occurred in Lake Huron, off Lexington, at about 7 o'clock in the morning of October 20, 1886. The libel averred, in substance, that the barge was the fourth of a tow of five vessels in tow of the propeller Missouri, and bound down the lake on a course nearly south; that the schooner Page, bound up the lake, on a parallel opposite course, with a free wind, approached as if to pass on the port side, but, after she had passed the Missouri, and when a short distance ahead of the Saginaw, she suddenly swung, as if under a starboard wheel, directly across the tow, and struck the Saginaw upon her port bow, not far from the stem. The answer of the Missouri did not differ essentially from the libel in its statement of facts, but denied all the allegations of fault made against the propeller. The answer of the schooner Marion W. Page averred that she, together

with the schooners John Kelderhouse, Newsboy, and Arthur, had just been cast off by the tug William A. Moore, and had shaped her course north by west up the lake, with a free wind; that about half past 6 in the morning the Missouri was seen coming down the lake, at a distance of three-quarters of a mile, and bearing a point upon the schooner's starboard bow; that the vessels continued on their respective courses until the Missouri suddenly, and when about two lengths off, hauled up and attempted to cross the Page's bow. "The Page, however, was kept steadily on her course until she approached the third barge of the Missouri's tow, when her wheel was ported sufficiently to clear the stern of this barge. After this had been done, her wheel was put to starboard, and the man on the third barge was called to let go the line to the fourth barge. This, however, was not done, and before the Page could swing sufficiently to clear the tow line she struck, and the fourth barge, which proved to be the Saginaw, came on without apparent change of course, struck the Page a heavy blow on her starboard side between the fore and main rigging, opening up her own bows, and leaving her port anchor hanging on the Page's rail. From the time the Missouri and her tow were first sighted, and until after she crossed the Page's bow, the latter was kept steadily on her course without variance, and after the Missouri had crossed the Page's course, the time and distance were too short for the latter to avoid a collision with one or more barges in the Missouri's tow." The court was assisted upon the argument by Commander Elmer, U. S. N., and Capt. Thomas Hackett, nautical assessors.

*Moore & Canfield*, for the libelants.

*J. W. Finney*, for the propeller Missouri.

*C. E. Cramer and H. H. Swan*, for the Marion W. Page.

Brown, J., (*after stating the facts as above.*) We have found no difficulty in disposing of this case. The answer of the Page sets up an improbable state of facts, and the testimony discloses quite a different, but an equally improbable, defense, viz., that the tow was pursuing a south-westerly course down the lake, and so much across the course of the Page that the latter was unable, even with a free wind, to avoid coming into collision with the tow. Had this been the case, we are by no means certain that we should have exonerated the schooner from fault. While the general rule is unquestioned that a steamer, having vessels in tow, is to be considered as a steam-vessel, and bound to keep out of the way of a sailing vessel, this rule is subject to important qualifications, and in fact is of little value where a propeller, having four or five barges in tow, meets a number of sailing vessels, pursuing a different course, with a free wind. In such a case, it is clear, the sailing vessels are much better able to control their movements than the steamer, and it is but just that the duty of avoiding a collision should not rest wholly upon the latter. Such a case would seem to be an exceptional one, and falling within the twenty-fourth rule of special circumstances, rendering a departure from the general rules necessary in order to avoid immediate danger. *The Kingston-by-Sea*, 3 W. Rob. 152; *The La Plata*, Swab. 220; *The Arthur*

*Gordon*, Lush. 270; *The American*, L. R. 4 Adm. & Ecc. 226. But in this case we are entirely satisfied that the tow was upon the usual course of south by east, or south half east, from Pointe aux Barques to the St. Clair river. It is true, there is a great deal of conflicting testimony upon this point, and we cannot undertake to explain or reconcile the statements of the different witnesses. Aside from the general rule that the witnesses, upon a particular ship, are to be believed with regard to her course and maneuvers in preference to an equal number of witnesses upon another ship testifying from appearances, there is a strong probability that a steamer bound from one point to another will take the usual and shortest course between the two points; and in the absence of a showing of some good reason for a departure from the usual course, such as stress of weather, we feel ourselves safe in assuming that the usual course will be pursued. *The Alberta*, 23 Fed. Rep. 807. Now, the uniform course from Pointe aux Barques to the St. Clair river is south half east, or south by east, depending somewhat upon the variation of the compass or state of the wind; and when witnesses, who are not upon the tow, take the stand, and testify that the course of the tow was south-west, we have a very plain answer to their testimony. We simply do not believe them. It is utterly incredible to us that this tow, not having been driven easterly towards the center of Lake Huron by any stress of weather, and, there being nothing to show that she had gotten off her proper course from Pointe aux Barques to Port Huron, should be sailing south-westerly as she approached Lexington. Such a course would have carried her ashore in a very short time. We think, then, that we are bound to assume that the general course of this tow, from the time she left Sand Beach until the Page hove in sight, was south by east, and that the real question here is, what was the obligation of the Missouri when she made these four vessels? The testimony indicates that she first made them at a distance of seven or eight miles,—too far off to render it incumbent upon her to take any steps to keep out of their way. After they had approached within two or three miles of each other, two of these vessels appeared upon the port and two upon the starboard bow of the Missouri. It was evidently unsafe for the pilot of the Missouri at this point to port, because he would not only throw himself across the bows of the two vessels upon his starboard hand, but would endanger his running ashore. It was almost equally impossible for him to starboard without endangering a collision between his tow and the two vessels upon his port hand. He judged, and, we think, correctly, that, as there was an opening between the vessels, his better plan was to port slightly, and go between them. The two vessels upon his starboard hand kept their course, and passed between him and the shore. The Kelderhouse, instead of porting, as the master of the Missouri supposed she was going to do, starboarded, and, acting upon that hint, the Missouri also starboarded a little, and endeavored to make her way between the Kelderhouse and the Page. Now, we think, under these circumstances, the Page should have acted upon this intimation, and, while she was not bound to make any decided change in her course, she was bound to consider the fact that the tug was coming down

with a tow half a mile long, and should have looked out for herself to a certain extent, and kept away from the tow, as with a free wind she might easily have done. We think, if she had used ordinary care, she might easily have avoided the collision without violating the well-settled rules of navigation, but paying that regard to her own safety which is obligatory upon every vessel meeting another where any risk of collision is involved. The testimony shows that she passed within 1,200 feet of the Missouri. We think it entirely clear that if she had kept her course, or if she had kept off, as she might easily have done at that distance, she having a leeway between herself and the Missouri of 1,200 feet, she would have passed the entire tow in safety. The cause of the collision was the fickleness of the Page, or her apparent uncertainty with regard to what she ought to do. If she had fallen off, as we think she could have done without difficulty, she would easily have avoided the collision. She appears, however, to have allowed herself to get closer to the tow than was safe, and then, being in peril, and perhaps *in extremis*, she put her helm hard down, and attempted to cut across the tow. That was a desperate maneuver, and one which could hardly have failed to result in disaster. The only excuse given for it is that the master was afraid that if she jibed she would take the masts out of her. But it is suggested to me by the experienced gentlemen who have advised me in this case, that if she had dropped her aftersails, or the peak of her mainsail, she might very easily have fallen off without jibing; and even if she had jibed, it would not have injured her masts or yards. It seemed to me from the first that there could be but one result to this case, and I see no reason to change my mind in that regard. An order will be entered adjudging the schooner Marion W. Page solely in fault for this collision, and referring it to a commissioner to assess the damages. The libel as against the propeller Missouri will be dismissed, with costs.

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#### THE AUSTRALIA.

FREEMAN v. THE AUSTRALIA, (OCEANIC STEAMSHIP Co., Claimant.)

(District Court, N. D. California. March 9, 1888.)

#### PILOTS—HALF-PILOTAGE—SPEAKING VESSEL.

Asking the master of a vessel which was about to sail, at the custom-house, if he desired a pilot, and an answer that he did not know, is not such a speaking of a ship and decline of services as entitles a pilot to "half-pilotage" under Pol. Code Cal. § 2466, providing that when a vessel is spoken to, outward or inward bound, and the services of a pilot declined, "half-pilotage" shall be paid.

In Admiralty. Libel for half-pilotage.

P. D. Wigginton, (Lloyd & Wood, of counsel,) for libellant.

Milton Andros, (Charles Page, of counsel,) for claimant.

HOFFMAN, J. Section 2466 of the Political Code of this state provides that when a vessel is spoken, inward or outward bound, and the services of a pilot are declined, "half pilotage shall be paid." The libellant claims to have spoken the steamer Australia outward-bound, and that the offer of his services was declined. The circumstances under which the alleged "speaking" of the ship occurred, and the offer of services declined, were as follows: On the 2d of March, 1887, while Capt. Houdlette, master of the Australia, was at the custom-house engaged in clearing his ship for a foreign voyage, he was approached by the libellant, a licensed pilot for this port, who inquired whether he wanted a pilot. To this Capt. Houdlette, according to the libellant's account, replied, "I don't know." Other witnesses testified that he added, "Come to the ship, and I will tell you." It is upon this conversation that libellant relies as constituting a "speaking of the ship," and a refusal by the master to accept his services. It is clearly proved that for many years a practice or usage has prevailed in this port under which the pilots have been accustomed to inquire at the custom-house, of masters of outgoing vessels, when clearing their ships, whether they will require the services of a pilot. This practice is convenient and unobjectionable when both parties agree to treat such an inquiry as equivalent to speaking the ship. But where a pilot claims a compensation under a statute for a constructive service, no practice or custom, however inveterate, can absolve him from the duty of bringing himself within the requirements of the law. To say that an inquiry at the custom-house, such as that made in this case, constitutes "a speaking of the ship" within the meaning of the statute, would seem to be an abuse of terms. The law requires not only that the vessel be spoken, but also that the services of the pilot be declined. In this case the master did not decline the pilot's offer, if offer it can be called. He merely replied that he did not then know whether or not he would require his services. Other witnesses testified, as I have stated, that he told the pilot to come to the ship for a definite and final answer. I think this discrepancy is immaterial. On either statement it is clear that his services were not declined. I do not mean to say that if the master had informed the pilot in positive and unequivocal terms that he would not require or accept his services, and that he intended to proceed forthwith to sea without a pilot, this announcement might not be accepted as a waiver of any irregularity in the offer of service, and as relieving the pilot of the duty of making a more formal offer of services which he was assured would be declined. But no such response was made by the master when the vessel was, as is said, "spoken at the custom-house." The master merely informed the pilot that he had not determined whether or not he would take a pilot, and, as he says, directed him to come to the ship for a final answer. It seems to me plain that, to entitle the pilot to the compensation allowed by law, he should have brought himself within the terms of the statute by making a formal offer of his services when the ship was about to proceed to sea, and by procuring from the master a distinct refusal to accept them.



CHIESA v. CONOVER *et al.*

(District Court, S. D. Alabama. September 21, 1888.)

## ADMIRALTY—PROCEEDINGS IN PERSONAM—ATTACHMENT—WHEN LIES.

Rule 2 of the admiralty rules of practice, providing that the mesne process in a suit *in personam* may be a warrant of arrest of the person of the defendant, and, if he cannot be found, for an attachment of his goods and chattels, does not authorize an attachment in Alabama, where imprisonment for debt has been abolished.

In Admiralty. Libel *in personam*.

The libel was filed at Mobile, while the vessel was there, loading for Liverpool, and sets up a violation of charter in not sailing on a voyage from Pensacola to Rosario. It alleges that the bark was the property of E. M. Conover and John Doe, whose name is to libelant unknown. On showing made, the district judge made an order for issue of attachment of the vessel as such property. On hearing at special term, of motion to dissolve the attachment, it appeared that E. M. Conover was the sole owner, was wife of the present master, and with him upon the vessel.

*Pillans, Torrey & Hanaw*, for owner.

*G. L. & H. T. Smith*, for attaching creditor.

TOULMIN, J. After a careful consideration of the motion to quash the attachment in this case, and the arguments thereon, and an examination of the authorities bearing on the question that I have been able to find, including those submitted by counsel, I feel bound to hold that the order for the attachment of the vessel was improvidently made, and that the attachment was without authority of law, and should be vacated. The only authority for the attachment of the property of the defendant in a suit *in personam* is found in rule 2 of the rules of practice, which provides that the mesne process may be a warrant of arrest of the person of the defendant, and, if he cannot be found, for an attachment of his goods and chattels. The attachment of the vessel is not authorized except where the defendant cannot be found, and then, where the warrant of arrest is authorized under the law of the state where issued, it should be in the alternative; that is to say, it should direct, first, the arrest of the person of the defendant, and, if he cannot be found, then the attachment of the property. My opinion, therefore, is that the writ of attachment can be had only where a warrant of arrest of the person of the defendant is authorized. Such attachment can only issue where such warrant can issue, and be executed only where the warrant of arrest cannot be executed because the defendant cannot be found. As a warrant of arrest of the person of the defendant is unauthorized and illegal under the law of this state, so is a writ of attachment, which is dependent on such warrant of arrest. In other words, as the right to the writ of attachment is dependent on the right to imprison for debt, and as by law imprisonment for debt is abolished in this state, it must follow that the writ of attachment in this case is without authority of law, and should be vacated; and it is so ordered.

## THE DIRECTOR.

BALFOUR *et al.* v. THE DIRECTOR.

(Circuit Court, D. Oregon. October 9, 1888.)

## 1. SHIPPING—CHARTER-PARTY—BREACH OF WARRANTY—ACTIONS—JOINDER OF CAUSES.

In case of a breach of warranty of seaworthiness in a charter-party, an action for the recovery of the goods shipped and for damages for the breach of warranty may be joined.

## 2. SAME—BREACH OF WARRANTY—RECOVERY OF POSSESSION OF CARGO.

The libelants chartered a ship to carry a cargo of wheat from Portland to Europe, and, when she was loaded, she commenced, from inherent weakness, to leak, so that her cargo had to be discharged. *Held* that, the vessel not being seaworthy at the date of the charter and the delivery of the cargo, there was a failure on the part of the ship-owner to perform the condition precedent to the contract, and the shipper was absolved therefrom, and was entitled to recover possession of his wheat, and such damages as he may have sustained by reason of such failure.

In Admiralty. On appeal from district court. 34 Fed. Rep. 57.

This case was heard on an appeal from the district court. The suit was brought to recover damages for the breach of a warranty of seaworthiness of the bark *Director*, and to recover the possession of 18,868 bags of wheat theretofore delivered to the same for transportation to Liverpool under said warranty. An exception to the libel for misjoinder of causes of action was overruled by the district court, (11 Sawy. 493, 26 Fed. Rep. 708,) and on the final hearing the court found that the bark was unseaworthy, and that the libelants might maintain the suit to recover possession of the wheat, and to recover damages for the non-performance of the contract of affreightment, which were a lien on the vessel.

*C. E. S. Wood*, for libelants.

*Frederick R. Strong*, for claimants.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally*.) Three points are made by counsel for the claimants and appellants against the findings and decree of the lower court: (1) That the possession of the wheat and damages for the breach of warranty of seaworthiness cannot be recovered in one suit; (2) that the libelants, having sold the cargo of wheat to arrive in Liverpool, cannot maintain a suit to recover possession of the same, notwithstanding the repudiation of the sale and the return to the libelants of the bill of lading by the purchaser; and (3) the vessel was seaworthy at the date of the charter-party, or was made so before the expiration of the lay-days.

The first two of these points involve questions of law. Upon both reason and authority, I think the libelants are entitled to join the cause of suit for possession of the wheat with that for damages in one libel. They are also entitled, as against the claimants, to maintain the suit for the possession of the wheat. The sale in Liverpool has been repudiated by the purchaser, and the bills of lading returned to the libelants. The fact that the libelants may also intend to hold the purchaser liable in damages for such repudiation, if the law will permit, does not affect their right to the possession of the wheat, as against the claimants.

On the question of seaworthiness, I have read the testimony carefully, and am satisfied that at the date of the charter-party the Director, contrary to the implied, as well as the express, warranty therein, was altogether unseaworthy; and the subsequent repairs did not make her seaworthy for such a voyage and cargo. The mere fact that she only brought \$3,000 at the marshal's sale, after near \$5,000 of repairs had been made upon her, is itself satisfactory evidence of her inherent weakness, and that nothing short of rebuilding her would make her seaworthy.

In conclusion I adopt the findings of the district judge, both of fact and law, and for the reasons given in his opinion, to which I can add nothing.

There must be a decree for the libelants accordingly.

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THE C. P. RAYMOND.<sup>1</sup>

BROWNE *et al.* v. THE C. P. RAYMOND.

(Circuit Court, S. D. New York. December 9, 1887.)

1. ADMIRALTY—PRACTICE—APPEAL FROM DISTRICT TO CIRCUIT COURT—INTEREST ON DECREE.

Where both parties appeal from the decision of the district court apportioning damages in a collision case, the circuit court, on affirming the decree of the district court, will not allow interest thereon.

2. SAME—APPEAL—COSTS—APPORTIONMENT.

Where the libelants and one of two claimants appeal from the decree of the district court apportioning damages in a collision case, and the same is affirmed by the circuit court, the costs of the other claimant (appellee) will be apportioned between the appellants, each appellant bearing his own costs.

In Admiralty. Libel for damages. On appeal from district court. 26 Fed. Rep. 281.

The libel in this cause was filed by the owner of the bark Margaret Mitchell for damages alleged to have been sustained by her and her cargo, while in tow of the tug C. P. Raymond, through a collision with a float in tow of the steam-tug George L. Garlick. The district court found that the collision occurred through the fault of the Raymond and the bark, and dismissed the libel as to the Garlick, and decreed a division of the damages and costs between the tug and bark, from which decree both appealed.

WALLACE, J. Upon the authority of *The Rebecca Clyde*, 12 Blatchf. 403, interest after the date of the decree of the district court cannot be allowed the libelants. The costs of the claimant of the Garlick upon the appeal to this court are to be taxed against both appellants, and apportioned between the libelants and the claimants of the Raymond. The decree should provide for four days' notice to sureties on appeal, in accordance with rule 136 of the circuit court, and 144 of the district court. Each appellant must bear his own costs of the appeal. *The North Star*, 106 U. S. 29, 1 Sup. Ct. Rep. 41.

<sup>1</sup>Affirming 26 Fed. Rep. 281.

SHARON v. TERRY *et al.*NEWLANDS *et al.* v. SAME.

(Circuit Court, N. D. California. September 3, 1888.)

**1. ABATEMENT AND REVIVAL—DEATH OF PARTY—BILL OF REVIVOR—OBJECTIONS TO JURISDICTION.**

Upon proceedings to revive a suit in equity, abated by the death of the complainant, for the purpose of executing a final decree which has been rendered in such suit, no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction, apparent upon the record. An attack upon a judgment or decree in a proceeding to revive it is a collateral attack, and can only avail when there is a want of jurisdiction, either of the parties or of the subject-matter.

**2. MARRIAGE—FORGED CONTRACT—CANCELLATION—COURTS—FEDERAL CIRCUIT.**

The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine, and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised.

**3. SAME—ACTION TO CANCEL—ABATEMENT AND REVIVAL—DEATH OF PARTY.**

The right of action to cancel a marriage contract, which, if genuine, and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator.

**4. SAME—ABATEMENT AND REVIVAL—TRANSFER OF PROPERTY.**

The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it, if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit canceling the contract, to protect the property from claims made under or by virtue of it.

**5. COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION.**

Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a state other than that in which the court is held, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court.

**6. SAME—JURISDICTION FIRST ATTACHING.**

Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree.

**7. SAME—EXCEPTION TO RULE.**

The exceptions to the rule that priority of jurisdiction controls priority of decision are—*First*, where the same plaintiff has asked, in different suits, a determination of the same matter; and, *second*, where the cases are upon contracts or obligations, which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.

8. SAME—STAYING PROCEEDINGS IN OTHER COURT—MARRIAGE—ANNULING CONTRACT.

The decree of a circuit court of the United States, canceling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a state court.

9. SAME—PROHIBITING FEDERAL ENJOINING STATE COURTS—REV. ST. U. S. § 720.

Section 720, Rev. St., prohibiting injunctions by any court of the United States to stay proceedings in a state court, does not apply where the federal court has first obtained jurisdiction of the subject-matter of the proceedings and of the parties in the state court. This section must be construed in connection with section 716, Rev. St., which provides that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

(*Syllabus by the Court.*)

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge.

In Equity. On demurrer.

Bill of revivor by Frederick W. Sharon, executor, against David S. Terry and Sarah Althea Terry, his wife, and bill in the nature of revivor and supplement, and to carry decree into execution, by Francis G. Newlands, trustee, against the same. These cases are brought to revive and carry into execution a final decree of this court in the suit of *William Sharon v. Sarah Althea Hill*, entered as of the 29th day of September, 1885. On the 3d day of October, 1883, William Sharon, a citizen of the state of Nevada, since deceased, instituted, in the circuit court of the United States for the district of California, a suit in equity against Sarah Althea Hill, now Sarah Althea Terry, to obtain its decree adjudging a certain paper in her possession, purporting to be a declaration of marriage between them, to be a forgery, and enjoining its use, and directing its cancellation. In his complaint, after stating his citizenship in Nevada, and the citizenship of the defendant in California, he sets forth, in substance, this: That he was, and had been for some years, an unmarried man; that formerly he was the husband of Maria Ann Sharon, who died in May, 1875, and that he had never been the husband of any other person; that there were two children living, the issue of that marriage, and also grandchildren, the children of a deceased daughter of the marriage; that he was possessed of a large fortune in real and personal property, was extensively engaged in business enterprises and ventures, and had a wide business and social connection; that, as he was informed, the defendant was an unmarried woman, of about 30 years of age, for some time a resident of San Francisco; that within two months then past she had repeatedly and publicly claimed and represented, and then declared and represented, that she was his lawful wife; that she falsely and fraudulently pretended that she was duly married to him on the 25th day of August, 1880, at the city and county of San Francisco; that on that day they had jointly made a declaration of marriage, showing the names, ages, and residences of the parties, jointly doing the acts required by section 75 of the Civil Code of California to constitute a marriage between them; and that thereby they became and were husband and wife according to the law of that state.

The complainant further alleged that these several claims, representations, and pretensions were wholly and maliciously false, and were made by her for the purpose of injuring him in his property, business, and social relations; for the purpose of obtaining credit by the use of his name with merchants and others, and thereby compelling him to maintain her; and for the purpose of harassing him, and, in case of his death, his heirs and next of kin and legatees, into payment of large sums of money to quiet her false and fraudulent claims and pretensions. He also set forth what he was informed was a copy of the declaration of marriage, and alleged that if she had any such instrument it was "false, forged, and counterfeited;" that he never, on the day of its date or at any other time, made or executed such document or declaration, and never knew or heard of the same until within a month previous to that time, and that the same was null and void as against him, and ought in equity and good conscience to be so declared, and ordered to be delivered up, to be annulled and canceled.

The complaint concluded with a prayer that it be adjudged and decreed that the said Sarah Althea Hill was not, and never had been, the wife of the complainant; that he did not make the said joint declaration of marriage, or any marriage, between them, and that she be perpetually enjoined and restrained from making said allegations, representations, and pretensions of marriage with him; that said contract or joint declaration of marriage be decreed and adjudged to be "false, fraudulent, forged, and counterfeited," and ordered to be delivered up, to be canceled and annulled, according to the practice of courts of equity in like cases; and that he might have such other and further relief as the nature and justice of the case might require. The complaint was verified in the usual form by his oath. It was filed, as stated above, October 3, 1883, and on the same day a subpoena was issued thereon, which was personally served by the marshal on the defendant, at San Francisco, two days afterwards,—October 5th. On the 3d of December following the defendant appeared in the suit by solicitors, giving her name as Sarah Althea Sharon, and demurred to the complaint on the alleged ground that it did not contain any matter of equity whereon the court could make any decree or give the complainant any relief against her. The demurrer was argued at the ensuing February term in 1884, and overruled, with leave to the defendant to answer by the next rule-day on the usual terms.<sup>1</sup> The case, as presented, was held to be a proper one for equitable relief. "This supposed contract," said the court, "is alleged to be a forgery, and to be fraudulent. It purports to be in writing, and to be signed by the parties; and the defendant claims by virtue of it to be the wife of complainant, and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant against the claim set up under the alleged contract, and no means at law to annul it at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged con-

<sup>1</sup>20 Fed. Rep. 1.

tract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction. The instrument in question is alleged to be a forgery and a fraud. If it is a forgery, it is of course a fraud also. The only parties who appear to have any personal knowledge of the facts, so far as indicated,—who personally know anything about this transaction,—are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other, the complainant being alleged to be sixty and defendant twenty-seven years old. The elder, in the ordinary course of nature, is more liable to die, and the contract, in such an event, would be in control of the defendant, without any testimony to defeat the fraud, if fraud there be. The right to several millions of property might be in after years affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of and cancel it. There is no way by an action at law that we are aware of to meet the conditions or effectually dispose of this instrument." 10 Sawy. 49, 50, 20 Fed. Rep. 3. And again: "If there is no remedy in equity for such a wrong as is charged, then the law is indeed impotent to protect the community against frauds of the most far-reaching and astounding character." *Sharon v. Hill*, 10 Sawy. 48, 20 Fed. Rep. 1. After the case had been commenced in the circuit court of the United States, and process served, the defendant, by the name of Sarah Althea Sharon, commenced an action in one of the superior courts of the city and county of San Francisco against the said William Sharon, alleging in her complaint that they had been married by virtue of the said declaration of marriage,—that is, the same contract for the cancellation of which, on the alleged ground of its forgery, the suit in the circuit court of the United States had been commenced,—and praying that her said marriage might be declared legal and valid, and then that she might be divorced from him by reason of certain infidelities to his marriage contract committed by him, which are specially set forth. In that complaint, assuming, without stating, what was generally known in the community, that the defendant was a man of large wealth, and had a large income, she alleged that when they intermarried he did not have over \$5,000,000, and that his income did not then exceed the sum of \$30,000 a month, but that since such intermarriage they had, "by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, accumulated in money and property more than ten millions of dollars, (\$10,000,000,) so that now the defendant has in his possession or under his control money and property of the value of at least fifteen millions of dollars, (\$15,000,000,) from which he receives an income of over one hundred thousand dollars per month." She therefore further prayed that an account might be taken of their business transactions to ascertain their common property, in order that it might be equitably divided between them. William Sharon filed an answer to that complaint, denying, among other things, that he was ever married to the said Sarah Althea, and averring that the said alleged declaration of marriage between them, purporting to have been signed by

him, was a false and forged document, which he had never signed, and never heard of until within 60 days then past. When the defendant, in the circuit court, upon the overruling of her demurrer, was called upon to answer, she set up as a plea in abatement to that suit the pendency of the action in the superior court of the city and county of San Francisco, upon the theory that, as that action, though subsequently commenced, was founded upon the assumed validity of the alleged marriage contract, and involved a determination of that question, and the action, after being removed to the federal court, had been remanded back to the state court by stipulation of parties, and was then on trial, the circuit court of the United States ought to stay its proceedings in the original suit until the state court had expressed its opinion in reference to the validity of the contract in question, and then accept its judgment as conclusive.

The plea also set up that the circuit court of the United States had no jurisdiction of the case, on the ground that the plaintiff was, and had been for more than three years, a resident and citizen of California. The plaintiff traversed both pleas, and the court held both to be bad, the first because the two suits were not identical, but for different objects, —the one proceeding upon an assumed valid contract, and asking for a divorce and a division of the community property, and the other seeking a cancellation of the contract for alleged forgery,—and because the two suits were pending in courts of different jurisdiction. *Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 169, 178. The second plea as to the citizenship of Sharon was held to be false, no testimony impeaching the allegations of the complaint in that respect having been offered. 10 Sawy. 394, 22 Fed. Rep. 28. These pleas having been overruled, the defendant was allowed 30 days to answer to the merits, and accordingly, on the 30th day of December, 1884, she filed such answer. In the mean time, subsequent to the disposition of the special pleas of the defendant, the superior court of the city and county of San Francisco had decided the case before it, holding the said declaration or contract of marriage to be a genuine and valid instrument, by virtue of which the parties thereto had become husband and wife. In her answer, therefore, the defendant not only denied the several allegations of the complaint as to the citizenship of the plaintiff, as to the plaintiff's never having been the husband of any other person than Maria Ann Sharon, and as to her being an unmarried woman, and that her "claims were made for any other purpose but that of obtaining the recognition and support justly due" to her as wife of the plaintiff, but set up as a separate defense the action of the superior court of the city and county of San Francisco, and its judgment that the said alleged declaration of marriage was a genuine instrument by which the parties were made husband and wife. A supplemental answer averred that the state court had filed its decree and findings, reaffirming its adjudication as to the genuineness of that instrument. One of its findings set forth the alleged marriage contract, and added, "which was the only written declaration, contract, or agreement of marriage ever entered into between said parties; and at



the time of signing said declaration plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife." To these answers replications were filed, whereupon proofs were taken by the parties, which occupied several months. On the 29th day of September, 1885, the cause was submitted on the pleadings and proofs, after elaborate arguments of counsel. While it was pending before the court, undecided, and on November 13, 1885, the plaintiff, William Sharon, died. The decree, when rendered, was therefore entered as of the day when the cause was submitted, in accordance with the usual practice in such cases. By that decree it was ordered and adjudged that the alleged declaration of marriage was not, nor was any part thereof, signed or executed on said 25th day of August, A. D. 1880, or at any time, by the plaintiff, William Sharon; that it was not his declaration, contract, agreement, or other instrument; but was a false, counterfeited, fabricated, forged, and fraudulent instrument, and as such was null and void; and that the said instrument, within 20 days after notice of the decree to the defendant, or to her solicitors, should be delivered by her to, and deposited with, the clerk of this court, to be indorsed, "Canceled;" and that upon such delivery the clerk should write across the same, "Canceled," by virtue of this decree, and sign his name, and affix thereto the seal of this court; and that the document should thereafter remain in the custody of the clerk, subject to the further order of the court. The decree concluded as follows: "And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys, be, and they and each and all of them are, hereby perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same, in evidence or otherwise, to support any right claimed under it, or making any claim, or setting up any right, interest, or claim of any kind, under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit." William Sharon left a last will and testament, in which he named his son, Frederick W. Sharon, and his son-in-law, Francis G. Newlands, as executors. Newlands declined to act, and to Frederick W. Sharon, as sole executor, letters testamentary were issued. As such executor he, on March 12, 1888, filed one of the bills, the titles of which are given above, to have the suit revived in his favor as such executor, so that proceedings may be had for the enforcement of the decree. He alleges that the suit and proceedings under the decree have abated by the death of Sharon; that the alleged marriage contract, adjudged to be a forgery, has not been surrendered for cancellation, as ordered by the decree, and he fears that the said defendant will claim and seek to enforce property rights, as the wife of William Sharon, by virtue of that written declaration of marriage, under the decree of another court, (the superior court

of the city and county of San Francisco;) essentially founded thereon, which, as he is advised, is wholly subject and subordinate to the decree of this court, contrary to the true intent, meaning, and spirit of the perpetual injunction ordered, and in violation thereof. He alleges the marriage of the defendant with David S. Terry, who is joined as a defendant with her, and prays the process of the court to the end that the said suit and proceedings therein may stand revived in his favor; and be in the same condition and plight in which they were at the time of the abatement. On the 4th of November, 1885, William Sharon executed a deed of his property, real and personal, to his son-in-law, Francis G. Newlands, and his son, Frederick W. Sharon, subject to various trusts. Without specifying the details of the said trusts it may be stated generally that they are designed to secure for some years the protection and management of the property, which is of great value, amounting to several millions of dollars, and its final distribution to the children and grandchildren of the grantor, and to others related by blood or marriage to him. It reserves, however, a power in the grantor to require at any time the trustees to pay over to him "the whole or any part of the net income, rents, issues, and profits of said property" remaining after making certain monthly payments to his children, and to his son-in-law for his grandchildren. It also reserves a power in him to direct a distribution and conveyance of his property at any time during his life to the beneficiaries named, instead of at the periods designated therein. It concludes with a solemn asseveration that the said Sarah Althea Hill was not, and never had been, his wife; that he never proposed marriage to her, or married her in any form or manner whatever; that the so-called marriage contract and "dear wife" letters introduced by her in evidence in the state court were forgeries; that all her claims to wifehood were based upon forgeries and perjuries, and he "specially empowers and directs" the trustees "to vigorously contest, in every court where a contest can be made," her false claim and pretensions. Frederick W. Sharon has since resigned the duties and powers of said trust, and the execution of the trusts has devolved upon the other trustee named, Francis G. Newlands. And he, as such trustee, and other parties and beneficiaries under the trust deed, on April 14, 1888, filed the other of the bills, the titles of which are given above, which is an original bill in the nature of a bill of revivor and supplement to carry the decree in *Sharon v. Hill* into execution, for their benefit. It sets forth with particularity the proceedings in the suit in the circuit court of the United States, and the decree rendered therein, and its non-execution and the abatement of the suit by the death of Sharon, and the execution, and contents of the trust deed; also the commencement and prosecution by said Sarah Althea of the action in the state court, claiming to be his wife under the said declaration of marriage, and the proceedings and judgment therein. It avers that the matter in suit in the circuit court exceeded the sum or value of \$500; that the property of Sharon was of the value of \$5,000,000 over and above his debts and liabilities; that said Sarah Althea Hill claimed all the rights of a wife, under the laws of the state of California,

in the property of the plaintiff, and to a reasonable support from him as her husband, and to a share in the property acquired by him after the date of said declaration of marriage; that such support was of the value of at least \$500 per month, if she was in fact his wife; that she also claimed and asserted a right to one-half of all the property acquired by said William Sharon after the 25th day of August, 1880, and that she is entitled as her share of such property to at least \$5,000,000; that said claim was disputed as false and fraudulent by the said William Sharon, and is now disputed by his successors in interest, and that it was the object of the suit in this court to protect the property and property rights of said William Sharon, and of the complainants, as his successors in interest, against said claims, which were settled by the decree of this court enjoining her from asserting any property rights, either as the wife of complainant, or under or by virtue of said declaration of marriage.

The bill also sets forth that the state court expressly found and adjudged that the declaration of marriage (which the circuit court has held to be a forgery, and annulled) was the only written declaration, contract, or agreement of marriage ever entered into between the parties, and upon such findings and adjudication rendered its judgment, declaring that Sarah Althea was his wife, and granting her a divorce from such marriage, and awarding her one-half of all the community property accumulated by him after August 25, 1880, and ordering an accounting to ascertain the community property; that the defendant, now Sarah Althea Terry, is threatening and endeavoring for the first time to proceed with an accounting under her judgment of divorce, for the purpose of enforcing a division of the property acquired by William Sharon after August 25, 1880, and that she is seeking to discover and inspect the books of account kept by him, to the great injury and harassment of the complainants. The bill also sets forth that the state court made an allowance of alimony by its order, as follows: "It is hereby ordered that the defendant, William Sharon, pay to the plaintiff, Sarah Althea, or her order, on or before the 9th day of March, 1885, the sum of \$7,500, as alimony herein; and the further sum of \$2,500 on or before the 8th day of April, 1885; and the same amount on or before the 8th day of each and every month hereafter as alimony, until the further order of this court;" that this judgment was afterwards modified, on appeal, by the supreme court of the state, on the 31st day of January, 1888, by striking out therefrom the words, "the sum of \$7,500, as alimony herein, and the further sum of \$2,500 on or before the 8th day of April, 1886," and inserting in the stead and place of those words, "the sum of \$1,500, as alimony herein, and the further sum of \$500 on or before the 8th day of April, 1885;" that the said defendant Sarah Althea Terry is seeking to enforce that judgment, as modified, to the injury and harassment of the complainants; that the said judgment of alimony was founded upon and subsists essentially by virtue of the said declaration of marriage, adjudged by this court to be forged and fraudulent and fabricated, and that its execution and enforcement ought in equity to be restrained, as an infringement of the decree and prior jurisdiction of this court, and of the rights of the complainants there-

under. The complainants therefore pray that the decree in the original suit, and the proceedings in enforcement and execution thereof, may stand revived, and be in the same state, plight, and condition in which the same were at the time of the death of the said William Sharon; and that it may be declared that the complainants, as trustees and beneficiaries, as aforesaid, are entitled to revive the said decree and proceedings thereunder for the enforcement thereof, and to have the full benefit thereof, and to fully enforce and execute the same; and that the decree may be construed and adjudged to forbid and enjoin any and all proceedings in execution or enforcement of the said judgment of the said superior court for alimony; and for an accounting and division of the community property; and that said judgments may be declared void and of no effect as against the complainants, so far as they authorize any recovery of property or property rights; and that the defendants may be restrained, pending the suits, by an injunction, from taking any further proceedings to enforce or execute the said judgment for alimony, or the the said judgment for an accounting and division of community property, and from commencing or maintaining any further suit or suits, proceeding or proceedings, of any kind, under or upon either of said judgments, against the complainants, or any of them; and that such injunction, upon the hearing, may be made perpetual; and that they may have such other or further relief in the premises as may be just.

To these two bills, to revive and enforce the decree in the case of *Sharon v. Hill*, the defendants have appeared and demurred. The principal grounds of the demurrer in each case are that the court has no jurisdiction of the subject-matter of the suits, or to grant the relief prayed; that the plaintiffs do not show any right or title to maintain their respective suits; and that there is ambiguity and uncertainty in the bills, in that they fail to show what particular property is involved.

*W. F. Herrin*, for complainant.

*Stanley, Stoney & Hays*, for respondents.

FIELD, Justice, (*after stating the facts as above.*) As appears by the statement herewith filed, the decree of this court in the case of *William Sharon v. Sarah Althea Hill*, entered as of the 29th of September, 1885, adjudged the alleged declaration of marriage between the parties, purporting to be executed on the 25th of August, 1880, to be a forgery, and ordered it to be surrendered and canceled, and enjoined the defendant, and all parties claiming under her, from making any use of the same, as evidence or otherwise, to support any claim advanced under it, as wife of William Sharon, or to any interest in property of any kind against him, or his heirs, executors, or successors. William Sharon having died, Frederick W. Sharon, as the executor of his last will and testament, has filed one of the bills before us to revive and carry that decree into execution. Francis G. Newlands, as acting trustee, under a deed of trust executed by William Sharon a few days before his death, and certain beneficiaries under that deed, have filed the other bill before us, which is an original bill in the nature of a bill of revivor and supplement. It also

has for its object to revive the decree in the original suit, and enforce its execution for their benefit. The demurrers are in form to these bills, but the objections raised by them are intended to apply to the original bill in the suit of *Sharon v. Hill*, and have been argued as though they were in terms directed against it, the position of counsel being that the circuit court possessed no jurisdiction of the subject-matter of that suit, and no power to make the decree entered therein; that the same was absolutely null and void, and therefore that there is nothing to revive. These objections could have been urged when the original bill was pending, and in fact were presented so far as they relate to the power of the court to grant the relief prayed. 10 Sawy. 50, 20 Fed. Rep. 3. And the general doctrine is that objections taken to the original bill, or which might have been thus taken, cannot again be made upon a bill of revivor, where the original suit has abated by the death of the plaintiff. The only questions which can then be raised are whether the party in whose name the revival is asked has succeeded to the interests, rights, or claims of the deceased, or has become the legal representative of his estate, so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed. If the suit be pending, undetermined, questions previously decided cannot be again raised and reconsidered any more than they could if the plaintiff had not died, and, if the suit has gone to final judgment, objections which might have controlled it, if presented in time, cannot be afterwards urged against its validity any more than they could by a stranger to the record. An attack upon a judgment in a proceeding to revive it is a collateral attack, and can avail only when there is an absolute want of jurisdiction, either of the parties or of the subject-matter. The leading counsel of the defendants accepts this position, although his argument has covered a wider circuit, and embraced many matters which could only be considered by us if we were sitting as a court of appeal, or upon a rehearing of the case. We reminded him, indeed, that we had no more power in the matter than the court which originally decided the case,—the court is the same, its members only being different,—but we did not limit his argument. We felt the exceeding gravity of the case, and the serious consequences to the parties, whichever way the controversy may be finally determined. If we are to take the judgment of this court as valid and binding, and as importing absolute verity, as the law compels us to do, if the court had jurisdiction of the parties and subject, a case is presented which from its enormity may well make society shudder. We therefore have listened to and with assiduous care have examined every suggestion of the learned counsel, that we might reach, if possible, a just conclusion. The main point of his argument is that the original suit was brought to cancel a piece of evidence which might assist in establishing a marriage between the parties, but which of itself had no value capable of pecuniary estimation; that no such value is alleged in the pleadings, or could be; and therefore the suit is not within the jurisdiction of the circuit court of the United States, under the act of congress of March 3, 1875, in force when the suit was

commenced, prescribing and limiting that jurisdiction. That act, as applicable to suits between citizens of different states, is as follows:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, \* \* \* in which there shall be a controversy between citizens of different states." Act March 3, 1875, (18 St. U. S. c. 137.)

This statute, as counsel very justly claims, requires that there shall be a matter or thing in dispute susceptible of a pecuniary valuation, and exceeding the sum or value of five hundred dollars; that the money demand or thing of value must be directly involved in the suit which is tendered for judicial action. We accept the statement as accurately expressing the limits of the jurisdiction of the circuit court, under the statute of 1875. A subsequent statute requires the sum or value of the matter in dispute to be \$2,000. By matter in dispute, as held by the supreme court, is meant, in an action at law, "the subject of litigation, the matter for which suit is brought, and upon which the issue is joined, and in relation to which jurors are called, and witnesses are examined." If the case be one in equity instead of law, the definition is equally explicit, the words "in relation to which jurors are called" being omitted. The matter at issue in the original suit of *Sharon v. Hill*, was the alleged contract of marriage between the parties, purporting to have been executed on the 25th day of August, 1880, and the object of the suit was to enjoin its use, and obtain its cancellation as a forgery and a fraud. All the testimony was directed to the establishment of the genuineness of that instrument or to prove its forgery. As the fact was found one way or the other the character of the judgment would be determined. But it is insisted that this contract was not capable of pecuniary estimation; if forged, as claimed on one side, it would be a valueless paper; if genuine, as claimed on the other side, it could of itself establish no property rights in the defendant. What might ultimately result from the marriage which it might aid in proving was only prospective and contingent, lying among mere possibilities. We do not so construe the alleged contract, or the rights it conferred upon the alleged wife, and the obligations it imposed upon the alleged husband. If genuine and valid, it established a marriage between the parties from its date, assuming, as claimed by her, that it was followed by the requisite consummation.<sup>1</sup> It is not a contract to marry at a future day, or an admission that a marriage has already taken place. It is an instrument by which, on the assumption mentioned, the marriage relation was immediately created. It therefore imposed upon him from that date all the obligations of a husband which the law creates, and among which is that of supporting the defendant as his wife in a manner suitable to his condition of life. In her complaint in the state court, which became by her plead-

<sup>1</sup> NOTE BY FIELD, Justice. By requisite consummation is meant what the law required to render the contract operative as a marriage, such as openly living together as man and wife, or, as the statute states, "a mutual assumption of marital rights, duties, or obligations." Civil Code, § 55.

ings in the circuit court a part of the record there, she assumes that he was, when married, worth \$5,000,000, for she avers that he was not then worth more than that sum, with an income of \$30,000 a month, and she alleges that since then, by their joint prudent management, he has become worth \$10,000,000 more, and his income has increased to \$100,000 a month. A reasonable allowance for her support, which she might claim from him by virtue of that contract of marriage, if genuine and valid, would greatly exceed the amount required for the jurisdiction of the court. Again, the contract, if genuine and valid, placed her in a position to claim her rights to a portion of the community property; that is, property acquired by the earnings of both since its date. She alleges in the state suit that such earnings amounted to \$10,000,000, and if so, under the law, as his wife, she would be entitled to one-half thereof on his decease, against any attempted testamentary disposition. It may be true that he could, notwithstanding the marriage, have disposed of the community property, given it away, perhaps, so as to cut off any claim by her; but the law will not presume that a husband will act so as to defeat any rights which his wife might otherwise justly claim under the law, nor will a remedy of a court of equity be refused because one may place his property where a claim cannot be enforced against it. Again, the contract, if genuine and valid, gave her an inchoate right of dower in the real property, which he then possessed in the District of Columbia, amounting in value to \$300,000. That right, though to be enjoyed only in case of her surviving him, had a present substantial value, capable of pecuniary appraisal, and of which he could not deprive her by any conveyance of the property without her joining with him. Tables are framed by which the value of such interest is estimated according to the probable duration of the lives of the parties; and compensation for the value of such interest is constantly made in the transfer of real property in states where the right of dower is allowed. 2 Scrib. Dower, c. 24, tables in appendix. Such right in the real property of Sharon in the District of Columbia would greatly exceed in value the amount required to give jurisdiction to this court. We are therefore of opinion that an instrument, such as the declaration of marriage,—which, if genuine, and followed by the requisite consummation as claimed, would impose upon the plaintiff the obligation to support the defendant Sarah Althea in a manner suitable to his condition; that would give her a right to claim one-half of the property in California, subsequently acquired by him, alleged to be of the value of \$10,000,000; and would give her an inchoate right of dower in real property in the District of Columbia, worth \$300,000,—may be safely treated as having a pecuniary value exceeding \$500, the amount necessary to give the circuit court jurisdiction when the suit was commenced. It is true, there is no statement in the pleadings in the original suit of the value of the property of the complainant. It is only alleged that he is possessed of a large fortune in real and personal property; but that its value amounts to several millions of dollars does appear in the evidence presented in that case, and that is all that is necessary to maintain the jurisdiction. It is well

settled that where the controversy is not respecting the amount or value of the matter in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed in behalf of the parties. On this ground the affidavits as to the value of real property owned by William Sharon in the District of Columbia, and also of the value of other property owned by him, were allowed to be filed during the argument. In *Ex parte Bradstreet*, 7 Pet. 634, application was made to the supreme court of the United States for a *mandamus* to compel the district judge of the Northern district of New York to reinstate and proceed to try certain writs of right to land, which were dismissed by him, because it did not appear that they involved the required amount to give the court jurisdiction, and to admit such amendments in the pleadings or such evidence as might be necessary to show that amount. In granting the *mandamus*, the court, by Chief Justice MARSHALL, said:

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States is to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court had a right to give the value of the property demanded in evidence, at or before the trial of the cause, and would have a right to give it in evidence in this court."

See, also, *Wilson v. Blair*, 119 U. S. 387, 7 Sup. Ct. Rep. 230, and *Den v. Wright*, Pet. C. C. 64, 73.

The practice of admitting such evidence as to the value of the matter in dispute, in order to give the supreme court of the United States jurisdiction to review the judgments of inferior tribunals, where such value does not appear upon the records, is followed at every term. The doctrine for which the learned counsel contends, if successfully maintained, would strip the federal courts of the most important branch of their jurisdiction in equity cases. That jurisdiction is remedial and preventive, and, to frustrate fraud and further justice, may be invoked for the reformation, delivery, or enforcement of contracts or other instruments, or for their surrender or cancellation.

"It is obvious," says Story in his treatise on Equity Jurisprudence, "that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest." Vol. 2, § 694.

And again:

"If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere



written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment." *Id.* § 700.

Now, these instruments, which may be thus controlled by the court, are only evidence of the right to the things to which they relate. They are not the things themselves, and in exercising jurisdiction to compel their reformation, delivery, or enforcement, or their surrender or cancellation, the court is merely acting upon the evidence by which the possession and enjoyment of the things may be advanced or defeated. The value of instruments, in the sense by which the jurisdiction of the court is determined, is the value of the property, the possession or enjoyment of which may be thus affected. Suits to cancel forged contracts, such as a forged deed, are of common occurrence. What is the value of the instrument in controversy in such cases? If it be forged, its actual value is nothing; but, for purposes of jurisdiction over it by the court, it must be held to have, to the rightful owner of the property, the value of the property, the possession and enjoyment of which is imperiled by it. That such is the general understanding of the profession we have no doubt, for we can find no case where jurisdiction of the court has been denied, in the multitude of instances where it has been invoked, because such instrument is incapable of pecuniary estimation. It is everywhere assumed that the property which could be affected by it, if genuine, is the measure of its value for the purposes of jurisdiction. We might also refer, in support of this view, to that branch of equity jurisdiction which is exercised in discovering testimony or perpetuating it. What is the measure of value in such cases? Clearly, for purposes of jurisdiction, it must be estimated with reference to the value of the property in relation to which it is desired to discover or perpetuate the testimony. A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor; whether they establish a marriage relation with another, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation. It is enough that unless set aside, or their use restrained, they may impose burdens upon the complaining party, or create claims upon his property by which its possession and enjoyment may be destroyed or impaired. It is of no consequence, therefore, that the bill in the original suit of *Sharon v. Hill* may contain matters appropriate to a suit of jactitation of marriage in a spiritual court of England. It also presents matters of which a court of equity in that country and in this has always had jurisdiction; that is, a case where the possession of a forged document by the defendant is alleged, purporting to be executed by the plaintiff, which, if genuine, would impose obligations upon him, and create claims upon his property. The learned counsel of the defendants also contends that the bills cannot be maintained on the ground

that the plaintiffs show no title in themselves or legal capacity to maintain the suits. As to the bill of revivor by the executor, Frederick W. Sharon, this position is assumed upon the theory that the decree in the original suit is self-executing; that the cause of action in that suit did not survive to the executor; that he only avers that he is the "personal representative" of the deceased plaintiff, without stating that any estate of the deceased has come into his hands. As to the original bill in the nature of a bill of revivor by Newlands and others, the further position is assumed that the original suit abated by the transfer by William Sharon of his property to trustees, under the deed of trust of November 4, 1885. To these several positions there is a ready and satisfactory answer found in the language of the original decree, in the law prescribing the powers and duties of executors, and in the terms of the deed of trust. The original decree is not self-executing in all its parts. It may be questioned whether any steps could be taken for its enforcement until it was revived. But if this were otherwise, the surrender for cancellation of the alleged marriage contract, as ordered, requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should be thus put out of the way of being used in the future, to his harassment and the embarrassment of his estate, but public justice required that it should be formally canceled, that it might constantly bear on its face the evidence of its bad character whenever and wherever presented or appealed to. In *Railroad Co. v. Schuyler*, 17 N. Y. 592, 599, the court of appeals of New York said:

"There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. \* \* \* Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title, or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be canceled."

In *Peake v. Highfield*, 1 Russ. 559, a case which came before Lord GIFFORD, master of the rolls, in 1826, the bill prayed that an instrument purporting to be a deed of conveyance of real estate by a person since deceased might be delivered up to be canceled. The report of the case states that there was strong evidence that the deed was forged, though the defendant, who was charged with the commission of forgery, stated in his sworn answer that the deed was executed by the party whose deed it purported to be, and a witness testified that he was present at its execution. The defendant's counsel insisted on three points—"First, that a court of equity had no jurisdiction on the ground of forgery; secondly, that, even if the court had jurisdiction in such a case, it would never decree an instrument to be canceled on the ground of its being a forgery, without sending the question to be tried by a jury; thirdly, that, at all

events, it was impossible, in the present case, to order the deed to be canceled without a trial at law, since there was a witness who swore he saw it executed." The master of the rolls maintained the jurisdiction of the court, although he ordered an issue to try the fact of forgery, and said:

"This court has jurisdiction to order a forged instrument to be delivered up and canceled. In *Bishop of Winchester v. Fournier* [2 Ves. Sr. 446] several cases are mentioned in which forged instruments have been ordered to be delivered up; and they are referred to by Lord REDESDALE as unquestioned authorities. In some of them the court made the order at once that the instrument should be delivered up, without sending the question to be tried by a jury. In *Masters v. Braban*, [1 Russ. 560,] 10th July, 1735, the decree made at the hearing declared a deed to be a forgery. It does not appear that the plaintiffs in the cause prayed that the deed might be declared to have been forged, or might be delivered up to be canceled; yet the court made the declaration, and gave the plaintiffs the consequential relief. In *Secombe v. Fitzgerald* [1 Russ. 561] the bill was filed to set aside certain notes, and it also impeached a bond which was alleged to be forged. The decree with respect to the bond was that it should be delivered up to be canceled."

In *Pierce v. Webb*, which was before Lord Chancellor THURLOW in 1792, and is reported in a note to 3 Brown, Ch. 16, 17, the bill prayed that a certain lease of land might be declared fraudulent and delivered up to be canceled. It was contended on the part of the defendants that no use could be made of the lease at law, and that equity could not, in such a case, compel the delivery of a deed; and, further, that the defendant Stalker, having proved expenses for lasting improvements, was entitled to those allowances; but the lord chancellor decreed for plaintiff, with costs, and ordered the lease to be delivered up to be canceled, and did not admit any allowances for improvements, saying that "it has never been doubted that if a man would create a forged deed, (of which no use could be made at law,) yet equity will interfere and deliver it up." The doctrine of these cases, as observed by counsel, is in accordance with the statute of this state, which declares that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Civil Code, 3412. The cause of action set forth in the original suit survived to the executor. The object of that suit was to set aside and cancel an instrument which, if genuine and valid, created a claim on the part of the defendant to be supported out of the property of the plaintiff, and inchoate rights which, on his death, would entitle her to a large share of that property. Had no such suit been brought by William Sharon, his executor could have brought one. Indeed, it would be his duty to do so if he believed the instrument a forgery. For the same reasons it is his duty to see that the decree is enforced so far as it may be necessary to protect the property of the deceased against any fraudulent claims, or interfere in any way with its disposition, as directed by his will, and for that purpose to seek a revival of the decree. Under the law of this state, the executor or administrator, when there is no will, is en-

titled to the possession of all the real and personal property of the deceased until the estate is fully administered, or a decree of distribution is made by the probate court. The heirs or devisees of the deceased can only take possession upon such distribution. Until then the executor or administrator represents the heirs and devisees, also the creditors of the deceased, and in the interest of all of them is bound to use all lawful means, by suit or otherwise, to preserve and protect the estate against all fraudulent claims by which the title or value of the property in his charge may be impaired. This duty devolves upon them from the very nature of their office, (*Meeks v. Vassault*, 3 Sawy. 213; *Cunningham v. Ashley*, 45 Cal. 485,) and is independent of the specific powers and duties prescribed by statute. In *Curtis v. Sutter*, 15 Cal. 264, a suit by an administrator to quiet the title of an intestate to real property was sustained by the supreme court of the state against the objection that it was improperly brought in his name. If a suit of that nature may be brought, it is not perceived, as counsel justly observes, why a suit *quia timet* may not be brought by an executor to cancel a forged paper, and, if so, why he may not file a bill of revivor to obtain the benefit of a decree rendered in favor of the deceased in a suit of that character. We have no doubt that whatever suit the deceased might have brought for the protection of his estate from unreasonable, illegal, and fraudulent claims, his executor may bring, and whatever judgments the deceased may have obtained for that protection, which the courts had jurisdiction to render, and which have not been fully enforced, his executor may have revived and enforced. The fact that the executor in his bill simply describes himself as the personal representative of the deceased, without averring that any property of the latter had come into his hands, is of no moment. The bill of revivor is to be read in connection with the record in the original suit, which declares that the deceased was possessed of a large property, real and personal; and it will be presumed that it came into the hands of his executor, where the law places it, in the absence of averments to the contrary. Besides, the only question which can be considered on this bill to revive is whether the plaintiff is executor of the deceased, and thus succeeds, by operation of law, to the charge of his property; and this fact is admitted by the demurrer. As said by Mr. Justice STORY, in *Slack v. Walcott*, 3 Mason, 508, 512:

"When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representation in law, there is no change in the title itself; and the only question that arises is, who is the person entitled to take as representative?—that is, in respect to real estate, who is the heir? and in respect to personal estate, who is the executor or administrator? When this fact is ascertained, the person succeeds, by operation of law, to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title except that of transmission by operation of law. The title of representation or heirship, at least in a court of chancery, is not disputable; but the person in whom it is vested is alone to be ascertained."

The objection that the bill does not describe specifically the property of the deceased is without force. The fact appears in the record of the  
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original suit that the deceased possessed a large and valuable property, the right to portions of which would be affected by the alleged contract, if genuine and valid. But it is earnestly contended, both against the bill of revivor and against the original bill in the nature of a bill of revivor, that the suit in the circuit court abated by the transfer of the decedent's property under the deed of trust of November 4, 1885, and therefore the court could not proceed any further therein. Both of the bills have the same object,—to revive the original decree and enforce its execution; the latter being necessary because the trustees and beneficiaries under the trust deed take by a title which may be contested, and not like the executor by operation of law. As said in *Slack v. Walcott*:

"When a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original. It does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far, then, as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor."

But, as held in the same case, purchasers and devisees, by an original bill, in the nature of a bill of revivor, may draw to themselves the advantages of the former suit, in whatever stage it may be at the time of the abatement. To the alleged abatement of the original suit, by the transfer of the decedent's property, there are three answers, each of which is complete. In the first place, the reservations in the trust deed of power in the grantor to claim during his life the payment of the net income, rents, issues, and profits of the property remaining after certain monthly payments to his children, and to his son-in-law for his grandchildren, continued in him sufficient interest in the property to maintain the suit to cancel a forged document which might lessen the amount of such income, rents, and profits. In the second place, the decree, having been entered as of September 29, 1885, was, with reference to the trust deed subsequently executed, as though the decree had been announced by the court as of that day. *Mitchell v. Overman*, 103 U. S. 62; *Borer v. Chapman*, 119 U. S. 596, 597, 7 Sup. Ct. Rep. 342. In the third place, the deed of trust having been made *pendente lite*, the trustee and beneficiaries took subject to the decree which might be subsequently rendered. The suit being to revoke and cancel an instrument which might otherwise lessen the value of the estate, and having been heard and submitted for decision, it is to be presumed, in the absence of any application by the trustee and beneficiaries to be substituted as plaintiffs, that they desired that the case should be held for such determination in their interest. While they might properly have asked to be joined with the plaintiff, they were not bound to do so. The court had jurisdiction to proceed without them to render the decree.

Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon v. Hill*, we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sha-

ron, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states,—a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. *Railway Co. v. Whitton*, 13 Wall. 270, 289. So valuable has the right of citizens of other states than the one in which suits are brought against them to have their cases heard in a federal court always been regarded, that, at the very outset of the government, congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court, he may, upon proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court, and tried or heard there; and all the acts of congress have declared that it shall be the duty of the state court in such a case to accept the surety, and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. As said by the supreme court, in *Railroad Co. v. Koontz*, 104 U. S. 14, it is well settled that, “when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored.” As congress has made such careful provision to secure to citizens of other states a right to transfer to a federal court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that court by a citizen of another state could cut off and practically nullify the latter’s constitutional right to a hearing there by instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other. In *Wallace v. McConnell*, 13 Pet. 143, we have a decision of the supreme court of the United States illustrative and confirmatory of this doctrine. That case was brought in the district court of the United States for the district of Alabama, exercising the powers of a circuit court, upon a promissory note of the defendant for \$4,880. The defendant pleaded payment and satisfaction, and, issue being joined therein, the

case was continued until the succeeding term. The defendant then interposed a plea of *puis darrein continuance*, alleging that as to \$4,204 of the sum demanded the plaintiff ought not further to maintain the action against him, because that sum had been attached in proceedings commenced against him under the attachment law of Alabama, in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case was ultimately taken to the supreme court, where it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount of the sum attached, and that therefore the demurrer ought to have been overruled. But the court said:

"The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice."

In *Taylor v. Taintor*, 16 Wall. 370, the supreme court, speaking by Justice SWAYNE, said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function."

In *Shoemaker v. French*, Chase, 267, a bill was filed in the circuit court of the United States for the district of Virginia by the plaintiff, Shoemaker, for an injunction to prevent the defendant, French, from acting as president of the Alexandria & Washington Railroad Company, and an order was made directing that he be served with notice of motion for the injunction. After this, French filed a bill in a state court of Virginia, praying an injunction against Shoemaker for matters cognate to the bill in the circuit court; and Chief Justice CHASE, in granting the prayer of the bill in the circuit court, said:

"The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court."

The doctrine that where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the other, prevails very generally, both in the federal and state courts, with some exceptions which we shall hereafter consider. Thus, in *Gaylord v. Railroad Co.*, a bill was filed in the circuit court of the United States for the district of Indiana to obtain, among other things,

the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained, and an amendment made, a receiver was appointed. While proceedings were thus pending in the federal court, a suit was commenced in a state court of Indiana, in which a receiver was also appointed, who took possession of the property. Subsequently the parties thus having possession surrendered the property to the receiver of the federal court, upon his application and the presentation of its order. He was thereupon arrested by the state court, but the federal court released him, and he retained the property, the court refusing to rescind the order appointing him. In disposing of the case, the federal court said:

"We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled." 6 Biss. 286, 291.

In *Insurance Co. v. University* a bill was filed in a state court of Illinois to enjoin the foreclosure of a mortgage, and have it set aside and declared void. Later, on the same day, a bill was filed in the circuit court of the United States for the Northern district of Illinois to foreclose the mortgage. The process of the federal court was first served, preceding by a few hours the service of process from the state court, and it was held that the fact that process from the federal court was first served gave that court jurisdiction to go on with the foreclosure suit, and determine all questions as to the validity of the mortgage. In deciding the case, the court, speaking by Judge DRUMMOND, said:

"It is undoubtedly a very embarrassing state of litigation, there being two suits, brought in two jurisdictions, involving to a great extent the same subject-matter, and I have felt some difficulty in determining what is the true rule upon this subject; but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago; that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage." 10 Biss. 191, 195, 6 Fed. Rep. 443.

In *Mason v. Piggott*, in the supreme court of Illinois, it appeared that the defendant, instead of making a defense in an action pending in a court of law, had attempted to transfer the case to a court of equity, and the court said:

"It by no means follows, because a court of equity has concurrent jurisdiction with a court of law, that it will take cognizance of a case already pending in a court of law, and oust it of jurisdiction. As a general principle, in all cases of concurrent jurisdiction, the tribunal which first obtains jurisdiction of the subject-matter must proceed and finally dispose of it. A court of equity will not take jurisdiction where it has first been acquired by a court of law, unless there is some equitable circumstance in the case which the party cannot



avail himself of at law. Subject to this qualification, the rule is inflexible." 11 Ill. 88.

In *Bank v. Railroad Co.*, in the supreme court of Vermont, it appeared that the defendant, in an action at law pending against him in Massachusetts, had filed his bill in a Vermont court of chancery to enjoin the action. The bill was dismissed, and the court, admitting the power of a court of equity to enjoin parties within its jurisdiction from proceeding in a court of law in another state, said:

"We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party having the law in his favor from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts." 28 Vt. 470-477.

In *Stearns v. Stearns*, in the supreme court of Massachusetts, a decree of the probate court appointing commissioners to make partition of an estate among the heirs was reversed, because proceedings were first commenced for that purpose in another court of concurrent jurisdiction against the parties moving the decree, which proceedings were pending when the decree was rendered; the court saying that "when different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority paramount to the other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties in relation to the same subject, in the same or any other court." 16 Mass. 170. The case of *Insurance Co. v. Howell*, in the court of chancery of New Jersey, presents some features similar to the case at bar. The complainant filed its bill for relief against two policies of insurance which it alleged the defendant had fraudulently obtained from it upon his property in Illinois. The bill prayed that the policies might be delivered up and canceled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or equity upon them, or making use of them in any way for the purpose of establishing any claim or damage against the complainant. The defendant appeared and filed an answer, to which, a replication being made, proofs were taken. After the suit was commenced, the defendant brought an action at law upon the policies against the company in a state court of Illinois, which suit was on its petition removed into the circuit court of the United States for the Northern district of Illinois. The company thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting the suit in Illinois. An injunction having been issued, a motion was made to dissolve it. In denying the motion, the chancellor said:

"This court having the power to hear and determine the subject-matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is

that, as between courts of concurrent and co-ordinate jurisdiction, (and the circuit court of the United States and the state courts are such in certain controversies, such as that involved in this suit, for example, between citizens of different states,) the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court. \* \* \* Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court." 24 N. J. Eq. 239.

In *Brooks v. Delaplaine* the high court of chancery of Maryland dismissed a bill in equity because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction, the chancellor saying:

"When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. \* \* \* Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results." 1 Md. Ch. 354.

Similar decisions might be cited from the highest courts of nearly every state; for upon the principle stated there is, with certain well-recognized exceptions, a general concurrence of opinion. Where two judgments, relating to the same subject, are irreconcilable, both cannot be enforced. One or the other must give way, and the only reasonable test by which the superiority of one over the other is to be determined is that which is expressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment, independently of the commencement of the suit, were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident or circumstances beyond the power of the court or parties; as one court may have a large calendar, and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence, because it is enabled, from paucity of cases, to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference. The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: *First*, where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent

and illegal, and therefore vitiating the several obligations; or where the jurisdiction of a court of equity, as well as a court of law, is invoked by him with reference to the matter. Of course a decision first rendered in either suit may be pleaded in the others. The plaintiff must abide the adjudication which he has sought. And, *second*, where the cases are upon contracts or obligations, which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. The cases of *Duffy v. Lytle*, 5 Watts, 120; *Rogers v. Odell*, 39 N. H. 452; *Child v. Powder Works*, 45 N. H. 547; *Bank v. Bank*, 7 Gill, 415; and *Westcott v. Edmunds*, 68 Pa. St. 34,—fall under one or the other of these classes. The language quoted from *Buck v. Colbath*, 3 Wall. 345, was used as explanatory of the general doctrine that, in examining into the exclusive character of the jurisdiction of a court, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The illustration given of a party suing in a court of chancery to foreclose his mortgage, and in a court of law to recover judgment on his notes, and in another court of law, in an action of ejectment, to recover the possession of the land, would have brought the supposed case, if a real one, under the first class of exceptions stated above, where a decree first rendered in either suit upon the same point could have been pleaded as conclusive in the others. In the *Tubal Cain Case*, 9 Fed. Rep. 834, the judgment of the state court pleaded in the United States district court was recovered in the prior action, and the circuit court stayed its proceedings to await the determination of an appeal from the judgment. The other authorities cited do not seem to us, after careful consideration, to be entitled to any weight upon the question presented.

The case at bar is not within either of the excepted classes. The plaintiff has not invoked the jurisdiction of the state court, and the alleged marriage contract is not one which in any sense of the rule was merged or could be merged in the judgment, any more than a deed, upon which title to real estate is asserted, is merged in a judgment in ejectment for the possession of the property. It was as much an outstanding and existing contract after the judgment of the state court as before, and was equally available for all purposes. But, aside from this, the doctrine of the excepted cases can have no application to cases instituted in a federal court by a citizen of another state, so as to give paramount authority to a judgment of a state court in a suit subsequently commenced against him, without defeating a most important right conferred upon him by the constitution and laws of the United States,—a result which can in no manner be accomplished either directly or indirectly. See *Suydam v. Broadnax*, 14 Pet. 67, and *Payne v. Hook*, 7 Wall. 430. It is true that, in the decision of the case, Judge DEADY expressed his opinion to the effect that, as the validity and genuineness of the declaration of marriage were invoked in the state court, its determination would be conclusive, and estop the plaintiff in this court to show the contrary, if it had not been obviated by the appeal from the judgment. We do not concur with the learned judge in this view, for reasons already stated;

but, assuming it to be sound, we agree with him that the effect of the appeal was to prevent the judgment from becoming final, and to destroy its efficacy as evidence. By the act of congress the judgment could only have such faith and credit given to it as it has by law or usage in the courts of the state; and by the law of the state its operation as evidence is superseded by an appeal. The Code of Civil Procedure provides that when an appeal is perfected "it stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein;" and also that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Such is the express language of the Code, (sections 946, 1049,) and, as the district judge observes, these provisions are in conformity with the law previously existing, according to which an appeal not only stayed the execution of a judgment, but suspended its operation for all purposes. Thus, in *Woodbury v. Bowman*, 13 Cal. 635, which was decided before the adoption of the Code, the record of a judgment from which an appeal was pending was offered in evidence, and rejected, and the court, in affirming the ruling, said:

"We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue, even between the parties to it."

And in *Murray v. Green*, 64 Cal. 369, decided since the adoption of the Code, the record of a judgment in a case then on appeal was offered in evidence, and rejected; and the court, in sustaining the decision, said that while the appeal was pending "the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties." The circuit judge did not concur with the district judge as to what would be the effect of the judgment in the state court, if it were final, observing that it was unnecessary to determine that question, and that he reserved his opinion upon it until it should properly arise for judicial determination, and until an opportunity was had for its full discussion and mature consideration. But the circuit judge did concur with the district judge as to the effect of the appeal in destroying the judgment of the state court as evidence of any kind in the federal court. It was of no avail, therefore, when pleaded as an estoppel. It was not evidence of the truth of the matters found, much less conclusive evidence. The ruling of the circuit court in refusing its consideration was therefore correct at the time; and if correct then, it could not become erroneous by any subsequent event. The affirmation of the judgment since has no retroactive operation so as to make that ruling bad which was then sound. But, more than this, there is still pending an appeal to the supreme court from an order refusing a new trial in the state court. The judgment therein has not, therefore, even yet become final. It does not yet establish, as between the parties, the verity of the findings. In the recent case of *Gillmore v. Insurance Co.*, in the supreme court of this state, (65 Cal. 63, 66, 2 Pac. Rep. 882,) the effect of a pending motion for a new trial upon the finality of a judgment

was considered. There a stipulation had been made that all proceedings should be stayed until final judgment and decision in another action. It was contended that the judgment in that action had become final, within the meaning of the stipulation, after a year had elapsed from its entry without an appeal being taken from it. There was pending a motion for a new trial, and the court said:

"Although no appeal had been taken from the judgment within the statutory time, proceedings were pending, upon a motion made by the defendant in the case, to vacate the judgment, and grant a new trial. That motion subjected the judgment to be reviewed, and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for a new trial had been disposed of. *Hills v. Sherwood*, 33 Cal. 474. While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended, and until litigation on the merits is ended there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it has become final for the purpose of an appeal from it."

See, also, *Fulton v. Hanna*, 40 Cal. 278.

It remains to consider the further objections of the defendants that the priority of jurisdiction of the federal court was waived by the stipulation to remand the case originally commenced in the state court, from the federal court to which it had been removed, back to the state court; that the failure to present to the state court the judgment of the federal court was an abandonment of its protection; and that the execution of the decree in the federal court by injunction against prosecuting proceedings under the judgment of the state court is forbidden by the act of congress prohibiting the issue of an injunction to stay proceedings in a state court except in cases of bankruptcy. Rev. St. § 720. The alleged waiver of priority of jurisdiction by the federal court because of the consent of parties to remand the case commenced in the state court back to it, after its removal, was considered on the argument in the original suit, and held to be without force. A statement of the circumstances of the remanding is sufficient answer to the position. The case commenced in the state court by the alleged wife, Sarah Althea, against Sharon, praying that her alleged marriage be declared legal and valid, and then that a divorce be decreed, was removed on the application of the defendant therein to the federal court on the supposition that he had a right to have it heard there. The plaintiff therein denied that right on the ground that the subject-matter, being an action for a divorce, was not within the jurisdiction of the court, and moved to remand it back to the state court. The defendant's counsel appears to have come to the conclusion that her motion would be granted, and, instead of waiting for the order of the federal court to that effect, consented that the case might be remanded, and that is all there is of the alleged waiver. The consent waived no rights of priority by the original suit, nor in any respect affected its position. It would be strange if the remanding of one action by consent should change or affect in any degree the jurisdiction of the court over another and different action, to which the consent made no

reference. The position that the protection of the decree of the federal court was waived because the attention of the state court was not called to it, either on the motion for a new trial, or on the argument of the appeal in the supreme court, merits careful consideration. There is not, and certainly ought not to be, anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States. Both have large and responsible duties in the administration of justice for the American people, and we are sure that neither has any desire to encroach upon the jurisdiction and rightful authority of the other. And yet, as both courts have on many subjects concurrent jurisdiction, it will sometimes happen that there will be a conflict of decision between them, and then a proper respect for each other will induce both to seek a solution consistent with the just rights of the parties. We think, therefore, it would have been a proper proceeding for the plaintiff in the original suit—the defendant in the state court—to have called the attention of that court and of the supreme court of the state in some formal way to the decision and decree of the federal court, not for the purpose of changing any alleged rulings had in the state courts, but in order to secure a stay therein of all further proceedings in them. The whole controversy in the state court rested upon the alleged validity of the marriage contract, and this fact is fully set forth in its findings. The decree in the federal court adjudged that contract to be a forgery, and ordered its surrender and cancellation. If this decree be a final one, and the court had jurisdiction to render it, there can be no doubt that it should, when presented to the state courts, stay all proceedings therein. Those courts would only be called upon to give full faith and credit to it, not to reverse or review any of their rulings, but to act upon a fact, conclusive of the case, for the first time brought to their attention. They would only be called upon to do what they would do upon official notice to them of any other fact which would conclude a pending controversy. If, for example, there should be brought to a *nisi prius* court, after a conviction of an accused party of murder, or before the supreme court of the state on appeal from the judgment, official notice that the convict had been pardoned subsequent to the conviction, the *nisi prius* court, would not thereupon grant a new trial, or the supreme court reverse the judgment, but both courts might properly be called upon to stay all proceedings upon the conviction; and an order to that effect, reciting the pardon, might be made. So, too, if, while argument is going on upon the appeal, the supposed murdered man should walk into court and present himself, I think the court, though it might find no error in the ruling of the lower court, would readily find a way to stay execution of the judgment upon reciting the personal appearance of the supposed murdered man. So we think the decree of the federal court might have been officially presented to the state courts, and a stay of proceedings in the action there asked. But it was not obligatory upon the defendant in the state courts to present to them the federal decree. He might think proper to await the final action of those courts, and, if the judgment of the superior court should be ultimately sustained, present the federal decree to stay its enforcement. He might

very well have deemed it wise to wait until the time to appeal from the federal decree had expired before calling upon the state courts, to give effect to it in proceedings before them. The time to appeal did not expire until the 15th of January, 1888, after the motion for a new trial had been heard in the lower court, and the appeal had been heard and submitted in the supreme court. The decree was entered as of September 29, 1885, and was as effectual for all purposes as if it had been announced on that day, except where the rights of others may have been prejudiced thereby; and to prevent such prejudice in shortening the time to appeal, it must be deemed to have commenced running only from the date of its actual entry. There was no effective appeal from the decree in the federal court taken during the statutory period. There was an attempt by the defendant to appeal, and an order was made allowing an appeal, but as this was before the case was revived the order was improvidently made, and was without any efficacy. Where a suit has abated by the death of the plaintiff after judgment, no appeal can be taken by the defendant until the case is revived. *McClane v. Boon*, 6 Wall. 244. The decree of the federal court, when revived, may be used to stay any attempted enforcement of the judgment of the state court. The case of *Boydton v. Ball*, 121 U. S. 462, 7 Sup. Ct. Rep. 981, is illustrative of this doctrine, and has a direct bearing upon the question. There a party, who had filed a petition for the benefit of the bankrupt law, was sued for a debt in a state court of Illinois. Although he could have applied, under the act of congress, to the state court for a stay of proceedings until the disposition of his petition in bankruptcy, he made no application of the kind, and judgment passed against him there. When he subsequently obtained his discharge in bankruptcy, he presented it to that court, and moved for a perpetual stay of execution on its judgment. The motion was denied, and the supreme court of the state affirmed the ruling. The case was then taken on writ of error to the supreme court of the United States, where the judgment of the supreme court of Illinois was reversed. After citing the section of the bankrupt act giving the right of the party to stay proceedings in the state courts, the supreme court of the United States said:

"The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons: *First*, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the *second* place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the *third* place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid *pro rata* with his other debts by the assignee in bankruptcy. If, for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene, as he may do,—*Hill v. Harding*, 107 U. S. 631, [2 Sup. Ct. Rep. 404,]—he

does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court, and obtain the stay of execution which he asks for now."

The failure to present the decree to the state courts did not, therefore, in our opinion, lessen its efficacy, and will not prevent it when revived from being hereafter presented to them, and does not impair in any respect the power of this court to enforce its execution. The prohibition against the issue of an injunction by a court of the United States to stay proceedings in a state court is found in section 5 of the act of March 2, 1793, (1 St. 334,) and has been continued in force ever since. It is now contained in section 720 of the Revised Statutes, with an exception relating to proceedings in bankruptcy, and is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the federal court has first obtained jurisdiction, or where, the state court having first obtained jurisdiction, the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the state court has first attached. With its proceedings, then, no federal court can interfere by injunction. In *Fisk v. Railroad Co.*, 10 Blatchf. 520, the circuit court of the United States for the Southern district of New York issued an injunction restraining that corporation from taking any steps in a state court to procure its own dissolution, and the effect of the statute in question was considered. Judge BLATCHFORD, now one of the justices of the supreme court, in deciding the case, said:

"The provision of section 5 of the act of March 2, 1793, (1 U. S. St. at Large, 334, 335,) that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a court of a state before the proceedings are commenced in a federal court. Otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of the act of September 24, 1789, (1 U. S. St. at Large, 81, 82,) that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the continued exercise of the jurisdiction of this court over the corporation in question that it should be restrained from taking steps in a state court to put itself out of existence."



In *Wagner v. Drake*, in the circuit court of the United States for the district of Iowa, (31 Fed. Rep. 851,) the question raised was as to the power of the court to restrain proceedings in a state court, after the action had been removed to it, and, though it was held that the facts of the particular case did not authorize the injunction, the power of the federal court to restrain such proceedings where irreparable injury would follow a refusal of the writ was fully recognized. In deciding the case, the court said:

"An injunction, in such case, by the federal court, restraining the parties before it from proceeding elsewhere, is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because, after removal, there is no proceeding left in the state court, and no jurisdiction to be interfered with. If, after removal, a party could continue or renew his litigation in the state court, the whole purpose of the removal might be defeated."

The doctrine of these cases has been affirmed by the supreme court of the United States. In *French v. Hay*, 22 Wall. 250, that court held that the circuit court of the United States for the Eastern district of Virginia rightfully enjoined proceedings in a suit in a court of Pennsylvania, founded upon a decree rendered in a suit in a court of Virginia, which had been properly removed to the circuit court. In deciding the case, the supreme court, speaking by Mr. Justice SWAYNE, said:

"The prohibition in the judiciary act against the granting of injunctions by the courts of the United States touching proceedings in state courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

In *Dietzsch v. Huidekoper*, 103 U. S. 494, it appeared that an action of replevin had been commenced in a state court of Illinois, which was removed to the circuit court of the United States for that district. Notwithstanding the removal, a writ for the return of the property was issued by the state court, which the plaintiffs in the replevin suit refused to obey. An action was then brought against them and their sureties on the replevin bond. They thereupon filed a bill in the United States circuit court, in which they prayed an injunction to restrain the prosecution of any suit upon the bond. An injunction was issued, and the supreme court held that it was properly granted, observing that "a court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court." It is essential to the due administration of justice in the federal courts that they have full power to issue all process necessary for the exercise of their jurisdiction, and such power is in explicit terms conferred by statute upon them. When, therefore, jurisdiction over a subject-matter has first attached in a federal court, it must be able to issue all such orders and process as may be essential to give effect to that jurisdiction. State courts, subsequently taking jurisdiction over the same subject, must exercise it in subordination to the determination of the federal court.

We have thus gone over, with as much care as we have been able to give, the several objections of counsel to the jurisdiction of the circuit court of the United States to render the decree in the original suit of *Sharon v. Hill*, and we have no doubt of its complete and paramount jurisdiction over the subject-matter of the suit, and to render the decree entered. That decree was reached after an exhaustive examination of the proofs in the case, as shown by the elaborate opinions of the judges. Although there are some doctrines announced in the leading opinion to which we do not assent, and to one of which we have already referred, no one, we think, with a clear judgment, unaffected by passion, can read and study its masterly analysis and presentation of the testimony without being convinced that the court had abundant reasons for its conclusions. The learned counsel for the defendants for once, contrary to his general habit, has been led by his zeal beyond the limits of proper discussion in declaring to the court which rendered the decree that it is "an ineffective, inoperative, unenforceable *pronunciamiento*." Being, upon the matters embraced by it, in our judgment, binding and conclusive, it must be enforced in all its parts until the only tribunal in this country which can control and stay it—the supreme court of the United States—has determined otherwise. That tribunal is lifted far above all prejudices, passions, and attachments, and will adjudge without any such influences what is just and right in the controversy, so far as that is attainable in our system of government. We have endeavored to discuss the questions presented purely as legal questions, without reference to or comment upon the evidence in the cases; yet, as counsel have referred to the different manner in which the testimony was given in the two courts,—that in the state court by the witnesses in open court, and that in the federal court by depositions before an examiner in chancery,—as though for this reason the conclusions of the state court were entitled to greater consideration than those of the federal court, we have read with care the opinion of the state court. The testimony is such that weight is to be attached to it more from its character and intrinsic nature than from the manner in which it was given. The great question in both was the genuineness of the alleged marriage contract; the holder, Sarah Althea, affirming its genuineness, and the alleged signer, William Sharon, asseverating its forgery. Both have accompanied their statements with their oaths. Both have not testified to the truth. There is falsehood on one side or the other. The burden of proof was on her, and the learned judge of the state court often speaks of testimony offered by her in terms of condemnation. In one passage he says of certain testimony given by her:

"This is unimportant, except that it shows a disposition, which crops out occasionally in her testimony, to misstate or deny facts when she deems it of advantage to her case."

Again, with respect to alleged introductions of her to several persons as the wife of Sharon, the judge says:

"Plaintiff's testimony as to these occasions is directly contradicted, and in my judgment her testimony as to these matters is willfully false."

As to her testimony that she advanced to Sharon in the early part of her acquaintance \$7,500, the judge says:

"This claim, in my judgment, is utterly unfounded. No such advance was ever made."

Again the court said:

"The plaintiff claims that the defendant wrote her notes at different times after her expulsion from the Grand Hotel. If such notes were written, it seems strange that they have not been preserved and produced in evidence. I do not believe she received any such notes."

Again, a document purporting to be signed by Sharon was produced by her, explaining why she was sent from the Grand Hotel in the fall of 1881, and also acknowledging that the money he was then paying her was part of \$7,500 she had placed in his hands. The production of the paper for inspection was vigorously resisted, but it was finally produced. At a subsequent period, when called for, it could not be found. Of this paper the judge said:

"Among the objections suggested to this paper, as appearing on its face, was one made by counsel that the signature was evidently a forgery. The matters recited in the paper are, in my judgment, at variance with the facts which it purports to recite. Considering the stubborn manner in which the production of this paper was at first resisted, and the mysterious manner of its disappearance, I am inclined to regard it in the light of one of the fabrications constructed for the purpose of bolstering up plaintiff's case. I can view the paper in no other light than as a fabrication."

There are several other equally significant and pointed passages expressive of the character of the testimony produced in support of her case. Of what she attempted, the judge thus speaks:

"I am of the opinion that to some extent plaintiff has availed herself of the aid of false testimony for the purpose of giving her case a better appearance in the eyes of the court; but sometimes parties have been known to resort to false testimony where, in their judgment, it would assist them in prosecuting a lawful claim. As I understand the facts of this case, that was done in this instance."

Notwithstanding this characterization of parts of her testimony, the genuineness of the alleged marriage contract rests to a great extent upon her testimony. It would seem that the learned judge reached his conclusions without due regard to a principle in the weighing of testimony, as old as the hills, and which ought to be as eternal in the administration of justice, that the presentation knowingly of fabricated papers or false evidence, to sustain the story of a party, throws discredit upon his whole statement. It is generally deemed equivalent to an admission of the falsity of the whole claim. *Deering v. Metcalf*, 74 N. Y. 501, 506; *Railway Co. v. McMahon*, 103 Ill. 485; *Egan v. Bowker*, 5 Allen, 449; Code Civil Proc. § 2061; Starkie, Ev. 873. We have referred to the opinion of the state judge merely on account of the claim that his conclusions, because he had the witnesses before him, and because of the alleged defective machinery for taking testimony in the federal courts, are entitled to more consideration than the opposite conclusions reached by the federal judges after a most thorough and exhaustive examination.

The judgment of this court is that the demurrers in both cases be overruled; that in the first case the original suit of William Sharon against Sarah Althea Hill, now Sarah Althea Terry, and the proceedings and final decree therein, stand revived in the name of Frederick W. Sharon, as executor, and against Sarah Althea Terry and David S. Terry, her husband; the said executor being substituted as plaintiff in the place of William Sharon, deceased, and the said David S. Terry being joined as defendant with his wife, so as to give to the said plaintiff, executor as aforesaid, the full benefit, rights, and protection of said final decree, and full power to enforce the same against the said defendants, at all times, and in all places, and in all particulars. In the second case, that of Francis G. Newlands, trustee, and others, beneficiaries under the trust deed, the defendants will have leave to answer until the next rule-day. Appropriate orders in conformity with this decision will be entered in the respective cases.

### *In re RUGHEIMER.*

(*District Court, E. D. South Carolina. October 15, 1888.*)

#### 1. EMINENT DOMAIN—EXERCISE BY UNITED STATES—ACT CONG. AUG. 1, 1888—CONSTITUTIONAL LAW.

Act Cong. Aug. 1, 1888, authorizing designated government officers to acquire for the United States, by condemnation, real estate for the erection of public buildings, and conferring upon the United States circuit and district courts jurisdiction of the condemnation proceedings, is not void as in conflict with Const. U. S. amend. 5, declaring that private property shall not be taken for public use without just compensation, by its omission to provide for compensation to the owner, as the act must be read with the constitution, and the courts will not award process of condemnation unless compensation be provided for.

#### 2. SAME—APPROPRIATION—CONDITIONS.

Act Cong. Feb. 9, 1887, making an appropriation for the erection of a public building at Charleston, S. C., provides that no part of the appropriation shall be expended until title to the site for the building shall be vested in the United States, nor until South Carolina shall cede to the United States jurisdiction over the site. South Carolina ceded jurisdiction, but provided in the act of cession, that the jurisdiction shall not vest until the United States shall have acquired title to the lands by grant or deed, and have had the evidence of title properly recorded. *Held*, that the conditions prescribed by the latter act need not be fulfilled before the appropriation could be used to pay for the land, but that the former act contemplated that delivery of the deed and payment of the consideration should be contemporaneous acts.

#### 3. SAME—CESSION BY STATE—CONSTRUCTION.

The words "grant or deed," used in the South Carolina act, do not exclude the idea of title by condemnation, as the title acquired by condemnation proceedings is by deed executed by order of the court, and, whether executed by the owner or by a court officer, it is in law the deed of the owner.

#### 4. SAME—PROCEDURE.

There being no fixed forms of pleading in South Carolina in condemnation proceedings, but the procedure being by petition by persons duly authorized, notice to the owner, a hearing by a court of record as to the necessity of taking the land, followed by an assessment of compensation finally made by a jury impaneled for that purpose, the institution of such proceedings by petition. v.36F.no.6—24

tion of a duly authorized agent of the United States, service of the petition on the land-owner, and disposition of the matter by the United States district court, is in accordance with the provision of the act of 1888, requiring the practice, pleadings, forms, and modes of procedure in condemnation proceedings to conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like cases in the courts of record of the state.

**5. SAME—PARTIES.**

The petition for condemnation, under the act of 1888, need not be in the name of the United States, but may be in the name of its designated agent, as, under the act, in order to put the machinery of the United States circuit or district courts in motion, it must appear that application is made by an authorized officer, and that in his opinion the condemnation of the property is necessary: but the final questions for the jury should be submitted in the name of the United States.

**At Law.** Petition for condemnation of real estate for purposes of the United States.

*L. F. Youmans*, Dist. Atty., and *H. A. De Saussure*, Asst. Dist. Atty., for the United States.

*Buist & Buist*, for respondent.

**SIMONTON, J.** This is a petition of the Hon. C. S. Fairchild, secretary of the treasury of the United States, setting forth the act of congress approved February 9, 1887, directing him to purchase or otherwise provide a site for a public building for the use and accommodation of the post-office and the circuit and district courts of the United States, and for other government uses, at the city of Charleston, S. C., and the appropriation of a certain sum of money therefor; that he has selected for said site a lot of land in said city, of which John Rugheimer is said to be the owner, describing it by metes and bounds; and further stating that, in the judgment of the said secretary, it is necessary and advantageous to the government of the United States to acquire the fee-simple absolute in said lot of land, by condemnation, under judicial process. The prayer is that the court will take such order in the premises as should result in the acquisition for the United States of the fee-simple absolute in said lot of land, by condemnation, in accordance with the act of congress in such case made and provided. Upon the filing of this petition an order was entered that a copy of the petition be served on John Rugheimer, in the manner provided for the service of a summons, and that he show cause by the first Monday in October next thereafter, before this court, why the prayer of the petition be not granted, and such proceeding be had thereunder as may be in accordance with law. The respondent, John Rugheimer, having been duly served with this order, has made his return thereto, and sets up these objections: (1) That the proceedings are not brought in the name of the United States. (2) That they do not conform to the practice, pleadings, form, and mode of proceedings existing in like causes in the courts of this state. On the contrary, that they are without precedent. (3) That the act of congress, under which these proceedings are brought, is in violation of the fifth amendment to the constitution of the United States. (4) That the act of 1887 does not authorize the payment of money for land condemned. (5) That these

proceedings are unnecessary, as John Rugheimer is willing to sell to the United States, at a price deemed by him reasonable, and warranted by the prices already paid by the United States for lands adjoining this lot.

Looking to the essence, this return is in the nature of a demurrer to the petition. The objection to the constitutionality of the act of congress, under which the petition is proceeding, if sustained, must be fatal. It will therefore be first examined. This act is in these words:

"An act to authorize the condemnation of lands for sites of public buildings, and for other purposes. Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that in every case in which the secretary of the treasury, or any other officer of the government, has been, or shall hereafter be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States circuit or district court of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the attorney general of the United States upon every application of the secretary of the treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from receipt of the application at the department of justice. Sec. 2. The practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit courts are held, any rule of the court to the contrary notwithstanding. Approved August 1, 1888."

The objection is that nothing is said in this act about compensation to the owner of the land sought to be condemned, and that in this the act is in conflict with the fifth amendment, which declares, "nor shall private property be taken for public use without just compensation." If the right to condemn private property for a public purpose rested on this act of congress, there would be great force in this objection. But the right of eminent domain does not rest on a statute or on a constitutional enactment. *Boom Co. v. Patterson*, 98 U. S. 406. It is an attribute of sovereignty, possessed by the general government as sovereign to enable it to perform its proper functions. It is an authority essential to its independent existence and perpetuity. *Kohl v. U. S.*, 91 U. S. 367; *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. Rep. 346; *Cooley, Const. Lim.* 526. The fifth amendment recognizes this attribute of sovereignty in the United States, possessed by it, notwithstanding the absence of any express grant in the constitution of 1789, by declaring that it shall not be exercised "without just compensation." This right of eminent domain, being thus possessed by the United States, the mode of exercising it, in the absence of any express provision in the constitution to the contrary, is within the discretion of the legislature. *Secombe v. Railroad Co.*, 23 Wall. 108. Without doubt congress, representing as it does, in the house of representatives the sovereignty of the people, and in the senate the sovereignty of the states, can, whenever it deems necessary, order private property to be appropriated for a public use. Such order would be subject to the

constitutional limitation, and would require that compensation should be made for such appropriation. In the act of 1888 congress has empowered certain public officials, who may thereto be specially authorized, to put in operation the right of eminent domain. It requires this right to be exercised by judicial proceedings in the district or circuit courts of the United States. These courts, in directing and conducting these proceedings, mindful of their constitutional obligations, must see to it that the process of condemnation be not awarded unless full compensation be provided. The act of 1888 must be read *in pari materia* with the constitution. The term "condemnation," used in that act, must be construed to mean condemnation with just compensation. The machinery of the courts is employed to ascertain and secure such compensation. In my opinion the act is not in conflict with the constitution.

2. The next material objection is that the act of 1887, under which the appropriation is made for the payment for the site, does not authorize payment for land condemned. The act in question contains this provision:

"Provided, that no part of the said sum shall be expended until a valid title to the said site shall be vested in the United States, nor until the state of South Carolina shall cede to the United States exclusive jurisdiction over the same during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of said state, and the service of civil process therein."

There can be no doubt that the exercise of the right of eminent domain vests a valid title. Under an act of the legislature of South Carolina (Gen. St. § 9) the jurisdiction of the state, except for the administration of the criminal law, and the service of civil process, "is ceded to the United States over so much land as is necessary for the public purposes of the United States, provided, that the jurisdiction shall not vest until the United States shall have acquired the title to the lands by grant or deed from the owner or owners thereof, and the evidence thereof shall be recorded in the office where by law the title to such land is recorded." It is argued that these conditions must be fulfilled before any use can be made of the appropriation. We cannot go to this extent. If the money cannot be used until an absolute deed is made and recorded, few persons would be found to convey property to the United States. The payment of the consideration and the delivery of the deed are contemporaneous acts. The stress, however, is laid on the words "have acquired the title to the lands, by grant or deed, from the owner or owners thereof." The argument is that this involves the idea of a voluntary act, and excludes a title by condemnation. The act should be liberally construed. It is an act of comity by the state to the United States. The purpose of the act is to cede the jurisdiction whenever the United States have acquired full title to the land. Title is acquired in land from the owner or owners by grant or deed, where the whole title has passed from the owner to the alienee, whether this be effected by deed signed by the parties or by an order of court, as in the case of a deed by the sheriff or master. If the United States were, in the present case, to ac-

quire title to this lot in judicial proceedings for its condemnation, the title so acquired would be under the order of the court by deed, and whether by said order the deed be made by the owner or by the executive officer of the court it would be in law the deed of the owner of the land. This is the law of South Carolina. In *Williman v. Holmes*, the court says:

"When, in the case supposed, the court orders the fee to be sold and conveyed by the commissioner, his deed carries that estate and all the interests of the parties to the suit precisely as if they had themselves executed the conveyance." 4 Rich. Eq. 491; *McKnight v. Gordon*, 13 Rich. Eq. 222. See, also, section 307, Code Civil Proc. S. C.

This is also the law of this court. In *Miller v. Sherry*, 2 Wall. 238, the court says:

"When chancery has full jurisdiction both as to persons and property, and decrees that a master of the court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree is as effectual to convey a title as the deed of a sheriff, made pursuant to an execution at law. The defendant whose property is sold need not join in the deed."

3. It is further objected that the course adopted by the district attorney is not authorized by the act of 1888. The act of 1888 provides that the practice, pleadings, forms, and modes of proceedings in causes arising under that act shall conform, as near as may be, to the practice pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state. "In like causes;" that is to say, in analogous causes. "As near as may be;" that is to say, as near as may be practicable, not as near as may be possible, with discretion in the judge of construing and deciding how far to go. *Railroad Co. v. Horst*, 93 U. S. 301; *Phelps v. Oaks*, 117 U. S. 239, 6 Sup. Ct. Rep. 714. The constitution of South Carolina contains the same provision as that of the United States, forbidding the taking or applying private property for the public use without just compensation. It goes further, and, subject to the same limitation, permits private property to be taken for the use of corporations or for private use. Section 23, art. 1. No provision is made in the organic law for the mode of ascertaining the compensation when property is taken for public use; but when the right of way over private property is appropriated for the use of any corporation, "full compensation therefor shall first be made or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of 12 men in a court of record, as shall be prescribed by law." Article 12, § 3. No provision is made by the legislature for any special form of proceeding for the condemnation of land for the use of the state, or the condemnation of the fee-simple in land for any purpose, except as stated hereafter. Highways are opened over lands by the county commissioners, in their discretion, under the superintendence of special commissioners appointed by them. Gen. St. S. C. §§ 611, 1063. Provision is made for a special mode of ascertaining the compensation to be paid to the owner, with the right of appeal to the circuit court and a jury. 18 St. at



Large, 532; 19 St. at Large, 283. In certain cases, in which the land of a person is surrounded by private lands and he needs a way to a public highway, he can condemn land enough for such way. Ten days' notice in writing is given to the owner of the land, by the party desiring the right of way, referees are appointed to value the land so needed, and to determine the compensation and damages, from whose decision lies an appeal to the circuit court of the county and a jury. Gen. St. §§ 1077-1079, 18 St. at Large, 398. So, also, railroad companies may acquire the right of way over lands of private persons and corporations. The practice proceeds upon petition by the corporation needing right of way, notice thereof to the owner, organization of a special jury by the clerk of court, inspection of premises by the jury, with a right of appeal to the circuit court and a jury. Gen. St. §§ 1551-1553. The fee in lands for depots, etc., is acquired in the same way, (Id. § 1554,) by similar proceedings and a verdict. When private property is needed for drainage purposes a petition is filed in the circuit court, setting forth the necessary facts, and is served on the land-owner 10 days before the hearing. The hearing is summary. If it appear that the grounds of the petition are well taken, commissioners to assess compensation are appointed. An appeal to and final valuation by a jury are provided for. Id. §§ 1563-1567. In case the United States needs land for forts or arsenals, and cannot agree with the owner as to the price, the land shall be valued on oath by a majority of persons appointed for this purpose by the court of common pleas of the county in which the land is situated. Id. § 5. Of course, there must be formal application to the court, and due notice thereof. So, when land is needed by the United States, for light-houses or light-house purposes, and application for the purpose of purchasing the same is made to the court of common pleas by any authorized agent of the United States, that court, after due notice to the owner, who is either unable or unwilling to sell the same, shall impanel a jury in the manner now provided by law for the purpose of assessing the value of the lands, etc. Id. § 7. We thus see that there is no fixed form of pleading in the state of South Carolina. But the procedure and practice are uniform, both as provided in the constitution and in the statutes; that is to say, a petition by persons duly authorized, notice to the land-owner, a hearing by a court of record as to the necessity of taking the land, followed by an assessment of compensation finally made by a jury impaneled for that purpose. We have, in the present case, all of these elements. The petition by a duly-authorized agent of the United States, vested, by the act of 1888, with discretion to determine the necessity for condemnation, the service of this petition on the land-owner to appear in a court of record. Under the act the courts of the United States, the district and circuit courts, not the judges, have jurisdiction. This cause is brought into this court as a law cause. *Kohl v. U. S.*, *supra*; *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460; *Boom Co. v. Patterson*, 98 U. S. 403. Juries are in attendance on the court, a necessary and essential part thereof, regularly impaneled for the purpose of trying cases at law. The proceeding adopted conforms, as near as may be, to the

practice, pleadings, forms, and proceedings in courts of record of this state.

4. The last objection which requires attention is that the proceedings are not brought in the name of the United States. It must be observed that this is not the proceeding for condemnation. The petition prays "that the court will take such order in the premises as shall result in the acquisition for the United States of the fee-simple absolute" in the lot of land. The respondent is asked to show cause "why the prayer of the petition should not be granted, and such proceeding be had thereunder as may be in accordance with law." Under the act approved August, 1888, in order to put the machinery of the district or circuit court of the United States in motion, it must appear that application for the commencement of the proceedings is made by the secretary of the treasury or some other officer of the United States; that such officer has been authorized to procure real estate for some public use; and that, in his opinion, it is necessary or advantageous to the government to acquire such real estate for the United States, by condemnation under judicial process. This being shown to the satisfaction of the court, it takes cognizance of the proceedings, and proceeds upon the matter of condemnation. In the present case all the facts necessary to secure action on the part of the court have been set out in the petition. In this, as we have seen, the practice of the state has been observed. In all the acts provision is made for the inception of the proceedings by some person thereto duly authorized. In the case of light-houses the language used is strikingly like this: "Whenever it shall have been made to appear to any circuit court upon the application of any authorized agent of the United States." Gen. St. S. C. § 7. The representation must be made upon the petition of such person to a court of record, and then follow notice of such petition to the land-owner, a summary hearing by the court, the submission of the question sooner or later, always to a jury. When that question is to be submitted it must be submitted in the name of the United States. The property of a citizen cannot be taken for a public use without just compensation. To protect him, to secure him in his right, the condemnation by the action of this court must be accompanied by provision for his compensation. As the judgment binds him in the taking of his land, so it must bind the United States to pay him for it. But this only becomes necessary and proper after the officer of the United States, asking for the exercise of the sovereign right of eminent domain, has satisfied the court that he is authorized to make his application. The fifth exception cannot now come up for consideration. The act of 1888 gives to the secretary of the treasury the right to determine whether the acquisition of land by condemnation, by judicial process, be necessary or advantageous. Whatever may be his motive, with that the court can have no concern. Nor can it control his discretion. Hearing the petition and the answer to the rule thereon, it appearing to the court that the Hon. Charles S. Fairchild, secretary of the treasury of the United States, has been put in possession of funds wherewith to acquire a site for a public building in the city of

Charleston for the public uses of the United States by purchase or otherwise, and it further appearing that, being thus authorized, the said secretary of the treasury is of the opinion that it is necessary or advantageous to the United States to acquire for the United States by condemnation, under judicial process, the lot of land in the city of Charleston described by metes and bounds in his petition, and that he has made application to the attorney general of the United States to cause proceedings to be commenced for the condemnation of the said lot of land,—it is ordered, adjudged, and decreed that the question be submitted to a jury, to be impaneled according to the laws and practice of this court attending at the present term thereof, what sum of money shall be assessed and awarded to the owner of said lot of land as just compensation to him by reason of the acquisition of the same by the United States of America? that the question shall be submitted in such form as that the United States of America and John Rugheimer shall be the parties thereto.

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*In re* RUGHEIMER.

(District Court, E. D. South Carolina. October 19, 1883.)

**1. EMINENT DOMAIN—COMPENSATION—PUBLIC BENEFITS.**

In awarding compensation for land taken by the United States for the erection of a public building, benefits resulting to the community at large from the use made of the land should not be considered.<sup>1</sup>

**2. SAME—SPECIAL VALUE.**

The amount of the award need not be confined to the market value of the land, as fixed by experts; but where the land possesses a special value to the owner, which can be measured by money, he is entitled to have that value estimated.<sup>1</sup>

At Law. Proceedings for condemnation of land for purposes of the United States.

For opinion on application for decretal order, see *ante*, 369.

*L. F. Youmans*, Dist. Atty., and *H. A. De Saussure*, Asst. Dist. Atty., for the United States.

*Buist & Buist* and *Wingate*, for respondent.

SIMONTON, J., (*charging jury*.) The government of the United States needs the lot of land of John Rugheimer, and before it will acquire the property your verdict is asked. Your duty is to assess and name the sum of money which, you conclude from the evidence produced before you, must be paid to the owner of the lot of land in question as just compensation to him in case of its acquisition by the United States, if the United

<sup>1</sup> Respecting the elements of damage which may be considered in awarding compensation in condemnation proceedings, see *Esch v. Railway Co.*, (Wis.) 89 N. W. Rep. 129, and note; *Quigley v. Railroad Co.*, (Pa.) 15 Atl. Rep. 478, and note; *Redmond v. Railway Co.*, (Minn.) 40 N. W. Rep. 64, and note.

States takes it. You should give him the value to-day of the lot of land, with its buildings thereon. I mean so much of its value as can be measured by money, taking it as a whole, not estimating the lot and the buildings separately. In estimating your award you must not take into consideration any benefit the city or the community at large may derive from the use the United States may make of this lot of land. All the community enjoy these benefits equally with Mr. Rugheimer, and there is no reason why he should contribute to them at his personal cost. Again, the government needs this lot of land. It is owned by a private person. They cannot agree as to the price. While there can be no doubt as to the right of the United States to acquire the lot for a public purpose, it is also the unquestionable right of the citizen to hold his property, and if the public exigencies require him to part with it against his will, the constitution of the United States secures him just compensation. I am not prepared to charge you, as requested, that, in determining compensation, we are, in every case, necessarily bound to confine ourselves to the market value of the property, as fixed by experts, and to that only. The owner, in cases of condemnation, does not offer the property for sale; nor is there any contract of sale. The market value of property has a controlling influence when the price is to be fixed after a contract of sale is in question. This market value of real estate put up for sale is determined by the opinion, judgment, whim, necessity, or caprice of others. Compensation in cases like this before you is somewhat influenced by the circumstances and personal relations of the individual to be compensated. His property may have a special value to him which it could not have to any one else, and when he is called upon to make the surrender of it for public use, he is entitled to have this special value estimated, if it exists, and can be measured by money. So, while the market value of this property necessarily must enter as an essential and important element of compensation, and in many, perhaps most, instances is the sole element, it may or may not be the sole measure of compensation. Does such special value exist in this case? You are not to make perfect and complete compensation. This oftentimes, perhaps always, is impossible. You are to make just compensation. In estimating what is just compensation you must inquire what he will lose by parting with it to the United States. He is entitled to this, and no more than this,—what he will lose, not remotely, but proximately, directly, as the immediate result of the acquisition of the lot by the United States. And fix the sum which, in justice to both parties, the United States should pay. The fact that the lot is required by the United States will not justify you in paying more than its value. You are impartial persons, selected by lot. Consider the whole case. Deal with both parties fairly. While you facilitate the public purpose of the government, respect and guard the rights of the citizen.

VULCANITE PAV. CO. *et al.* v. AMERICAN ARTIFICIAL STONE PAVEMENT CO.

(Circuit Court, E. D. Pennsylvania. October 8, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—MEASURE OF DAMAGES.

In a suit for the infringement of a patent for an improvement in pavements, the amount charged by defendant for pavements containing the improvement more than for similar pavements which do not contain it, is the measure of profits for which he is liable.

2. SAME—EVIDENCE—LOSS OF CONTRACTS.

Evidence that complainant lost valuable contracts through the competition of defendant, and of the amount of profits which complainant lost, is inadmissible; it being shown that complainant charged no more for its pavements containing the improvement than for those which do not.

3. SAME—ROYALTY BY LICENSEE.

The royalty paid by complainant under a license for the use of the patent infringed, and the use of two others capable of being used conjointly with it, does not show the market value of a license for the improvement alone, especially where a previous license has been granted for a royalty of one-half the amount.

In Equity. On exception to master's report.

Bill by Vulcanite Paving Company, Peter Stuart, and Matthew Taylor, for infringement of letters patent, against the American Artificial Stone Pavement Company, for infringing letters patent No. 269,480, granted December 19, 1882, to Peter Stuart, of Edinburgh, Scotland, for an improvement in composite pavements. The improvement is especially, though not exclusively, intended for application to sidewalks, and it consists in the formation in the surface of pavements of depressions of such a character that in stepping thereon the pressure of the feet will expel the air, causing a partial vacuum, which, supplementing the mechanical effect of the roughened surface, will operate to afford an additional hold to the feet, and prevent slipping. A decree having been entered for an account, (34 Fed. Rep. 320,) it was referred to Henry P. Brown, as master, who, among other things, reported that the patentee granted to Taylor an exclusive license for the United States and Canada for the use of this and two other patents capable of being used conjointly with it, for a royalty of one cent per square foot on all work done by him or his agents, and Taylor granted an exclusive license for the city of Philadelphia to the complainant corporation for a royalty of two cents per square foot. The complainant company charged no more for its pavements with the depressed surface than for those without; the defendant charged one cent a square foot more. The amount of artificial pavement infringing the patent made and laid by defendant was 48,912 square feet. The master finds the loss to plaintiff was two cents per square foot. The complainants excepted to the report on the finding that there were no profits or damages arising solely out of the use of the patented invention, and for the exclusion of evidence that complainants lost valuable contracts through the competition of defendant, and of the amount of profits which they lost in consequence. The defendant ex-

cepts on the ground of error in awarding to the plaintiffs anything beyond the actual profits of one cent per square foot, because there was no substantial legal basis for an award of damages as such; and in awarding damages as such at the rate of two cents per square foot, on the ground that the plaintiff Matthew Taylor has lost royalty at that rate on the pavement laid by the defendant.

*George Harding*, for complainants.

*Hector I. Fenton*, for defendant.

BUTLER, J. The complainants' exception must be dismissed. We need not add anything to what the master has said, in passing upon this branch of the case. The respondent's exceptions must be sustained. We do not find any reliable evidence of damages or profits, except to the extent of one cent per square foot,—the sum respondent received for the "indented surface" pavement over the price of one having a plain surface. The price paid by the Vulcanite Company for its license does not show the market value of a license under the patent here involved, covering the indented surface pavement alone. It embraces two other patents covering other pavements. How the royalty should be apportioned between these patents does not appear. If this were otherwise, however, the market value of the patent in question could not be established by the single license referred to. In addition to these difficulties is the important fact that a previous license was granted for a royalty of one cent,—the license under which Taylor holds. To the extent indicated the report must be modified, and a decree entered against the respondents for \$489.12, with costs.

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### WILSON v. SIBLEY *et al.*

(*District Court, S. D. Alabama.* October 17, 1888.)

#### 1. TOWAGE—NEGLIGENCE.

Defendant was employed to tow a raft of logs from a creek through Mobile bay up to the city: a trip which usually takes 12 hours, but which in this case took more than 50, in consequence of the slow progress made by the small tug which towed it out of the creek into the bay, the delay in sending a larger tug to meet it, and the loss of time occasioned by a collision with the shore of the creek, and by the breaking of the tow-line. The raft was tied up during the intervening nights, one night in the creek and the other anchored, but unattended, in the bay. *Held*, that these accidents and delays must be deemed to have caused the loss of the logs from the raft, if that was seaworthy when taken in tow.

#### 2. SAME.

Defendant had agreed, as is the custom, to send a small tug to take the raft from the creek into the bay, where the larger tug was to meet the tow and take it up to the city. Much time was lost in sending the larger tug, the only reason given for the delay being that defendant did not know where the tow was. *Held*, that the delay was a want of due care.

## 3. SAME.

Though the evidence to show that the collision of the raft with the shore was caused by having too much tow-line, rendering the tow unmanageable by the tug, is not very clear, in the absence of satisfactory explanation of the cause, negligence will be presumed.

## 4. SAME.

Turning on too much steam, so as to cause a tug to start with such speed, and so sudden a jerk, as to wrench the tow-line, is a want of reasonable care and skill.

## 5. SAME—SEAWORTHINESS OF RAFT.

The evidence that the raft was put together in manner customary for such voyages was uncontradicted, but defendant, to show that it was unseaworthy, relied on the opinion of experts, on the facts that logs were lost from it, and that a raft fastened in the manner indicated by the cutting and boring on a piece of log shown in court would be unseaworthy. There was no evidence that any of the other logs were cut and bored like this one, and the evidence of libelant was that they were not. *Held*, that the raft was in a seaworthy condition when taken in tow.

## 6. SAME.

Even if the raft was unseaworthy by reason of its defective construction, that was an obvious defect, and it was negligence to undertake the trip; and, as the loss occurred from extraordinary hazards arising from defendant's failure to use due care and skill, libelant is entitled to a decree for the value of the logs lost.

In Admiralty. Libel by E. L. Wilson against Sibley & Sibley.

*G. L. & H. T. Smith*, for libelant.

*Pillans, Torrey & Hanaw*, for defendants.

TOULMIN, J. This is a libel, brought by the owner of a raft of about 400 logs to recover the value of a part of them, alleged to have been lost through the negligence of the owners and officers of the steam-tugs which undertook to tow the raft from Bay Minette creek to the city of Mobile. Libelant claims that the raft was constructed in the customary way of rafting logs to be towed over the voyage this raft was to make, and that it was sufficiently strong and seaworthy for the purpose of such navigation. The defendants deny negligence on their part, and charge that the loss was occasioned wholly by the unseaworthy condition of the raft; that it was badly constructed, and not sufficiently strong and staunch to withstand the ordinary perils to be encountered upon the voyage. It is not claimed, and the evidence does not show, that any extraordinary perils from wind and weather were encountered upon the voyage. The testimony on the part of the libelant is that the raft was put together in the customary way of rafting logs to be towed over the voyage this raft was to make, and this was uncontradicted. The testimony on his side further is that the raft was in good condition and seaworthy, and libelant so represented it to defendants when the contract for the towage was made. But the masters of the three several tugs that had at different times during the voyage participated in the towing of the raft testify that it was badly put together. One of them (the master of the last tug which took part in the towage, and which was on the third day of the voyage) testifies it was the worst raft of logs he ever saw, and that, if he had been called on to take it in tow in the first instance, he would have refused to do so, because, in his opinion, it was not seaworthy. The evidence tends to

show that it was usual for the master of a tug taking a raft in tow to examine it, to see if it is in a proper condition to be towed. In this instance it was not specially examined by the master of the first tug that took it. The evidence also shows that the owner of the raft did not accompany it, either personally or by agent, and was not present when it was taken, or notified that it would be taken at the particular time. It further appears that the contract between libellant and defendants was that defendants would send for the raft as early as convenient, or when, in their judgment, the stage of the water in the river justified the undertaking. And it seems to have been understood that a small tug was to be sent to tow the raft out of Bay Minette creek into Mobile bay, where a larger and more powerful tug was to meet the tow and bring it up to the city of Mobile, and it appears that this was the usual course. It further appears that it generally took about 12 hours to make the trip with a tow such as this was. In this instance more than 50 hours were consumed; but the raft was tied up during the two intervening nights, —one night before getting into Mobile bay, and the other night it was left anchored, but unattended, in the bay. The chief cause of the delay in making the voyage seems to have been because of the slow progress made by the small tug which brought the raft out of Bay Minette creek, and the delay in sending a more powerful tug to take the tow from her. In view of the understanding between the parties, and of the usual course in towing rafts from the same locality, the delay in sending such larger tug is not satisfactorily accounted for. The reason given by one of the defendants, that he "did not know where the tow was," does not, in view of the evidence, excuse the delay. There was much time lost in sending the larger tug to meet the tow, and after it was sent more time was lost in the breaking of the tow-line, caused, as it appears, by the improper or unskillful conduct of her engineer, who was drunk. It also appears from the evidence that the raft while in tow by the first tug, before getting out of Bay Minette creek, was run aground or upon the shore, and must have been somewhat injured, as a natural result of a collision with the shore of so large a raft, and as appears from the fact that one of the logs was lost there. This must have resulted from want of sufficient power in the tug to control the raft, or from unskillful management of the tow. There is some evidence (not very clear, it is true) which tends to show that this accident was caused by having too much tow-line, which rendered the raft unmanageable by the tug. There being, however, no satisfactory explanation of the cause of the accident, nothing to show that it was unavoidable by the exercise of reasonable skill and care, negligence will be presumed. *The Quickstep*, 9 Wall. 665; *The Cummings*, 18 Fed. Rep. 181; *The Delaware*, 12 Fed. Rep. 571; *The Seven Sons*, 29 Fed. Rep. 543.

I think, upon the evidence, it is reasonable to suppose that the injury and loss complained of were occasioned by the collision of the raft with the shore in Bay Minette, its long exposure to the wind and waves in its slow passage in and across Mobile bay, and by being anchored for so long a time in the open bay, waiting to be towed up the channel to the city



of Mobile, which caused the logs to be chafed and worn by the chains with which they were fastened together, and rendered them liable to be broken loose by the ordinary action of the wind and water. There is no other adequate cause shown or suggested for the breaking of the raft and loss of the logs therefrom, assuming that the raft was seaworthy when it was first taken in tow. But it is strenuously urged on part of the defense that the raft was not seaworthy. On the evidence in the case there is no question that it was put together in the customary way of rafting logs to be towed over the voyage this raft was to make. But there is some conflict of opinion as to whether it was in a seaworthy condition; that is, in "such condition of strength and soundness as to resist the ordinary action of the sea, wind, and waves during the contemplated voyage." The evidence relied on by the defendants to establish the unseaworthiness of the raft, and that the loss was attributable thereto, is the opinion of expert witnesses, masters of tug-boats,—who as such had had some experience in towing rafts,—the fact that logs had been lost from this raft, and the exhibition in court of a small piece of the end of a log claimed to have been the first log lost from the raft in question, and showing the manner in which it was cut and bored for the reception of the chain with which the raft was fastened together. There was some conflict of evidence as to whether this log was one of the logs lost from this raft. But I am inclined to believe from the evidence that it was; and, independent of any expert or other testimony on the subject, I would say that a raft of logs fastened together as indicated by the log exhibited would not be seaworthy for a voyage contemplated by the raft in question. But there was no proof on the part of the defendants that any of the other logs in the raft were cut and bored like this one, and the evidence for the libellant was that they were not. I therefore find from a preponderance of the evidence that the raft was in a seaworthy condition when it was taken in tow, and that the cause of the loss was due to circumstances which subsequently occurred, and which were attributable to a want of proper care on the part of the owners of the tugs, and of their agents who were in charge of them.

Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. But there are cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. *The Webb*, 14 Wall. 406. My opinion upon the whole evidence is that the delay in sending the larger tug to meet the tow, thus causing an unusual exposure of the raft to danger, was a want of due care on the part of the defendants; that the collision with the bank of Bay Minette was a want of due care in the handling of the tow; and that the action of the engineer in turning on too much steam, and causing the tug to start with so much speed, and so sudden a jerk or wrench as to part the tow-line, was a want of reasonable skill and care; all of which, it seems to me, must have combined to produce the loss complained of, in the absence of satisfactory proof of the unseaworthiness of the raft. But if the raft was in an unseaworthy condition by reason of its defective construction, as is claimed, it was an ob-

vious defect. And it is held that owners of tugs are chargeable with negligence in undertaking a tow upon a trip for which its unfitness is obvious. *The Wm. Murtaugh*, 3 Fed. Rep. 404; *The Wm. Cox*, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342. If the loss occurs in the ordinary contingencies of the voyage, to which the unfitness contributed, public policy requires that both tug and tow should be held to be in fault. And so here, if the raft was in a condition obviously unfit to encounter the known hazards of the voyage, the rule that both should be held in fault would be applied. But I have found from the evidence that the loss here complained of occurred from extraordinary contingencies, or hazards resulting from defendants' failure to use due care and skill, and best endeavors in performing the service, as required by their engagement. *News. Salv.* 141, 144. A decree will be entered for libellant for \$132.18, being the value of the logs lost, less \$15, the balance of the towage charges due to defendants by the libellant, which is claimed as a set-off in this case.

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THE NITH.

THOMPSON *et al.* v. THE NITH.

(Circuit Court, D. Oregon. October 9, 1888.)

1. SHIPPING—STOWAGE—SALT OVER IRON NEAR MAST.

It is bad stowage to place salt over iron and anvils, though crates of crockery be placed between them, and to place the salt, iron, and crates within an inch or so of the mast.

2. SAME—LIABILITY OF CARRIER—PERILS OF THE SEA.

Where the cargo is thus stored, even though a rent in the mast-coat, by which water went into the hold, causing the iron and anvils to rust, was a peril of the sea, the carrier is liable for the injury.

In Admiralty. On appeal from district court, *ante*, 86.

This case was heard on an appeal from the district court. The suit was brought to recover damages for the non-performance of a contract of affreightment concerning a lot of Swedish iron and anvils brought on the bark *Nith* from Liverpool to Portland. When the goods were discharged at this port they were found to be badly rusted from contact with salt water, and the libellants refused to receive them, and brought this suit for damages. The district court found for the libellants, and gave them a decree for \$3,996.18, the value of the goods at this port, with legal interest thereon from the date of arrival, with costs and disbursements. From this decree the claimant appealed.

*Edward N. Deady*, for libellants.

*C. E. S. Wood*, for claimant.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally.*) Three points are made here by counsel for the claimant and appellant against the findings and decree of the district court: (1) The iron was damaged with rust from contact with sea-water when it was received on board the Nith; (2) the iron and anvils were properly stowed under the salt, with the crates of earthenware between them; and (3) the break in the mast-coat by which the sea-water went into the hold, and caused the iron and anvils to rust, was a peril of the sea, for which the vessel is not liable.

On a careful examination of the evidence in the case, I am satisfied that the iron and anvils were in good condition when shipped on the Nith; that it was not good stowage to place salt over the iron and anvils, as was done in this case, even with the crates of crockery between them, and that it was clearly bad stowage to place the salt, crates, and iron within an inch or so of the mast. Admitting that the rent in the mast-coat was a peril of the sea, had it not been for this bad stowage, no harm would have resulted to the cargo, as the water would have run down the side of the mast to the bottom of the vessel. A peril of the sea does not excuse the carrier from a loss or injury to the goods committed to his care if his own negligence or want of skill has contributed to the result. The cargo, and particularly the salt, should have been dunnaged away from the mast, so the water flowing down the same would not have affected it.

In conclusion, I adopt the findings of the district judge, both of fact and law, for the reasons given in his opinion, to which I can add nothing. There must be a decree for the libelants accordingly.

opened, and extended and made a uniform width of sixty-six (66) feet, from Scottwood avenue (formerly Raymond street) to the west line of the east 1 46-100 acres of that part of the west half of the north-west one-fourth of section 35, town 9, range 9 east, south of lots 1 and 2, and north of Monroe street.

"Sec. 2. That for the purpose of laying off, opening, and extending said Woodruff avenue, and making the same a uniform width of 66 feet between the aforesaid points, it is necessary and hereby ordered that the following described parcels of lots or lands be appropriated by the city of Toledo, to-wit: Being more particularly described as follows, to-wit: Commencing at a point where the south line of Woodruff avenue produced intersects the west line of Scottwood avenue; thence north 66 feet along the west line of Scottwood avenue to the north line of Woodruff avenue produced; thence along the north line of Woodruff avenue produced to the west line of the east 1 46-100 acres of that part of the west half of the north-west one-fourth of section 35, town 9, range 7 east, south of lots 1 and 2, and north of Monroe street; thence south along said west line above described to the south line of Woodruff avenue produced; thence east along said south line of Woodruff avenue produced to the place of beginning,—which lies within the lines of said Woodruff avenue extended, and not now dedicated for street purposes, and being in said city of Toledo, Ohio.

"Sec. 3. That the costs and expenses of laying off, opening, extending, and widening and straightening said street, including all expenses incident to and resulting from the appropriation of the lots and parcels of land hereinbefore described, shall be assessed upon the lots bounding and abutting upon said Woodruff avenue, between Scottwood avenue and the west line of the east 1 46-100 acres above described, in proportion to the foot front, and the amount so assessed shall be payable in two annual installments.

"Sec. 4. The city solicitor is directed to institute the necessary proceedings in the probate court of Lucas county for the condemnation and appropriation of the lots and lands specified for the above purposes."

This extension of Woodruff avenue, which the ordinance seeks to accomplish, will affect only the property of complainants; that is, the land of no other party or parties will be appropriated thereunder, and the only lots bounding and abutting on said proposed extension, and subject to the foot-front assessment, made to cover the costs and expenses incident to and resulting from the appropriation and the improvement of the street, are the remaining lands of complainants, left after carving out the street. Thus, under the practical and actual operation of said ordinance, there will be taken from or off the land of complainant Scott 33 feet in width adjoining the center line of said proposed extension, leaving him a narrow strip of ground with a frontage on said street or extension of 150 feet in length and 17 feet in width. This 17 feet in width, at one end of the strip, has a frontage on Scottwood avenue, (a street crossing said Woodruff avenue extension at right angles.) From the land of complainant Calkins there will be appropriated, at the west end of the proposed extension, a parcel of ground 66 feet in width, leaving her on either side thereof a frontage of 75 feet; and from the east end of her property there will be taken 33 feet in width, leaving her a frontage on said extension of 150 feet. The frontage on said extended avenue of complainant Scott's remaining ground will be 150 feet, and of complainant Calkins will be 300 feet. This frontage of complainants, being the only property bounding and abutting on said proposed extension, is by the

SCOTT *et al.* v. CITY OF TOLEDO.

(Circuit Court, N. D. Ohio, W. D. September 28, 1888.)

## 1. EMINENT DOMAIN—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—MUNICIPAL CORPORATIONS.

Appropriation of land by a city for a public street under an ordinance, though authorized by a state statute, requiring the remaining land of the owners to be assessed by the front foot for the entire costs and expenses incident to and resulting from the appropriation, together with all the expenses of laying off and opening the street, without requiring compensation to be first made to the owners for the land so taken, is in violation of the requirement of Const. U. S. 14th amend., that no state shall "deprive any person of life, liberty, or property, without due process of law."

## 2. SAME—MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—NOTICE.

In levying special assessments upon property for the purpose of opening and improving a street, it is an essential element of "due process of law" that notice or an opportunity to be heard be given to the owner of the land so assessed, especially where the statutes of the state (Rev. St. Ohio, § 2283) require that, "so far as practicable, regard must be had, in making special assessments, to the probable benefits to the property assessed," and where the assessment so levied may, under the laws of the state, be collected by distress without notice to the owner.

## 3. SAME.

The notice required by Rev. St. Ohio, § 2304, of the adoption of the preliminary resolution declaring the necessity of opening the street and appropriating the lands, having no reference to any assessment to defray the expenses thereof, is not sufficient to make a subsequent assessment, without further notice, valid.

## In Equity.

Application by Maurice A. Scott and another for an injunction to restrain the city of Toledo from enforcing an ordinance authorizing the appropriation of land of complainants for the purpose of a public street, and the assessment of the costs and expenses upon the remaining lands of complainants.

*Brown, Geddes & Jackson*, for complainants.

*Guy W. Kinney*, City Sol., and *Parks & Barber*, for defendant.

JACKSON, J. The present suit seeks to enjoin and restrain the city of Toledo, its officers, agents, and attorneys, from proceeding or attempting to enforce a certain ordinance passed on or about November 30, 1885, by the common council of said city, entitled "An ordinance to lay off, open, and extend Woodruff avenue," which provided for the appropriation by said city of certain real estate belonging to complainants, for the purpose of a public street or highway, as an extension of Woodruff avenue, and which assessed upon complainants' lots and lands bounding and abutting upon said avenue so to be laid out and extended, on the basis of a foot-frontage assessment, the entire costs and expenses incident to and resulting from said appropriation, together with all expenses of laying off, opening, extending, widening, straightening, and improving said extended avenue. Said ordinance is as follows:

"An ordinance to lay off, open, and extend Woodruff avenue:

"Section 1. Be it ordained by the common council of the city of Toledo, two-thirds of all members concurring, that Woodruff avenue shall be laid off,

terms of the ordinance assessed on the foot-front with all the costs and expenses incident to or resulting from the appropriation of complainants' land for the purpose of the street sought to be opened and extended; and is also charged with all the expenses of laying off, opening, and extending and widening and straightening said street. Under a stipulation of the parties it is agreed that—

"The amount which said Scott can recover for his property so appropriated, and damage to his remaining property, will be not less than the sum of \$1,500, and not more than the sum of \$2,000. The amount which said Calkins can recover for the property so appropriated, and for damage to her remaining property, will be not less than the sum of \$4,000, and not more than the sum of \$5,000. The total amount which will be chargeable to the property bounding and abutting upon that part of Woodruff avenue so laid off, opened, and extended will not be less than \$4,500, or ten dollars (\$10.00) per foot front upon each front foot thereof. There will be chargeable to the property [remaining] of said Scott, at the rate aforesaid, the sum of not less than fifteen hundred dollars, (\$1,500.00,) and to the property of said Calkins a sum not less than three thousand dollars, (\$3,000.00.) The value of the remainder of said Scott's property, after said improvement shall have been made, which will be subject to said assessment, will be not more than the sum of seven hundred dollars, (\$700.00,) and the value of said Calkins' property remaining after said improvement shall have been made, subject to said assessment, will be not to exceed the sum of eight thousand dollars, (\$8,000.00.)"

Complainants were not given any notice of the passage of said ordinance, and of the foot-front assessment therein made on this bounding and abutting property; nor was any opportunity afforded them, either before or after its passage, to be heard before the common council in respect to said assessment, which undertook to provide for the costs and expenses connected with said appropriation in the manner above stated. In July, 1885, before the passage of said ordinance, the common council of Toledo adopted a resolution declaring it necessary to lay off, open, and extend Woodruff avenue by appropriating the necessary lands lying within the proposed street. This resolution was duly published in a daily newspaper of said city, and notice of its passage was given to complainants. Said resolution required all persons claiming damages on account of said proposed improvement to file their claims therefor with the city clerk within four weeks from the first publication of the resolution, or within 20 days after service of written notice of the same. This was the only step in the city's proceedings of which the complainants were given notice; but neither the resolution nor the notice given complainants thereof furnished any information as to how or in what manner the city council proposed or intended to secure the appropriation of the lands required to lay off, open, and extend said avenue, nor of the way in which the costs and expenses incident to or resulting therefrom were to be met, or by whom paid.

No question is made as to the power and authority of the common council of Toledo, under the constitution and laws of Ohio, to appropriate private property for the purpose of laying out and opening streets, which may be deemed necessary or convenient for the public use, upon making just compensation to the owner of the property so taken. To

effectuate such appropriation, where the parties cannot agree upon the price of the property taken, or sought to be acquired, the city must apply to certain designated courts for a condemnation of the land wanted, and to determine the owner's compensation therefor, and his damage to the remaining property, which are to be ascertained and assessed by a jury. The details of such proceedings in court are not involved in this case, and need not be specially noticed. The city of Toledo, under the ordinance in question, had the undoubted right to apply to the courts of the state for a condemnation of the property sought to be appropriated for the extension of Woodruff avenue, and to have fixed and ascertained by a report of a jury the compensation and damages that should be paid the owners therefor. But in making such application to the court there is no provision of the law allowing or authorizing the owner of the property sought to be taken to inquire into or contest the validity of such an assessment as that made by the ordinance in question. Such court proceedings would relate only to an ascertainment of the compensation and damages to be allowed the owner upon the condemnation of his property. In ascertaining the compensation and damages that should be awarded the owner for the property sought to be appropriated to such public use, the constitution of the state requires such compensation to be "first made in money, or first secured by a deposit of money;" and that it "shall be assessed by a jury, without deductions for benefits to any property of the owner." Article 1, § 19. And by article 13, § 5, of said constitution, it is further provided that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Under these provisions of the organic law of the state, it seems clear that no benefits which might result to complainants or to their adjoining and abutting property from the laying out, opening, and extension of Woodruff avenue could be lawfully estimated in reducing or offsetting the compensation to which they would be entitled for the appropriation of their property to the purpose contemplated by said ordinance. For so much of their property as the city needed for the proposed extension of Woodruff avenue they were entitled, by the requirements of the constitution, to full compensation in money, "without deduction for benefits to any property" belonging to them resulting from such proposed improvement. The general assembly, in the organization of cities and incorporated towns or villages, as they were empowered to do by general laws, could not confer upon such municipalities or the courts any authority to disregard these provisions of the constitution relating to the manner in which compensation for private property taken or appropriated for public use should be ascertained and paid for. The statutes of the state relating to the right of cities and incorporated villages to appropriate private property for streets or other public purposes, or conferring upon them power and authority to levy taxes or make special assessments for local improve-

ments, should, therefore, be read and interpreted in the light of these provisions of the fundamental law. The authority under which the assessment made in and by the ordinance in question is sought to be sustained is found, as defendant's counsel insist, in sections 2263, 2264, 2267, and 2271 of the state statutes, which provide as follows:

"Sec. 2263. When the corporation appropriates or otherwise acquires lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires so to improve, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax-list, in which case the same shall be an assessment on all the taxable real and personal property in the corporation.

"Sec. 2264. (as amended April 20, 1881.) In the cases provided for in the the last section, the council may decline to assess the costs and expenses therein mentioned, or any part thereof, except as hereinafter mentioned, on the general tax-list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax-list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the feet front of the property abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more installments, and at such times as council may prescribe." 78 Ohio Laws, 259.

"Sec. 2267. No public improvement, the cost or part of the cost of which is to be specially assessed on the owners of adjacent property, and no order appointing assessors of damages or confirming their report, shall be made without the concurrence of the council, and it shall be essential that two-thirds of the whole number of the members elected to the council concur, unless two-thirds of the owners to be charged petition in writing therefor."

"Sec. 2271, (as amended May 4, 1885.) In cities of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment specially levied or assessed upon any lot or land for any improvement shall not, except as provided in section twenty-two hundred and seventy-two, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and, except as provided in section twenty-two hundred and seventy-two, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made; and in cities of the third grade, first class, said tax or assessment shall not exceed twenty-five per centum of the value of such lot or land after the improvement is made; and whenever any street or avenue is opened, extended, straightened, or widened, the assessment for the cost and expense thereof shall be assessed only on the lots and lands bounding and abutting on said street or avenue so improved: provided, that nothing in this section contained shall apply to any improvement ordered, commenced, or completed prior to the passage of this act." 82 Ohio Laws, 260.

In connection with these and other sections of the statutes relating to the subject of municipal improvements, counsel for the city of Toledo cite and rely upon the case of *Cleveland v. Wick*, 18 Ohio St. 303, in which



the supreme court of Ohio, construing the constitution and statutes of the state, held that a municipal corporation had authority to levy an assessment upon lands fronting on a street, to reimburse the corporation for the amount of compensation paid the owner for his other land taken for the street, and for expenses incurred by the city in its improvement as a highway, and that such action was not in violation of the constitutional provision requiring full compensation in money to be paid the owner "without deduction for benefits." In that case, it will be noticed, the appropriation of and payment for the property, and the assessment to reimburse the city for its expenses and outlays thereby incurred, were separate, distinct, and disconnected acts. Some time after the property had been condemned, and the owner paid therefor "without deduction for benefits," the city of Cleveland made a front-foot assessment on all the property abutting on the street, including that of the party whose property had been previously appropriated, to reimburse the city for its expenses in laying out and completing the improvement of such street. Its action was sustained, as not being in violation of the constitutional provision requiring the payment of compensation "without deduction for benefits." But in the present case the ordinance in question does not propose to follow the course pursued by the city of Cleveland. It "does not contemplate the payment of a single penny out of the city treasury" for the property of complainants which it is proposed to appropriate for public use; on the contrary, the ordinance and assessment therein made expressly provide that "the costs and expenses incident to and resulting from the appropriation, together with all the expenses of laying off, opening, and extending and widening and straightening said street, shall be assessed upon the lots bounding and abutting upon said Woodruff avenue," between the designated points. By section 2249 of the Ohio Statutes the costs occasioned by the inquiry and ascertainment of the owner's compensation for property appropriated are required to be paid by the corporation; but under this ordinance and assessment the owners of the property proposed to be taken are required to pay such costs. By the provisions of the constitution the owners are entitled to be paid full compensation in money for the value of their property appropriated, which includes damage to their remaining property, "without deduction for benefits to any property;" but under the actual operation of the ordinance and assessment in question, the complainants are required to pay in full for their own property appropriated to the public use of the city. The city proposes to acquire the complainants' property "without the payment of a single penny out of its treasury," and without entering into any obligation involving the expenditure of money out of the general or other funds of the city. By section 2271 (as amended May 4, 1885) it is provided that special assessments levied or assessed upon any lot or land for any improvement shall not (except as provided in section 2272) exceed 25 per centum of the value of such lot or land after the improvement is made; but by the ordinance and assessment under consideration the special assessment made on the property of complainants, as shown by the agreed statement above quoted, largely exceeds this limitation.

Again, by section 2283 it is provided that, "so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." The ordinance and special assessment in this case entirely disregard that requirement of the law, which appears to have been observed in *Cleveland v. Wick*, *supra*. Again, by section 2286 it is provided that "the owner shall not be liable, under any circumstances, beyond his interest in the property assessed at the time of the passage of the ordinance or resolution to improve;" but in the present case the front-foot assessment on the remaining property of complainant Scott will amount to \$1,500 or \$2,000, while the lot on which it is assessed does not exceed in value the sum of \$700. It may well be doubted whether the decision of the supreme court of Ohio in *Cleveland v. Wick*, 18 Ohio St. 303, will sustain such a proceeding as the scheme devised by the common council of Toledo for acquiring the property of complainants without expense to said city. This court is inclined to the opinion that the present is, in many essential particulars, distinguishable from the case of *Cleveland v. Wick*, and that its proper determination is not controlled by that decision, even considering the questions here involved alone under the constitution and laws of Ohio. The decision of the supreme court of Ohio in *Cleveland v. Wick*, in its construction of the state constitution and statutes, is, of course, conclusive on this court upon the question there presented; but whether that goes to the extent of sanctioning a procedure on the part of municipalities like the one in question, designed and intended, in advance, to make the owner of property pay for its appropriation to public use, admits of serious doubt and question.

But the questions raised and involved in the present case do not depend alone upon the proper construction of the constitution and statutes of Ohio. It is urged on behalf of complainants that, even admitting the constitution and laws of the state, as construed in *Cleveland v. Wick*, or otherwise, authorize such an ordinance and assessment as the one here involved, such a proceeding is in violation of that provision of the fourteenth amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law." It is claimed that the ordinance and assessment in question, if sanctioned by the statutes and constitution of Ohio, is "without due process of law." This, of course, presents a federal question, which must be settled and determined by subjecting the Ohio statutes and constitution, and the proceedings of the common council of Toledo here called in question, to the test of the requirements of the constitution of the United States as embodied in the fourteenth amendment.

Counsel for complainants, on this branch of the case, submit for consideration, upon the facts, two leading and general questions of law:

"(1) May a municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs

and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property appropriated? (2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed?"

Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that "due process of law" without which the citizen cannot be lawfully deprived of his property. For the defendant it is claimed that "the fourteenth amendment does not prohibit the taking of private property by a state without compensation;" in other words, that the appropriation of private property for public use, without compensation to the owner, is not depriving him of his property "without due process of law." Counsel for defendant further say that, "even if 'due process of law' be held to require compensation, the kind of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves 'due process of law,'—that is, notice and a hearing." We need not pause to consider this latter proposition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no "special benefits" will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially "benefited" by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, "due process of law" requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does "due process of law," without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involve as a necessary and essential ingredient the payment or the making of compensation for private property appropriated to public use? This precise

question has not yet been passed upon, either by the supreme court of the United States or the state courts, so far as we have been able to discover, and it must therefore be considered and determined upon the general principles applicable to the subject.

No attempt will be made to define the exact scope of the terms "due process of law." No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The supreme court has said (*Davidson v. New Orleans*, 96 U. S. 104) that, instead of attempting to define what constituted "due process of law," it was wiser, in ascertaining the intent and application of such an important phrase in the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning. In a general sense, "due process of law" is identical in meaning with the phrase, "law of the land," as used in the constitutions of the several states. *Cooley*, Const. Lim. 432. As applied to the appropriation of private property for public uses under the power of eminent domain, "due process of law" clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus, in *Cooley*, Const. Lim. 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And, again, (at p. 435:)

"The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any considerations of mere form. \* \* \* When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. \* \* \* 'Due process of law,' in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the supreme court in *Davidson v. New Orleans*, 96 U. S. 102, where the court, speaking by Mr. Justice MILLER, after explaining the reasons why the phrase "law of the land," as used in *magna charta*, was not directed against the enactments of parliament, proceeds to say:

"But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land,

which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

In this case of *Davidson v. New Orleans*, 96 U. S. 107, Mr. Justice BRADLEY said:

"If a state, by its laws, should authorize private property to be taken for public use, without compensation, \* \* \* I think it would be depriving a man of his property without due process of law. \* \* \* I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

In the *Kentucky Railroad Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57, this language of Mr. Justice BRADLEY is quoted with approval by the supreme court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, and that the owner must be compensated therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:

"So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. \* \* \* In this and similar cases the legislature alone can, and, indeed, frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." Cooley, Bl. Lk. 1, p. 137.

In the same work, (book 2, p. 35, note,) on the subject of "Ways," it is said:

"A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the 'right of eminent domain.' When this right

is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner."

So, too, in *Mills*, Em. Dom. § 1, it is said on this subject:

"The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void."

These well-recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government, were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation upon the federal power. The first 10 amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. The fifth amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty, and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty, and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no forced or unreasonable construction to hold that this fourteenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government. And as Judge Cooley well remarks:

"Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ."

Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the

owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. There is no difference in principle between the case put by Mr. Justice MILLER, as an illustration, in *Davidson v. New Orleans*, 96 U. S. 102, viz., the taking property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public. "Due process of law" is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If, therefore, the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complainants for the purpose of a public highway, and to do this in a way which will not only exempt it from the duty and obligation of compensating them for the property taken, but impose upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that "due process of law" required by the federal constitution; and the attempted proceedings had thereunder by the common council of Toledo are void, so far, at least, as said assessment is concerned.

The second proposition of law submitted on behalf of complainants: "May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard before the liability for such charge is finally established, and the amount thereof definitely fixed?" presents the questions whether complainants were entitled to notice or an opportunity to be heard before the assessment in question was made, and whether the statutes of Ohio provide for such notice or opportunity. It is claimed for complainants that "due process of law," in taxation or an assessment like that under consideration, includes notice and an opportunity to be heard before the charge is finally established, and the amount thereof definitely fixed, and that the statutes of Ohio relating to the subject of special assessments, or assessments on the foot-front basis, provide for no such notice and afford no such opportunity. Counsel for defendant controvert these positions, insisting that

complainants were not entitled to any notice of, or opportunity to be heard in respect to, said assessment; but that, if they were, the statutes do provide for such notice, and do afford such an opportunity to be heard, as will satisfy the requirement of "due process of law." It admits of no doubt that the assessment in question was an exercise of the taxing power of the state. Speaking of such special charges or levies, Judge Cooley, in his work on Taxation, p. 430, says: "That these assessments are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed." Nor is it any longer an open question that the provision of the federal constitution prohibiting the states from depriving any person of his property "without due process of law" applies to taxation by the state or its subordinate agencies, and that, in respect to all such taxation based on values and apportionment, and involving judicial or quasi judicial ascertainment and determination as to the amount to be imposed upon the citizen or made a charge upon his property, "due process of law" demands and requires that, at some stage in the proceeding before the tax charge or assessment is fixed and made final and collected, he shall have notice, or an opportunity to be heard in reference thereto. This subject has been so ably and exhaustively discussed and considered in numerous recent decisions of the federal and state courts that little or nothing remains to be added; nor is it deemed necessary to extend this opinion by quoting at length from those authorities which establish the general proposition that it is essential to the validity of state taxation, other than that of a personal character, such as licenses for privileges, or the exercise of franchises, that the tax-payer shall, at some stage in the proceeding, have notice or an opportunity to be heard; that if such notice is not given, or opportunity afforded to be heard, either in levying or collecting the tax, the proceeding will be wanting in that "due process of law" necessary to give it validity under the federal constitution. The legislature may prescribe the kind of notice and the mode in which it shall be given, "but it cannot dispense with all notice." The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened, before the tax or assessment becomes final and effectual, in order to constitute such procedure "due process of law." If the tax or assessment can, under the state law, be enforced or collected only by legal proceedings, in which any and all defenses, going either to the validity or amount of such tax or assessment, may be made, that will afford the opportunity to be heard, and in such cases the proceeding cannot be said to deprive the owner of his property "without due process of law," however objectionable or unjust it may be otherwise. In the application of these principles there is no distinction between taxation upon values for general purposes and special assessments based upon benefits. The authorities supporting these propositions are the following: *Kennard v. Louisiana*, 92 U. S. 482; *McMillen v. Anderson*, 95 U. S. 40-42; *Davidson v. New Orleans*, 96 U. S. 104, 105; *Hagar v. Reclamation Dist.*, 111 U. S. 707-711, 4 Sup. Ct.



Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 335, 336, 6 Sup. Ct. Rep. 57; *Williams v. County of Albany*, 122 U. S. 164, 165, 7 Sup. Ct. Rep. 1244; *Spencer v. Merchant*, 125 U. S. 354, 355, 358, 361, 8 Sup. Ct. Rep. 921; *Stuart v. Palmer*, 74 N. Y. 183; *Railroad Tax Cases*, 13 Fed. Rep. 751-753, 762-766; *County of Santa Clara v. Railroad Co.*, 18 Fed. Rep. 410-412, 416-424; *Cooley, Tax'n*, 266; *Welty, Assessm.* §§ 250-253, and cases cited. In the cases of *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, and *County of Santa Clara v. Railroad Co.*, 18 Fed. Rep. 409, the distinction between a tax or assessment which calls for no inquiry, nor for anything in the nature of judicial examination before levy and collection, and a tax or assessment imposed upon property according to its value or special benefits resulting thereto, to be ascertained by assessors or other officials upon inquiry or evidence, is pointed out and considered with reference to the necessity for notice or opportunity for hearing. In the former class of cases it is suggested that, as notice would be of no service to the individual, and no hearing could change the result, as in taxes for licenses and the exercise of franchises, such notice or an opportunity to be heard may be dispensed with; but that in the latter class of taxes and assessments, based upon values or benefits which involve inquiry, notice or an opportunity for hearing is essential, to render the proceeding valid. Counsel for defendant claim the benefit of this distinction in the present case, and insist that, as notice would have been of no service to complainants, and no hearing could have changed the result, they were therefore not entitled to such notice or hearing. But this position ignores the fact that the assessment in question falls within the latter class of cases, in which inquiry as to benefits is involved; section 2283 directing in express terms that, "so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." This requirement of the statute, that regard should be had "to the probable benefits to the property assessed" in making these special assessments, necessarily involved inquiry or consideration of benefits, which rested upon facts or evidence, and called for the exercise of a *quasi* judicial determination, like taxation based upon values to be ascertained by assessors.

It admits, therefore, of little or no question, that the assessment under consideration was of that character which entitled complainants to notice, or an opportunity to be heard in respect thereto, in order to give it validity, or make the proceeding conform to due process of law. Do the statutes of Ohio provide for such notice, or afford the owners of the property assessed an opportunity for a hearing? After a careful examination of the statutes relating to special foot-front assessments, we are unable to find any such provision in the state law. It is claimed that sections 2277-2281 and 2304 provide for the requisite notice, and afford the opportunity required by "due process of law." The notice provided for in section 2304 relates merely to the passage of the preliminary resolution declaring the necessity for a certain improvement. It has no reference to any assessment that may be subsequently made in connection

with such improvement, or to defray the costs and expenses thereof. The other sections relied on are as follows:

"Sec. 2277. In cases wherein it is determined to assess the whole or any part of the cost of an improvement upon the lots or lands bounding or abutting upon the same, or upon other lots or lands benefited thereby, as provided in section twenty-two hundred and sixty-four, the council may require the board of improvements, or board of public works, (city commissioners,) as the case may be, or may appoint three disinterested freeholders of the corporation or vicinity, to report to the council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection.

"Sec. 2278. Before adopting the assessment so made, the council shall publish notice, for three weeks consecutively, in some newspaper of general circulation in the corporation, that such assessment has been made, and that the same is on file in the office of the clerk for the inspection and examination of persons interested therein.

"Sec. 2279. If any person objects to the assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of the notice; and thereupon the council shall appoint three disinterested freeholders of the corporation to act as an equalizing board.

"Sec. 2280. On a day appointed by the council for that purpose, the board, after taking an oath before a proper officer, honestly and impartially to discharge their duties, shall hear and determine all objections to the assessment, and equalize the same, as they may think proper; which equalized assessment they shall report to the council, which shall have power to confirm the same, or set it aside, and cause a new assessment to be made, and appoint a new equalizing board possessing the same qualifications, which shall proceed in the manner above provided.

"Sec. 2281. When the assessment is confirmed by the council, it shall be complete and final."

It is by no means clear that section 2277 refers to front-foot assessments; but, assuming that it does, that section does not require the common council to refer the matter to the board of improvements, or other commissioners, to ascertain and report the benefits which may result from the improvement to the several lots or parcels of land to be assessed. It merely permits the common council to resort to that method of ascertaining benefits, and, when that method is resorted to, the assessment reported by the board of improvements or other committee of appraisers is not to be finally adopted by the common council until after notice (sections 2278, 2279) by publication is given, and an opportunity for inspection and examination is afforded to parties interested. If the common council, in the present case, had proceeded under section 2277, then the notice and opportunity to be heard, as provided under sections 2278, 2279, and 2280 would have been in conformity to "due process of law." But the common council, under section 2264, had the authority, and exercised it, of making the assessment for itself, without resorting to the method of ascertaining benefits, permitted by section 2277, and without being required to give notice, or afford complainants any opportunity for a hearing. These sections, relied on

by defendant, not constituting the sole method of procedure, and not in fact adopted or acted upon by the common council in making the assessment in question, cannot avail the defense. The validity of that assessment must be determined by the provisions of the statutes under which the city council acted in making it, viz., section 2264, which authorized action by the common council itself, without reference to any special board of appraisers, and as to which action by the council the statutes provide for no notice to, or opportunity to be heard by, the parties interested in or affected by the assessment. An assessment so made is wanting in "due process of law" if its collection can be enforced otherwise than by suit or legal proceedings in which all defenses to its validity or amount could be raised.

This brings us to the remaining question in the case, viz., in what way, or by what methods, may an assessment like the present be enforced under the statutes of Ohio? Three ways are provided for its collection: *First*, the amount assessed, with interest, and a penalty of 5 per cent., may be recovered by suit against the owners of the property assessed, before a justice of the peace or other court of competent jurisdiction, (section 2288,) which, of course, requires notice to the party sued; *secondly*, by proceedings, in certain designated courts, to enforce the lien when the owner of the land assessed is a non-resident, which requires notice by publication, (section 2288;) or, *thirdly*, the common council may certify any unpaid assessment to the auditor of the county in which the corporation is situated, and the amount so certified is to be placed upon the tax-list, with 10 per cent. penalty, and to be collected with and in the same manner as state and county taxes, (section 2295,) which are collected either by suit, by forfeiture and sale of the land, or by distraint of sufficient goods and chattels belonging to the person charged with such taxes or assessments. In the first two methods of collection to which the common council could or might resort, the notice provided for or required would constitute "due process of law" under the authorities above cited; but if, instead of resorting to these methods of collection, the corporation selected, as it might, the third remedy for the enforcement of the assessment, then the owners would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, and this would violate the requirements of "due process of law." In this respect the present case is distinguishable from that of *Hagar v. Reclamation Dist.*, 111 U. S. 711, 4 Sup. Ct Rep. 663, and other like cases, relied upon by counsel for defendant, in which the assessment complained of was enforceable only by legal proceedings in which any defense going either to the validity or amount could be pleaded. The common council of Toledo having made the assessment in question without notice to, or an opportunity for hearing by, complainants, and having the right to enforce its collection by distraining and selling their property, without resorting to any suit which would give them an opportunity to interpose any defense either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that "due process of law" required

by the federal constitution before depriving the citizen of his property.

In its material facts and the principles involved, the present cannot be distinguished from the well-considered case of *Stuart v. Palmer*, 74 N. Y. 183, which received the express approval of Mr. Justice FIELD in the *Railroad Tax Cases*, 13 Fed. Rep. 753, and was recognized by the supreme court as a correct exposition and application of the constitutional provision relating to the taking of private property under the form of assessment "without due process of law," in the case of *Spencer v. Merchant*, 125 U. S. 351-358, 8 Sup. Ct. Rep. 921. The opinion of Mr. Justice EARL in *Stuart v. Palmer* might well be quoted in full, because of its force, clearness, and direct application to the case now under consideration, but, without extending this opinion in making such a quotation, that opinion is specially referred to as sustaining the views above expressed and the conclusions herein reached. If anything, the case under consideration presents a clearer violation of the constitutional prohibition against depriving the citizen of his property without due process of law than appeared in *Stuart v. Palmer*. It is difficult to conceive of anything more arbitrary and wanting in the forms of law, or more in conflict with the first principles of justice, or more in disregard of that equality of burden which should be observed in the imposition of taxes and assessments, than the action of the common council in making the assessment herein complained of, the direct operation and practical effect of which is to charge complainants with all the city's outlay and expense in the appropriation and improvement of their property for public use, and with the damage thence resulting to their remaining property. The owners are required to pay the city for so much of their own property as is devoted to public use, and for such damage as their remaining property may thereby sustain, by making a front-foot assessment on the damaged property left in their hands. This arbitrary action being taken without notice or an opportunity for hearing, is wanting in due process of law, and renders the assessment void. The Ohio cases cited by defendant's counsel, sustaining frontage assessments in certain cases based on benefits, did not consider, if they involved, the federal question as to what would constitute "due process of law" in the making of such assessments. Neither was that question discussed in the case of *Cleveland v. Wick*, 18 Ohio St. 303, cited above. These authorities are not, therefore, controlling in the present case. They are conclusive upon this court in the construction of the state constitution and statutes, but in respect to the federal question here presented they are not controlling.

Other questions, not of a federal character, are presented by complainants, going to the validity of the ordinance and assessment under consideration for want of compliance with certain requirements of the state statutes applicable to the case, but in the view which the court has taken of the federal questions involved it is not deemed necessary to go into these purely local matters. The conclusion of the court is that the common council of the city of Toledo may proceed, in the manner prescribed by law, with the enforcement of so much and such part of said ordinance of November 30, 1885, as relates to or seeks to appropriate complain-

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ants' property to the purpose of a public street, or for the extension of Woodruff avenue, upon making or providing just compensation in money for the property so to be appropriated, and damage to their remaining property; but that said common council, and the city of Toledo, its agents, officers, and attorneys, should be restrained and enjoined from enforcing or attempting to enforce so much and such portion of said ordinance as relates to the assessment therein, and thereby made on the remaining property of complainants. Such an injunction is accordingly awarded and decreed in favor of complainants. The costs of the case will be taxed against the city of Toledo, for which execution as at law may issue.

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ALLEN *et al.* v. FAIRBANKS.

(Circuit Court, D. Vermont. October 16, 1888.)

EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATORS—ACTIONS.

Personal representatives, appointed in Missouri, cannot sue for assets of their testator's estate, situate in Vermont, such assets being recoverable only by personal representatives deriving authority within that jurisdiction.<sup>1</sup>

In Equity.

Daniel Roberts, for orators.

Henry C. Ide, for defendant.

WHEELER, J. This bill is brought to compel contribution among shareholders of a private corporation. Two of the orators, each seeking relief for himself alone, one seeking relief for himself with another jointly, and the defendant, have died. Personal representatives of the individual orators, appointed in Missouri, and the survivor of the joint one with the others, have brought *scire facias* against the personal representatives of the defendant in Vermont to revive the suit. The defendants have pleaded to so much of the *scire facias* as is brought in behalf of these representatives, and this survivor, denying their right to proceed with the case, and the plea has been argued.

The bill proceeds upon the ground that the defendant had in his hands money or property which in equity and good conscience belonged to the orators, respectively. This money or property constituted assets of the estates of these testators in Vermont. Such assets could only be recovered by personal representatives deriving authority from within that jurisdiction. *Wilkins v. Ellett*, 108 U. S. 256, 2 Sup. Ct. Rep. 641. This is not contrary to the decision in *Purple v. Whitted*, 49 Vt. 187, relied upon in behalf of these foreign representatives. In that case there were no assets of the estate of which the plaintiffs were administrators, in Vermont.

<sup>1</sup>As to the right of personal representatives to maintain an action to recover assets in a foreign jurisdiction, see *Gove v. Gove*, (N. H.) 15 Atl. Rep. 121, and note.

The plea appears to be sufficient as to these administrators. The right which belonged to the two jointly, at the death of one, however, survived to the other, and remains in him to be prosecuted. Their right is recognized and provided for by the statutes. Rev. St. U. S. § 956. Plea allowed as to executors in Missouri, without prejudice to administration in Vermont, and overruled as to the survivor and others.

FRAKER v. HOUCK *et al.*

(Circuit Court, D. Kansas. October 16, 1888.)

**MORTGAGES—DEEDS OF TRUST—BILLS TO REDEEM—LACHES.**

While complainant was confined in the penitentiary, for violation of the national bank act, the trustee, under a deed of trust to secure complainant's indebtedness to the bank, of which he had been president, sold the property to purchasers, who in good faith paid full value, the proceeds being applied to the debt, of which they paid only a small part. Complainant was pardoned within a few months after these sales, and, although he knew of them, and that the purchasers, supposing they had good title, were making improvements on the premises, he did not until more than seven years afterwards give any notice that he had any claim to them; paying no taxes, nor offering to pay any, nor taking any other step to assert his rights. Complainant contends that, because of his imprisonment at the time of the conveyances, they were, under the Kansas statutes, absolutely void, and that, as the trust deed gave no power of sale without a decree establishing the debt, he is in the position of a mortgagor out of possession, and entitled to redeem. *Held*, that the claim must be adjudged stale.

**In Equity.** Bill to redeem realty from a deed of trust. On demurrer. *L. H. Waters, Geo. H. English, and Geo. W. McOrary*, for complainant. *W. W. Scott, Sluss & Stanley, and A. L. Redden*, for defendants.

**BREWER, J.** This is a bill brought by complainant to redeem certain real estate from a deed of trust executed on the 18th of September, 1876. The circumstances under which this deed of trust was given are these: The First National Bank of Wichita had suspended. It was expected that a receiver would soon be appointed by the United States comptroller. Complainant had been president of the bank, and was largely indebted to it at the time of its suspension. James R. Mead was named as trustee, and, in addition to the ordinary language of a trust deed, making the conveyance as security for the payment of his indebtedness to the bank, the instrument contained the following provision:

"Provided, further, that the said James R. Mead, party of the second part, shall at once take possession of the premises hereby conveyed, and proceed to receive and collect the rents, issues, and profits of the same. Provided, further, that, if default be made in the payment of any of the indebtedness or liabilities herein secured, when the same becomes determined, and due and payable by the terms or nature of such several items of indebtedness or liability, the said party of the second part, or his successors, shall, as soon as practicable, after he shall be directed so to do by the comptroller of the United States,

proceed to sell the lands and tenements hereinbefore described, or so much thereof as may be necessary, at public or private sale, as he shall be directed by the comptroller of the currency or other competent authority, and convert the same into money, and execute to the purchaser or purchasers thereof a deed or deeds for the conveyance of the same. And the said party of the second part, or his successors, shall, immediately upon the receipt thereof, pay and apply the moneys arising from the sale of said lands and tenements, and the rents and incomes that he may receive upon the same, as follows: *First.* Pay the reasonable and necessary costs and expenses of executing this trust. *Second.* That all the rest and residue of the moneys arising from the sale of said lands and tenements, and the rents and incomes thereof, he shall pay to the said the First National Bank of Wichita, Kansas, its successors or assigns, or to its duly appointed and qualified receiver, as aforesaid, in payment, as far as it will go, of the indebtedness and liability of the said J. C. Fraker to the said the First National Bank of Wichita, Kansas, of every form, as hereinbefore described. But in the event that the said lands and tenements should sell for more than enough to pay all the said J. C. Fraker's indebtedness and liability, as aforesaid, to the said the First National Bank of Wichita, Kansas, after the application of the rents and incomes of the same, and the payment of the reasonable costs and expenses of executing this trust, the surplus, if any, shall be returned to the said parties of the first part. Provided, further, that, for the purpose of securing a more speedy execution of the trusts hereinbefore set out and described, and in the further consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, we, the said parties of the first part, do hereby make, constitute, and appoint the said James R. Mead, and his successor, hereinafter to be designated, our true and lawful attorney, irrevocable, with full power to sell and convey any and all of the real estate hereinbefore mentioned and described, in performance of said trust, and to execute and deliver a deed or deeds to the purchaser or purchasers of the same for the conveyance of the said several tracts of real estate, hereby ratifying and confirming whatever the said James R. Mead, or his successor to this trust, may lawfully do in the premises, the same as if we were personally present, and did the same. The said parties of the first part do hereby nominate and appoint as successor of the said James R. Mead in the execution of this trust the person who shall be appointed receiver of the said the First National Bank of Wichita, Kansas, by the comptroller of the currency of the United States, under the provisions of an act of congress, known as the 'National Bank Act;' that, as soon as such receiver is appointed and qualified, the said James R. Mead is hereby directed to convey to such receiver, as his successor, all and singular the property hereby conveyed to the said party of the second part that may remain then unsold, or any money that may be in his hands arising from the sale of any of said property, or the rents and incomes thereof. And the said receiver shall receive said lands and tenements and all moneys and other property conveyed to him or transferred to him by the said party of the second part, and shall proceed under the directions of the comptroller of the currency of the United States, or other competent authority, to fully perform and execute said trust as hereinbefore directed. And the said party of the second part doth hereby accept the trust created and in him reposed by these presents, and doth, for himself, his heirs, executors, and administrators, hereby covenant and agree to and with the said parties of the first part, their executors, administrators, and assigns, that he, the said party of the second part, will honestly, faithfully, and without unnecessary delay, execute the said trust to the best of his skill, knowledge, and ability, and subject to the advice and consent of the comptroller of the currency of the United States; and that, as soon as the comptroller of the currency of the United States shall appoint a receiver of the said the First Na-

tional Bank of Wichita, Kansas, and said receiver becomes qualified, he will convey and transfer to the said receiver all the lands and tenements and other property or effects that may have come into his hands by virtue of this conveyance as hereinbefore directed. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above mentioned.

J. C. FRAKER.

"ELIZABETH M. FRAKER.

"JAMES R. MEAD."

On October 21, 1876, H. B. Cullom was appointed receiver, and thereupon Mr. Mead conveyed the property to him. On January 9, 1877, Cullom, as such receiver, obtained authority, from the United States district court for the district of Kansas, for the sale of this property as well as other assets of the bank. During the year 1878 Cullom and his successor, as receiver, conveyed two of the tracts in controversy to parties who were *bona fide* purchasers, and paid full value, the proceeds being applied to complainant's indebtedness to the bank. Part of the property conveyed by this trust deed was a one-third interest in a certain mill. After the failure of the bank, the other owners of the mill property commenced suit in the state court to wind up their partnership affairs, and have the mill sold to pay the partnership debts. This proceeding resulted in a decree and sale, the conveyance being made on the 17th of June, 1878. This interest in the mill is the other property which the complainant seeks to redeem. By the 1st of August, 1878, all the property embraced within this suit had been sold to parties who bought in good faith, and paid full value. On the 13th of October, 1877, complainant was convicted in the United States district court upon the charge of violating the national bank act, and sentenced to imprisonment in the penitentiary for five years. He remained in the penitentiary until October, 1878, when he was pardoned. All the conveyances challenged were made during his confinement in the penitentiary. After his pardon complainant returned to Wichita, and engaged in the milling business, remaining there until February, 1881, when he removed to Arkansas, where he resided until the commencement of this suit, in 1887. The sales of the property conveyed by complainant realized only a small portion of his indebtedness to the bank, and the balance remained a part of the assets in the hands of the receiver until 1880, when, pursuant to an order of the United States district court, this property, with other assets, was sold at public auction, bought in by one Charles Hatton for \$6.15, and thereupon assigned by him to complainant for \$25. On his return to Wichita, in the fall of 1878, after his pardon, complainant knew of these sales; knew that the purchasers were in possession, supposing they had good title; lived within two blocks of one of them, who occupied his former homestead; knew of improvements being made upon the premises, or a part of them; gave no notice to any of the parties that he supposed he had any claim to any part of the property; left them in perfect ignorance thereof, and in the belief that they had a perfect title, until the year 1885, when he consulted with counsel as to his rights; then gave or caused information to be given to defendants that he claimed the right to redeem. During these years he paid no taxes; made no of-



fer to pay any; took no steps to assert his rights, and so acted as to leave the parties in possession, and claiming title in full belief that they had a perfect title. It is true that in the year 1879 he wrote one or two letters to the comptroller and Mr. Cullom, the first receiver, to ascertain the state of his account, and failed to get much information; but that seems to be about the only notice he took of past transactions. Now he claims that, because he was confined in the penitentiary at the time these conveyances were made, they were, under the statutes of Kansas, absolutely void, and that under that trust deed no power of sale was vested in the trustee or receiver without a decree of the court establishing the debt, so that he stands in the position of a mortgagor out of possession, with a right to redeem from those in possession.

I shall not stop to consider the question discussed by counsel as to the effect of the provision quoted from the trust deed. Neither shall I stop to consider the sufficiency of the plea of the statute of limitations. Though upon that these cases may well be noticed. *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, Id. 468; *Cross v. Knox*, 32 Kan. 736, 5 Pac. Rep. 32; *King v. Meighen*, 20 Minn. 264, (Gil. 237;) *Green v. Turner*, 38 Iowa, 112; *Locke v. Caldwell*, 91 Ill. 417. However, waiving these questions, it seems to me that complainant's claim must be adjudged stale. It should be noticed that, during the years of his silence, Wichita grew from a small town to a large city, so that one of these properties, worth at the time of its purchase three or four thousand dollars, is now affirmed to be worth fifty thousand. The doctrine of staleness of claim is one peculiar to a court of equity. It does not depend for its vitality upon any statute of limitations, but is applied by those courts where, by reason of the lapse of time, the acquiescence or inattention of the claimant, and the changed condition of affairs, it would be grossly inequitable to permit him to assert a right which, if asserted earlier, would have been sustained. In 2 Pom. Eq. Jur. § 965, the author thus states the rule:

"When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains, for a considerable length of time, from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering of time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of active and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands. Laches are often a defense wholly independent of the statute of limitations."

So, in the case of *Hayward v. Bank*, 96 U. S. 611, is the matter discussed as follows:

"Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right." 2 Story, Eq. Jur. § 1520. In *Smith v. Clay*, Amb. 645, Lord CAMDEN said: 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced.' These doctrines have received the approval of this court in numerous cases. *Oil Co. v. Marbury*, 91 U.S. 587; *Badger v. Badger*, 2 Wall. 87; *Marsh v. Whitmore*, 21 Wall. 178; *Harwood v. Railroad Co.*, 17 Wall. 79. In the last-named case this court said that, without reference to any statute of limitation, equity has adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. 'A delay, which might have been of no consequence in an ordinary case, may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been, in the mean time, varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his claim at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage.' Kerr, *Fraud & M.* (Bump's Ed.) 302, 306; *Oil Co. v. Marbury*, *supra*. If Hayward was defrauded of his stock,—if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally, upon any ground, to repudiate the sale, and reclaim the stock,—it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and the value of the stock had intervened. No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity."

See, also, *The Walter M. Fleming*, 9 Fed. Rep. 474; *Graham v. Railroad Co.*, 14 Fed. Rep. 753; *York v. Mill Co.*, 30 Fed. Rep. 471, *Munn v. Burges*, 70 Ill. 604.

Applying these considerations to the case at bar, we have a party, for seven years, with a claim upon property, living in its vicinity, conscious of the fact that parties in possession believe that they have a perfect title, leaving them to go in a belief in the sufficiency of their title, pay taxes, and make improvements, and giving no information as to his claim. Under those circumstances the mere lapse of time makes strongly against the equity of his present assertion. But that is not all. The property which has been sold to the defendants was sold to pay his indebtedness to the bank, and the money paid by the purchasers, which was the fair value of the property, was applied in partial payment of that debt. Yet, notwithstanding these sales, that debt was unsatisfied. The balance of the debt was believed to be absolutely worthless. He says nothing about

his claim until, in a roundabout way, and for a mere song, he acquires and thus extinguishes the claim of the bank against himself, and leaves its creditors largely unpaid. If he had asserted his rights before the bank had parted with this claim against him, it would have been an easy matter, by judicial proceedings, in respect to which no challenge could have been made, to have subjected the property at its then value to the satisfaction of his just debt to the bank; but he waits until, in this roundabout way, he has extinguished the claim of the bank against him, and then seeks to recover possession of the very property which has been in good faith appropriated to the partial payment of his debt. And upon what equity does he rest this claim? Not upon the ground that the property was sacrificed; that a fair value was not obtained; that a just debt was not partially liquidated; but upon the barren and cold averment that, by the letter of the law, a sale and conveyance made while he was in the penitentiary, suffering the just punishment for his crime, was technically void. If there is anything which can make less of an appeal to the conscience of a chancellor than that of an ex-convict, who pleads his own punishment in the penitentiary as a reason why his property which has been in good faith long years ago applied to the satisfaction of his just debts be restored to him, I have yet to hear it. Not the first imputation of bad faith or misconduct is cast upon the defendants. The complainant rests upon the mere technical protection which the law in its humanity casts about him who suffers the punishment of crime. This property, at fair value, was, in the course of supposed due legal proceedings, appropriated years and years ago to the payment of his just debts. Equity forbids that a title apparently conveyed by these proceedings should, after this lapse of time, be disturbed. I think the demurrer of the defendants should be sustained, and sustained, if upon no other, then upon the single ground of the staleness of the claim; and it is so ordered.

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GREGORY *et al.* v. BOSTON SAFE-DEPOSIT & TRUST Co. *et al.*

(Circuit Court, D. Massachusetts. October 5, 1888.)

1. PLEDGE—CONVERSION—ESTOPPEL.

Plaintiff, to raise money for a business enterprise, caused notes of his debtor to be made payable to B., who, with plaintiff's consent, gave them to J., to be used to raise money by either B. or J. for that purpose; they both being associates of plaintiff. J. exchanged the notes for others payable to himself, and one of these B. pledged to obtain the necessary funds. There was a conflict of evidence as to whether plaintiff authorized this pledge, as made, but he apparently acquiesced in it for months after learning of it, and it was only when the venture proved unsuccessful that he expressed dissatisfaction with B.'s action. *Held* that, as against the pledgee, who was an innocent purchaser for value, plaintiff was estopped from claiming the proceeds of the note.

2. ARBITRATION AND AWARD—SUBMISSION—NON-JOINDER OF PARTIES.

A submission to arbitration of a pending suit, without the consent of all the parties thereto whose interests may be affected by the award, is irregular and void.

**3. SAME—REVOCATION—DEATH OF PARTY BEFORE FINAL AWARD.**

Where an arbitrator makes an award, which does not purport to be final, and before such final award one of the parties dies, the death will operate as a revocation of the submission.

**In Equity.**

Bill by Charles A. Gregory and Charles F. Jones against the Boston Safe-Deposit & Trust Company, and the Merchants National Bank, and Mary H. Pike, administratrix of Frederic A. Pike, deceased, to obtain the amount of a judgment on deposit with said bank and trust company, said judgment being founded on a note claimed to be the property of complainants.

*F. A. Brooks*, for complainant.

*John Lowell* and *T. H. Talbot*, for defendant Mary H. Pike.

*L. S. Dabney*, for defendant Merchants National Bank.

*Solomon Lincoln*, for defendant Boston Safe-Deposit & Trust Company.

**COURT, J.** In 1881, George W. Butterfield sold certain mining property to Frederic A. Pike, of Calais, Me. Early in 1883, Butterfield became desirous of getting the same property back again. He associated himself with one Charles F. Jones. A contract of purchase was made with Pike, January 29, 1883, and Jones made the first cash payment under it. Shortly after this, Butterfield and Jones entered into negotiations with the plaintiff Charles A. Gregory and J. C. Kemp van Eé, as persons who could help furnish the requisite means to carry out the contract with Pike. To raise the money, Gregory and Kemp transferred to Butterfield 160,000 shares of the Great Sierra Consolidated Mining Company. These shares Butterfield, early in April, 1883, sold to W. C. N. Swift, of New Bedford, Mass., receiving \$10,000 in cash, and four notes, amounting to over \$80,000. These notes were made payable to the order of Butterfield, and were negotiable. On April 9th, two of these notes were delivered by Butterfield to Gregory, and on the same day Gregory passed the notes back again to Butterfield, who delivered them to Jones, as Butterfield, Gregory and Kemp sailed that day for England, to look after the sale of the mining property covered by the contract of purchase with Pike. On April 20th, Jones surrendered to Swift the four negotiable notes, and took in return from Swift five other notes, payable to the order of Jones, three of which were non-negotiable. It is one of these latter notes, amounting to \$20,334.60, which is in controversy in this suit. Under the contract with Pike it became necessary to sell the property before July 30, 1883. This was not accomplished, and Butterfield, who had returned from Europe, went with Jones to Calais, and on July 31st made a second contract with Pike, extending the time for selling the property to January 1, 1884. The body of this agreement called for a cash payment of \$25,000, but there was appended at the end of the paper the following modification:

"For the first payment of \$25,000, specified in the above agreement, the said Butterfield has lodged in the hands of said Pike the notes of W. C. N. Swift, of New Bedford, dated April 20, 1883, for \$15,000 and \$20,334.60,

payable in two and three years from date, which notes are to be held by said Pike until January 1, 1884, unless sooner redeemed by said Butterfield by the payment of \$25,000, and at that time the said Pike is authorized to raise \$25,000 out of them by pledging them on the most favorable terms he can obtain."

In December, 1884, Gregory brought suit against Pike and Swift in the state court of Massachusetts for the possession of these notes. This suit was removed to the circuit court of the United States in 1885, and is No. 2,170 of causes in equity. Subsequently the court allowed Kemp and Butterfield to become parties to the suit. Under a stipulation dated November 13, 1886, Gregory and Pike, through their respective counsel, submitted the questions raised in the equity suit to the Hon. E. R. HOAR, for determination. The award of Judge HOAR purports to be dated November 30th, the time of the submission, though the date when the award was made appears by the evidence to have been December 20th. He found the plaintiff Gregory entitled to the two Swift notes upon the payment of a certain note for \$2,437.50, signed by Butterfield and Jones, and payable to the order of C. H. Eaton. At the time of the negotiation of July 31st with Pike, it became necessary to free the mining property of a mortgage to Eaton. Pike agreed to hold the Swift notes as collateral for the payment of the note given Eaton, as well as for the payment of the \$25,000 called for by the contract. In consideration of this note, and acceptance by Pike, Eaton discharged his mortgage on the property. Pike died December 2, 1886, and Mrs. Pike became executrix under his will. On December 24, 1886, through her attorney, E. B. Harvey, she notified Judge HOAR that she revoked the submission made to him as arbitrator, and on the same day the two Swift notes were surrendered by the referee, and passed into the hands of John G. Stetson, clerk of the circuit court, to be dealt with as the counsel for Gregory and Mrs. Pike might jointly direct. In April, 1886, an action at law was brought against Swift in the name of Charles F. Jones, the nominal payee, on his note for \$20,334.60. Judgment was obtained, and the amount of \$24,926.90 was paid into court in full satisfaction of the judgment and interest thereon, and the note canceled. By order of the court, January 10, 1887, this amount was transferred to the equity cause of *Gregory v. Pike*, pending in this court. The present suit is brought by Gregory and Jones against the Boston Safe-Deposit & Trust Company, and the Merchants National Bank, where the money derived from the Swift judgment was deposited, and also against Mrs. Pike; and the bill prays that the funds in said banks may be paid over to the said Gregory.

The first point we have to decide is whether the submission to Judge HOAR is binding upon the parties to it. There is one objection taken, which is fatal to this award. The submission purports to be a submission of the equity cause then pending in the United States circuit court, and that cause is referred to, and of necessity made a part of, the submission. In that cause there were other parties besides Gregory and Pike, and a submission, whether by rule of court or otherwise, without

the assent of these other parties, whose interests might be affected, was irregular and void. "If a submission be entered into in a pending cause, or if a reference is undertaken to be made by agreement of parties, all persons who are parties of record to the suit must unite equally whether they are mere nominal parties or really interested." Morse, Arb. 33; *Owen v. Hurd*, 2 Term R. 643; *McCarthy v. Swan*, 145 Mass. 471, 14 N. E. Rep. 635. Again, Mr. Pike died pending submission which would ordinarily operate as a revocation. "The most familiar case in which it (revocation in law) takes place is where one of the parties dies pending the arbitration. As a general rule, this occurrence is a revocation of the arbitrator's authority." Morse, Arb. 233; *Marseilles v. Kenton*, 17 Pa. St. 238; *Dexter v. Young*, 40 N. H. 130. On December 24th Mrs. Pike gave formal notice to Judge Hoar that she revoked the submission. While Mr. Brooks, as representing Gregory, was anxious to obtain some kind of an award from Judge Hoar after he expressed his opinion orally on December 18th, yet, upon the evidence, it would seem that the arbitrator was to hear counsel further; and it may well be doubted whether he intended to make any final award before the notification of December 24th. He seemed anxious, rather, to surrender the papers on the ground that, after what had taken place, his work would not do the parties any good; and the notes in fact, it will be remembered, were surrendered to counsel for both parties, and by them lodged in Mr. Stetson's hands. Upon this state of facts I do not think the submission binding upon either party.

We come now to the merits of the controversy, and the first question is whether Pike's estate, as against Gregory, has any interest in this Swift note, or its proceeds now in the registry of the court. Gregory contends, in the first place, that he is entitled to the note, because neither Butterfield nor Jones had any authority to pledge it to Pike; and, second, that if they did have authority to pledge, Pike, by his failure to carry out the terms of his contract, has lost whatever rights he may have had. With respect to the first proposition, I do not think that, as against Pike, an innocent pledgee for value, Gregory can claim ownership of this note. Gregory, Butterfield, and Jones were engaged in a joint undertaking to sell on the London market the mining property contracted for with Pike. Pike's first contract with Butterfield was in January, 1883, and the contract of July 31st was a renewal upon different terms. In the spring of 1883, in furtherance of this scheme, Butterfield sold for Gregory and Kemp certain mining stock to Swift, who paid for the same in cash and notes. These notes were negotiable, and were made payable to the order of Butterfield, and Gregory passed over his two notes to Butterfield. It became necessary now to raise some money on the Swift notes, and so they were passed over by Butterfield to Jones for that purpose, with the consent of Gregory. Jones saw Swift, and exchanged these notes, together with the two belonging to Kemp, for five other Swift notes, payable to Jones, three of which were non-negotiable. It is one of the latter notes which is now in controversy. From Gregory's own statement it seems he did not know Jones had ex-

changed the original Swift notes which were negotiable for others which were not, and therefore he must have believed that Butterfield or Jones had the power to dispose of them to Pike, if they found it necessary. The fact that Butterfield on August 4th cabled Gregory, asking if he should use the note, and that Gregory replied that his interest must be increased if the note was used, the reply by Jones that they must adhere to original contract, and the subsequent answer by Gregory forbidding use of note except his interest should be increased, cannot, it seems to me, change the position of an innocent party like Pike, in view of the whole situation, and of the subsequent conduct of Gregory. Butterfield swears that, before leaving London, Gregory, being a partner with him, gave him authority to use the Swift note if it should become necessary, but to cable him before doing so; that it did become necessary, and therefore he used the notes. This authority Gregory denies. Jones swears that, on returning to London in August, he told Gregory just what had been done, and that he also agreed to give Gregory \$100,000 out of his individual interest in the sale of the mining properties if he would give his hearty co-operation in prosecuting the sale. Gregory denies that Jones told him the details of the contract of July 31st, but he admits that he told him that he would give him \$100,000 of stock in the May Lundy Company, if (quoting:)

"I would take the same in satisfaction on their having made use of the Swift note, or notes with Pike, in that connection; but I refused to take it, and refused to ratify the use of the note or notes."

He further says.

"He (Jones) told me that if the May Lundy sale did not succeed, that the note was to be given up by Pike. I did not learn what one of the Swift notes had been put up, and I did not know that the original notes had in any way been changed. I was left to suppose that such notes as had been used was one or some of the original Swift notes."

On August 21st, Gregory's brother writes him from Boston as follows:

"In my last or previous letter I wrote you that Butterfield had not given up to me (nor Frank) any note whatever. He said that you told him he could use it in arranging with Pike; and on his return from Maine he told me that he had put it up as collateral with Pike; but that it could be obtained, if you did not approve. He then went to California, and said Jones would go to London, and see you the next week."

It thus appears that Gregory knew, by the first week in September at latest, that the Swift note or notes had been put up as collateral with Pike under the agreement of July 31st. What course does he now pursue? Does he immediately inform Pike that Butterfield had no authority to pledge the notes? The evidence goes to prove that during the fall months Gregory and Jones were engaged in London in prosecuting to a successful issue the sale of this property, and that it was not until the following December,—and after, as Jones swears, an expert had made an unfavorable report of the property, so that the sale in London fell through,—that Gregory became dissatisfied, and demanded of Pike a return of the notes. Upon this state of facts it would clearly be inequita-

ble to permit Gregory to repudiate the contract made with Pike. He held Butterfield out to the world as the owner of the Swift notes, which were pledged to secure the success of a joint enterprise. He allowed Butterfield to deal with an innocent party as the owner of these notes, in furtherance of their joint interests. His conduct shows that he was satisfied to have the Swift notes pledged as collateral, if the joint enterprise proved a success; but, if it proved a failure, it was then his purpose to repudiate Butterfield's act, and demand a return of the notes. He is estopped by his acts from repudiating the pledge Butterfield made to Pike.

The remaining question is whether Pike has forfeited his right to the notes under the contract of July 31st. The contract provides that, in case the Union Trust Company, who were to hold the deeds of the property in trust until January 1, 1884, declined to deliver the bonds of the May Lundy Mining Company to Butterfield under the agreement, it should be void, and the money returned to Butterfield; and, further, that the action of the trust company was to be ascertained and reported to Pike within 30 days from the date of the agreement. While the evidence is somewhat conflicting, I do not find, taking all that is in the record bearing upon this point, either that the trust company declined to deliver the bonds, or that any notice was sent to Pike. Under the contract Butterfield was to pay \$25,000 at the time of the agreement, and the remainder of the purchase money, \$217,266, on or before January 1, 1884; and "in case the payments are not made, as above stated, on the first day of January next, the sums of money which shall previous to that time have been paid under this agreement \* \* \* shall be forfeited." Appended to the end of the contract is the provision that, for the first payment of \$25,000, Butterfield has lodged in Pike's hands the two Swift notes, which notes Pike was to hold until January 1, 1884, unless sooner redeemed by Butterfield on payment of \$25,000, and at that time Pike was authorized to raise \$25,000 out of them by pledging them. The fair construction of this provision is that Pike held these notes as collateral security for the first payment under the contract. The contract failed, not by reason of any default on the part of Pike, but by the default of Butterfield. The contract provided, in case of Butterfield's failure, he should forfeit all payments before made, including, of course, the first. In place of the first cash payment something else was substituted, which he was to hold as security for that payment until a certain time, and then, if the \$25,000 was not paid, he had power to pledge the security to raise the money; that is, he was then authorized to pledge. It does not seem to me a proper construction, or one in accord with the intent of the parties, to hold that Pike was obliged to pledge these notes immediately, or within a reasonable time after January 1, 1884, or lose his lien. He was empowered to do so if he chose; but, if he deemed it best for the interests of all not to pledge the notes, or found it impossible to raise the money on them, he would not thereby lose his lien upon them. The fair reading of this provision is that Pike was provided a way by means of which he might realize his \$25,000 if the notes were



not redeemed by January, 1st; not that he was obliged to pledge them at that time or forfeit all right to them. In my opinion, upon the evidence now before me in this case, Mrs. Pike, as executrix, has a lien on the Swift notes or their proceeds, to the extent of \$25,000, but the decision of this question belongs to equity suit No. 2,170; where all persons claiming an interest in these notes are made parties. The moneys in the possession of the defendants the Boston Safe-Deposit & Trust Company and the Merchants National Bank, referred to in the bill of complaint herein, are held by them subject to the orders of this court in said equity suit No. 2,170; and no orders relating to said moneys can properly be made in this suit, which does not include as parties some of the persons who are parties in said equity suit No. 2,170. The bill in this case should be dismissed, with costs.

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CAMPBELL PRINTING-PRESS CO. v. THORP *et al.*

(Circuit Court, E. D. Michigan. October 16, 1888.)

**SALE—WARRANTY—BREACH—REMEDIES.**

Plaintiff agreed to sell defendants certain printing-presses, and guaranteed that they should be "free from defective material or workmanship, and do their work satisfactorily." The presses did not do their work satisfactorily to the defendants, nor did they work reasonably well. Defendants did not return the presses, but sought, in an action for the agreed price, to recoup the damages sustained by them. *Held*, (1) that the obligation of the plaintiff was to furnish presses which should work satisfactorily to the defendants; (2) that the covenant was not satisfied, even if they worked reasonably well; (3) that there was no method of estimating the difference in value between the presses as they were and such as would have satisfied the defendants; (4) that defendants were bound to return the presses if not satisfactory, and that they could not recoup damages in an action for the price.<sup>1</sup>

**At Law.** On exceptions to referee's report.

Plaintiff agreed to sell to the defendants certain printing-presses, rollers, and other property connected with a printing establishment, and guaranteed that the presses should be "free from defective material or workmanship, and should do their work satisfactorily." The referee, to whom the case was referred, found that neither of the three presses was satisfactory to defendants; nor did they do their work reasonably well; yet he found as a conclusion of law that the plaintiff was entitled to recover the whole agreed price, less a small sum, conceded as a set-off, upon the theory that it was the duty of the defendants to reject the presses if they were not satisfied with them, and that, having kept them, there was no

<sup>1</sup>An agreement that the purchaser of an article sold with warranty may rescind the sale if the article is not satisfactory, does not preclude him from retaining it, and recouping damages for breach of the warranty, in an action for the price. *Shupe v. Colender*, (Conn.) 15 Atl. Rep. 405. See, also, note, *Id.*, as to sales on approval. On sales of machinery guaranteed to work to the purchaser's satisfaction, he is the sole judge as to its satisfactory operation. *Seeley v. Welles*, (Pa.) 13 Atl. Rep. 736. See note, *Id.* See, also, *Ventilator Co. v. Railway Co.*, (Wis.) 34 N. W. Rep. 509, and note.

method of estimating the loss they suffered by reason of their dissatisfaction; in other words, that the value of a press that should work to their satisfaction was not capable of pecuniary estimation.

*Charles A. Kent*, for plaintiff.

*W. L. Carpenter*, for defendants.

Before JACKSON, Circuit Judge, and BROWN, District Judge.

BROWN, J., (*after stating the facts as above.*) The correctness of the referee's ruling depends largely upon the proper construction of the guaranty that the presses should be free from defects of material or workmanship, and should do their work satisfactorily. There is no doubt of the general proposition that where one party agrees to do a piece of work to the satisfaction of another, the excellence of which work is wholly or in part a matter of taste, such, for instance, as a portrait, a photograph or bust, a suit of clothes, a musical instrument, or a piece of furniture, the buyer may reject it without assigning any reason for his dissatisfaction. In such case the law cannot relieve against the folly of the vendor, by inquiring whether the dissatisfaction of the vendee was based upon reasonable grounds or not. It is even doubtful whether it can inquire into the good faith of the vendee's decision. *Brown v. Foster*, 113 Mass. 136; *McCarren v. McNulty*, 7 Gray, 139; *Gibson v. Cranage*, 39 Mich. 49; *Hoffman v. Gallaher*, 6 Daly, 42; *Zaleski v. Clark*, 44 Conn. 218; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583. The true doctrine is expressed in *McCarren v. McNulty*, 7 Gray, 139, 141:

"It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

Other cases extend the same doctrine to contracts for the performance of labor, or for the support of another to his satisfaction. In such case the employer may be wholly dissatisfied with the character of the service rendered, or the beneficiary made exceedingly uncomfortable by his surroundings, without in either case being able to assign what the law would recognize as a sufficient reason for his dissatisfaction. It makes him, however, the sole judge of the reasonableness of his own discontent. *Taylor v. Brewer*, 1 Maule & S. 290; *Rossiter v. Cooper*, 23 Vt. 522; *Tyler v. Ames*, 6 Lans. 280; *Spring v. Clock Co.*, 24 Hun, 175; *Hart v. Hart*, 22 Barb. 606; *Ellis v. Mortimer*, 1 Bos. & P. N. R. 257.

Whether these words should receive the same construction where the suitability of the article furnished involves no question of taste or personal feeling, but simply one of mechanical fitness to do a certain work, or accomplish a certain purpose, admits of some doubt. The authorities are not entirely harmonious, but the decided weight of authority is in favor of the construction given to it by the referee. So far as this state

is concerned, two decisions seem to put the matter entirely at rest. In *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. Rep. 906, it was held that where the vendor of a harvesting-machine gave a warranty that the contract of purchase should be of no effect unless the machine worked to the buyer's satisfaction, it was held the purchaser had reserved the absolute right to reject the machine, and that his reasons for doing so could not be investigated. A still stronger case is that of *Manufacturing Co. v. Ellis*, 35 N. W. Rep. 841. The agreement was that a certain grain-binder should do good work and "give satisfaction." It was held that, unless the defendant was satisfied with the machine, although it did good work, he was not bound to purchase. See, also, *Platt v. Broderick*, 38 N. W. Rep. 579. In the case of *Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. Rep. 846, plaintiff guaranteed to furnish defendant a cord-binder guaranteed to work satisfactorily. It was held that in case, upon reasonable trial, it did not work satisfactorily, it was unnecessary for the defendant to return it to plaintiff, but it was sufficient for him, within a reasonable time, to notify plaintiff, in substance, that it did not work satisfactorily, and that he declined to accept it. The same ruling was made with regard to a steam-boat, in *Gray v. Railroad Co.*, 11 Hun, 70; with regard to a machine for generating gas, in *Aiken v. Hyde*, 99 Mass. 183; with regard to a fanning-mill, in *Goodrich v. Van Nortwick*, 43 Ill. 445; and with regard to a passenger elevator, in *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. Rep. 230. In this latter case a large number of authorities are cited by counsel and court to the same effect. The New York cases at first blush would seem to lay down a different rule, but when carefully examined the difference is more apparent than real. The earliest case is that of *Folliard v. Wallace*, 2 Johns. 395, in which one covenanted that in case the title to a lot of land conveyed to him should prove good and sufficient in law, that he would pay to a third party, three months after he should be well satisfied that the title was undisputed and good against all other claims. It was held that the award of certain commissioners on the title in favor of the covenantor ought to satisfy him, and that it was not enough for the defendant to allege that he was not satisfied with the title without some good reason being assigned for his dissatisfaction, and that he was not to judge for himself, but that the law would determine when he ought to be satisfied. Chancellor KENT, who delivered the opinion, observed that "if the defendant were left at liberty to judge for himself when he were satisfied, it would totally destroy the obligation, and the agreement would be absolutely void." In *City of Brooklyn v. Railway Co.*, 47 N. Y. 475, an action was brought upon a covenant in which the defendant agreed to keep the pavement of certain streets in thorough repair within the tracks, etc., under the direction of such competent authority as the common council might designate. The court held that, if the pavement were kept in thorough repair, it was sufficient, though it was kept up without direction from the competent authority designated by the common council. "That which the law shall say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." A like ruling was made in *Misell v. Insurance*

Co., 76 N. Y. 115, with reference to the certificate of a physician in a life insurance case; and, finally, in *Boiler Co. v. Garden*, 101 N. Y. 387, the parties entered into a contract by which plaintiff agreed to alter certain boilers belonging to defendants, for which the defendants agreed to pay the stipulated price "as soon as they are satisfied the boilers as changed are a success." In an action to recover the contract price, the defendants claimed the question as to whether the work was a success was one alone for them to determine. This was held to be untenable, and that a simple allegation of dissatisfaction without a good reason therefor was no defense. The prior cases were quoted as settling the law in that state. None of these cases, however, related to the sale of manufactured articles. In none of them was there an opportunity for a rescission, and restoring the parties to their *statu quo*. The last case particularly is much like that of *Iron Co. v. Best*, 14 Mo. App. 503, hereafter cited, and is subject to the same criticism.

Notwithstanding the cases in New York, and admitting all that is claimed for them, the weight of authority as well as of reason inclines us to the opinion that the parties must stand to their contract as they have made it, and if the vendor has agreed to furnish an article that shall be satisfactory to the vendee, he constitutes the latter the sole arbiter of his own satisfaction. It is entirely well settled that if the acceptance of a machine is made dependent upon the approval of an engineer, or if a pavement is to be laid to the satisfaction of a street commissioner, or if lumber is to be scaled by an inspector, the decision of such agent, in the absence of fraud, bad faith, or clear error, is conclusive. We know of no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive. In the case of chattel mortgages the rule is entirely well settled that, if the mortgage provides that mortgagee may take possession whenever he deems his security unsafe, the mortgagor thereby submits himself to the judgment of the mortgagee on the question of security, and the latter is not bound to prove circumstances justifying his action. Certain cases, however, establish a reasonable modification of this rule, to the effect that the dissatisfaction must be real, and not feigned, and that the vendee is not at liberty to say he is dissatisfied when in reality he is not; in other words, that his discontent must be genuine. *Manufacturing Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583. The same cases, however, hold that, while the vendee is bound to act honestly, it is not enough to show that he ought to have been satisfied, and that his discontent was without good reason. See, also, *Lynn v. Railroad Co.*, 60 Md. 404; *Railroad Co. v. Brydon*, 65 Md. 198, 611, 3 Atl. Rep. 306, and 9 Atl. Rep. 126. In *Manufacturing Co. v. Chico*, 24 Fed. Rep. 893, it was held that where, under a contract, a fire-engine was to be made and delivered which should be satisfactory to the purchaser, it must in fact be satisfactory to him, or he is not bound to take it; but that, where the purchaser was in fact satisfied, but fraudulently, and in bad faith, declared that he was not satisfied, the contract had been fully performed by the vendor, and the purchaser was bound to accept

the article. This I regard as an accurate summary of the whole law upon the subject.

Some doubt is thrown upon this case by the stipulation that the presses shall work satisfactorily, without stating the person to whom they shall be satisfactory. We think, however, that there can be but one interpretation fairly given to these words. When, in common language, we speak of making a thing satisfactory, we mean it shall be satisfactory to the person to whom we furnish it. It would be nonsense to say that it should be satisfactory to the vendor. It would be indefinite to say that it should be satisfactory to a third person, without designating the person. It can only be intended that it shall be satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee. This was the view taken of similar words in *Taylor v. Brewer*, 1 Maule & S. 290; *Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. Rep. 846; and in *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. Rep. 230. The case of *Iron Co. v. Best*, 14 Mo. App. 503, is clearly distinguishable from the cases last cited. In this case defendant agreed to build an air-furnace in plaintiff's warehouse, according to a plan to be furnished by himself. The furnace thus became attached to the freehold of the plaintiff, and was incapable of severance. It was a structure into which the plaintiff had put all the materials and the defendant had put all the labor. Defendant could not take away the materials, because they were not only attached to plaintiff's freehold, but actually belonged to him. His labor was gone, and could not be recalled. To permit the plaintiff, under such circumstances, to refuse to pay, if in fact the furnace worked reasonably well, and at the same time to retain the fruits of defendant's labor, would have been an unwarrantable extension of the doctrine applied to machines or articles of manufacture which can be rejected. The court very properly held that the covenant was satisfied if the furnace worked reasonably well. Conceding, then, that the plaintiff was bound to furnish presses that should work satisfactorily to the defendants, it is very evident that they were not satisfied with their operation, and that they had reasonable grounds for their dissatisfaction, as the referee finds that the presses neither worked to their satisfaction, nor reasonably well. This undoubtedly gave them the power to reject the machines. Instead of doing this, however, they kept them, and now seek to recoup their damages by reason of their failure to work as they ought to. Had the covenant been that the presses should work well, we should have no doubt that the defendants might have recouped such damages, and that the referee would have found them capable of estimation. These damages would have been the difference in value between presses which would work reasonably well and those which were actually furnished. But in attempting to apply the same rule in the present case, we encounter a formidable difficulty from the impossibility of fixing the value of machines which shall work to the satisfaction of the defendants. It will not do to say that such value is to be gauged by that of a machine which shall work reasonably well, because such a press might not have been satisfactory to the vendee, or he might have been content with one which would not have worked to the satis-

faction of experts in the business. We think that, having elected to retain the presses, they are bound to pay the full price for them. The exceptions to the referee's report will therefore be overruled, and judgment entered upon his finding.

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*In re TERRY.*

(Circuit Court, D. California, N. D. September 17, 1888.)

CONTEMPT—PUNISHMENT—IMPRISONMENT—REMISSION.

Defendant and his wife were present in court, of which he was an attorney, during the reading of an opinion in a cause to which they were parties; and the latter, rising, addressed the presiding justice, and charged him with having been bribed to render the decision. She refusing to be silent, the officer, under order of the court, attempted to remove her, when defendant struck him a severe blow. Both she and defendant resisted, using profane, opprobrious, and threatening language towards court, officers, and those assisting, and were only overcome by force. Defendant attempted to draw a bowie-knife immediately after striking the marshal, and as he was going out of the court-room succeeded in drawing it, and in the corridor adjoining brandished it, with threats, until it was forcibly taken from him. His wife also had a loaded pistol in her satchel. He was sentenced to six months' imprisonment for contempt, and, after a few days, presented a petition for release, which stated that he did not intend to say or do anything disrespectful to the court or any of its judges, and attempted a justification, but misstated the facts, as known to the court and set forth in the affidavits of others present, and expressed no regret for his acts. *Held*, that the sentence should not be remitted; that the forcible resistance to an officer of the United States in the execution of the lawful orders of their courts was an indignity and insult to the power and authority of the government, which were not extenuated by any averment that no disrespect was intended to the courts making the orders.

Commitment for Contempt.

On September 3, 1888, while the judges of the United States circuit court, holden at San Francisco, were delivering their opinion in the cases of Frederick W. Sharon against David S. Terry and wife, and Francis G. Newlands and others against the same defendants, Mrs. Terry, one of the defendants, interrupted Mr. Justice FIELD, who was reading the opinion, and was guilty of such misbehavior in the presence of the court that the marshal was ordered by the court to remove her from the court-room. The marshal proceeded to execute this order, when he was assaulted and beaten, in the presence of the court, by Terry, who at the same time thrust his right hand under his vest, where he had a bowie-knife concealed on his person, apparently for the purpose of drawing it, when the deputy-marshals and citizens present promptly laid hold of him, and restrained further violence until Mrs. Terry was taken from the court-room. When this was done, Terry was allowed to leave the court-room, and was accompanied by officers to the door leading to the adjoining corridor. As he was about leaving the room, he drew a bowie-knife from his bosom, and as he stepped into the corridor he brandished it, with threats of violence against those who opposed his going to his wife, when

he was again seized by deputy-marshals and others, and in the struggle ensuing his knife was taken from him. The judges holding the court were Hon. STEPHEN J. FIELD, Circuit Justice; Hon. LORENZO SAWYER, Circuit Judge; and Hon. GEORGE M. SABIN, District Judge. Hon. OGDEN HOFFMAN was present, sitting with the judges, but merely as a spectator. As soon as the disturbance had ceased, Justice FIELD proceeded with the reading of the opinion, after which orders were made by the court adjudging Mr. and Mrs. Terry guilty of contempt, and directing their imprisonment as a punishment therefor. The orders are as follows:

"At a stated term, to-wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the Ninth judicial circuit, in and for the Northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 3d day of September, in the year of our Lord one thousand eight hundred and eighty-eight. Present: The Honorable Stephen J. Field, associate justice of the supreme court of the United States; the Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, United States district judge, district of Nevada.

*"In the Matter of Contempt of David S. Terry.*

"Whereas, on this 3d day of September, 1888, in open court, and in the presence of the judges thereof, to-wit, Hon. Stephen J. Field, circuit justice, presiding, Hon. Lorenzo Sawyer, circuit judge, and Hon. George M. Sabin, district judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, one Sarah Althea Terry was guilty of misbehavior in the presence and hearing of said court; and whereas, said court thereupon duly and lawfully ordered the United States marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room; and whereas, the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said order, in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon, with intent to obstruct the administration of justice, and to resist such United States marshal, and the execution of the said order; and whereas, the said David S. Terry was guilty of a contempt of this court by misbehavior in its presence, and by a forcible resistance in the presence of the court to a lawful order thereof in the manner aforesaid: Now, therefore, be it ordered and adjudged by this court that the said David S. Terry, by reason of said acts, was and is guilty of contempt of the authority of this court, committed in its presence, on this the 3d day of September, 1888; and it is further ordered that said David S. Terry be punished for said contempt by imprisonment for the term of six months; and it is further ordered that this judgment be executed by imprisonment of the said David S. Terry in the county jail of the county of Alameda, in the state of California, until the further order of this court, but not to exceed said term of six months; and it is further ordered that a certified copy of this order, under the seal of the court, be process and warrant for executing this order."

"At a stated term, to-wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the Ninth judicial circuit, in and for the Northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 3d day of September, in the year of our

Lord one thousand eight hundred and eighty-eight. Present: The Honorable Stephen J. Field, associate justice of the supreme court of the United States; the Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, United States district judge, district of Nevada.

*"In the Matter of Contempt of Sarah Althea Terry."*

"Whereas, on this 3d day of September, 1888, in open court, and in the presence of the judges thereof, to-wit, Hon. Stephen J. Field, circuit justice, presiding, Hon. Lorenzo Sawyer, circuit judge, and Hon. George M. Sabin, district judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, the said Sarah Althea Terry interrupted the proceedings of said court by loud and boisterous language, and was thereupon by said court ordered to be silent and to take her seat, and refused so to do, but continued to use boisterous and insulting language, and asked the presiding justice, "how much he was paid for his opinion," and then and there used towards the court, and in its presence, other contemptuous and scandalous language; and, whereas, the said court then and there made an order that the said United States marshal remove the said Sarah Althea Terry from the court-room of said court, which order the said marshal then and there attempted to execute, and which said order, made in her presence and hearing, the said Sarah Althea Terry resisted then and there in the presence of the court; and, whereas, the said Sarah Althea Terry was thereby guilty of a contempt of this court by misbehavior and in its presence, and by a resistance in its presence to a lawful order thereof, and in the manner aforesaid: Now, therefore, be it ordered and adjudged by this court that the said Sarah Althea Terry, by reason of the acts aforesaid, was, and is guilty of contempt of the authority of this court, committed in its presence on this 3d day of September, 1888; and it is further ordered that Sarah Althea Terry be punished for said contempt by imprisonment for the term of thirty days; and it is further ordered that this judgment be executed by the imprisonment of the said Sarah Althea Terry in the county jail of the County of Alameda, in said state of California, until the further order of this court, but not to exceed said term of thirty days; and it is further ordered that a certified copy of this order under the seal of the court be the process and warrant for executing this order."

September 12, 1888, D. S. Terry presented the following petition:

"IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, NORTH-EARN DISTRICT OF CALIFORNIA.

*"In the Matter of Contempt of David S. Terry."*

*"To the Honorable Circuit Court aforesaid:* The petition of David S. Terry respectfully represents: That in all the matters and transactions, occurring in the said court on the 3d day of September, inst., upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court, or to the judges thereof, or to any one of them. That when petitioner's wife, the said Sarah A. Terry, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat, and remain quiet, and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room quietly and peaceably, and he had no intention or design of obstructing or preventing the execution of the said order of the court; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his presence violently, and, as he believed, unnecessarily, assaulted petitioner's wife. Your petitioner most



solemnly avers that he neither drew or attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States marshal, with any deadly weapon in said court-room or elsewhere. And in this connection he respectfully represents that after he had left said court-room he heard loud talking in one of the rooms of the United States marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath-knife, at the same time saying to those standing in his way in said door that he did not want to hurt any one; that all he wanted was to get in the room where his wife was. The crowd then parted, and your petitioner entered the doorway, and there saw a United States deputy-marshal with a revolver in his hand pointed to the ceiling of the room. Some one then said, 'Let him in, if he will give up his knife,' and your petitioner immediately released hold of the knife to some one standing by. In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court, or any of the judges thereof. That he lost his temper, he respectfully submits was a natural consequence of himself being assaulted when he was making an honest effort to peaceably and quietly enforce the order of the court so as to avoid a scandalous scene, and of his seeing his wife so unnecessarily assaulted in his presence. Wherefore your petitioner respectfully requests that this honorable court may, in the light of the facts herein stated, revoke the order made herein committing him to prison for six months. And your petitioner will ever pray, etc.

"Dated, September 12, 1888.

"*State of California, County of Alameda*—ss.: David S. Terry, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

D. S. TERRY.

"Subscribed and sworn to before me, this 12th day of September, 1888.  
[Seal.]

"GEORGE M. SHAW, Notary Public.

Affidavits were also filed by J. C. Franks, United States marshal, A. L. Farish, N. R. Harris, John Taggart, and W. W. Presbury, deputy-marshals, in attendance at the time of the occurrence, and Henry Finnegass, Benjamin F. Bohen, William Glennon, Thomas B. Van Buren, J. H. Miller, Alfred Barstow, and Joseph D. Redding, who were also eye-witnesses of the affair. Two only of the affidavits are published in full, that of Marshal Franks and that of Mr. Finnegass, as they detail sufficiently the most important features. Extracts from three others are also given.

#### AFFIDAVIT OF MR. FRANKS, THE MARSHAL.

"*State of California, City and County of San Francisco*—ss.: I, J. C. Franks, being duly sworn, depose and say that I am and have been since March, 1886, the United States marshal for the Northern district of California. That on the 3d day of September, 1888, I was standing where I usually stand in the court-room, on the west side of the railing inclosing the place where the clerk of the court sits. While Judge Field was reading his decision in the case of Sharon v. Terry, Judge Terry and his wife, Mrs. Terry, sat at the large table for attorneys in front of the railing around the clerk's desk; they being to my left, Mr. Terry being further away from me. Judge Field had read for a few minutes, when Mrs. Terry stood up, interrupting the court, said, among other things, 'You have been paid for this decision.' Judge

Field then ordered her to keep her seat, but she continued, saying, 'How much did Newlands pay you?' Then Judge Field, looking towards me, said, 'Mr. Marshal, remove that woman from the court-room.' Mrs. Terry said in a very defiant manner, 'You cannot take me from the court.' I immediately stepped to my left to execute the order, passing Judge Terry, to where Mrs. Terry was standing. Mrs. Terry immediately sprang at me, striking me in my face with both her hands, saying, 'You dirty scrub, you dare not remove me from this court-room.' Mrs. Terry made this assault upon me before I had touched her. I immediately moved to take hold of her when Judge Terry threw himself in my way, getting in front of me, and, unbuttoning his coat, said, in a most defiant and threatening manner, 'No man shall touch my wife; get a written order,' or words to that effect. I put out my hand towards him, saying, 'Judge, stand back; no written order is required;' and just as I was taking hold of Mrs. Terry's arm, Judge Terry assaulted me, striking me a hard blow in my mouth, with his right fist, breaking one of my teeth, and I immediately let his wife go, and pushed him back. He then put his right hand in his bosom, while at the same time Deputy Farish, Detective Finnegass, and other citizens, caught him by the arms, and pulled him down in his chair. I caught hold of Mrs. Terry again, Mr. N. R. Harris, one of my deputies, coming to my assistance, and we took her out of the court-room into my office; she resisting, scratching, and striking me all the time, using violent language, denouncing and threatening the judges and myself, claiming that I had stolen her diamonds and bracelets from her wrists, and calling several times to Porter Ashe to give her her satchel; I, during the whole time using no more force than was necessary, considering the resistance made by her, addressing her as politely as possible. When we got her into the inner room of my office, I left her in charge of Mr. Harris, went into the main office, saw a body of men scuffling at the door, heard Deputy-Marshal Taggart say, 'If you attempt to come in here with that knife, I will blow your brains out.' I said, 'What, has he a knife?' Deputy Farish answered, and said, 'He had a knife, but we took it away.' I then took hold of Judge Terry, and, with assistance of others, pulled him in the main office, and shut the door. I had him and his wife placed in my private office in charge of Deputy-Marshals Harris, Donnelly, and Taggart. I then went into the court-room, and when I had been in there but a short time, Mr. Farish came in and said, 'Mrs. Terry wants her satchel, which Porter Ashe has.' I went into the corridor, and found Mr. Ashe with the satchel. I requested him to hand it to me. At first he refused, saying it was Mrs. Terry's private property, and he was going to deliver it to her. I told him she was my prisoner, and her effects should be in my custody, and if he did not give the satchel up I would place him under arrest. He then gave it to me, and I told him to come with me into my office, and I would open it in his presence. He did so, and I opened it, and took a pistol therefrom,—a self-cocking 41 caliber Colt's pistol, with five chambers loaded, the sixth being empty,—after which I delivered the satchel to Mrs. Terry. Mr. Ashe then said he did not intend to give the satchel to her with the pistol in it. I appended hereto a photograph of the bowie-knife taken from the hands of Judge Terry by a citizen, with the assistance of my officers, and handed to me by the citizen, and also a photograph of the pistol taken from Mrs. Terry's satchel, both photographs exhibiting the actual size of these weapons. All this occurred in the appraisers' building, corner of Washington and Sansome streets, in the presence of and within the hearing of the United States judges, while they were delivering the decision. I noticed Judge Terry and his wife during the reading of the opinion; and, as some points were being decided against them, I carefully observed them before I commenced to remove Mrs. Terry from the court-room; and there was no word or act that I observed on the part of Judge Terry to restrain his wife in her conduct, or to take her from the court-room,

or to assist me in doing so. On the contrary, Judge Terry resisted me with violence, as I have stated. After Judge Terry was placed in my inner office, as I have above stated, he used very abusive language concerning the judges, referring to Judge Sawyer as 'that corrupt son of a bitch,' and also saying, 'Tell that bald-headed old son of a bitch, Field, that I want to go to lunch;' and after the order was made committing him six months for contempt, Judge Terry said: 'Field thinks that when I get out, he will be away; but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him.' Mrs. Terry said several times that she would kill both Judges Field and Sawyer.

J. C. FRANKS.

"Subscribed and sworn to before me, this 17th day of September, A. D. 1888. F. D. MONCKTON,

"Commissioner U. S. Circuit Court, Northern District of California.

#### AFFIDAVIT OF HENRY FINNEGASS.

"*State of California, City and County of San Francisco—ss.:* Henry Finnegan, being first duly sworn, deposes and says: That he is a citizen of the United States, over 45 years of age; that he was agent of the secret service division of the United States treasury department for the Pacific coast from March 1, 1871, to May 1, 1888, and during most of said time has also acted as a deputy United States marshal for the district of California; that he was present in the court-room of the United States circuit court in the appraiser's building, corner of Sansome and Washington streets, in the city and county of San Francisco, on September 3, 1888, when the judges were delivering their opinion in the cases of *Sharon v. Terry et al.*, and *Newlands et al. v. Terry et al.* The opinion of the court was being delivered by Judge FIELD, and when he had proceeded with the reading of the opinion for twenty minutes, commencing at 11 o'clock, he was interrupted by Mrs. Terry rising to her feet and saying: 'Judge are you going to take the responsibility of ordering me to deliver up that marriage contract?' Judge FIELD immediately said, 'Take your seat, madam.' Mrs. Terry retorted, 'How much did you get for that decision? You have been bought by Newlands.' The judge then said, 'Marshal, remove that woman from the court-room, and the court will deal with her hereafter.' During this time Mrs. Terry was standing almost immediately in front of Judge FIELD, at the table near the railing outside of the clerk's desk. When Judge FIELD ordered the marshal to remove Mrs. Terry from the court-room, she sat down, saying in a loud voice and indignant and insulting manner, 'I won't go out, and you can't put me out,' and other words to that effect. During this time Marshal Franks was standing at the west end of the railing around the clerk's desk, and about ten feet distant from where Mrs. Terry was standing and sitting. Judge Terry was sitting beside Mrs. Terry at her right hand, and between Mrs. Terry and the marshal. Immediately upon Judge FIELD directing the marshal to remove Mrs. Terry from the court-room, the marshal walked around behind Judge Terry towards Mrs. Terry. While the marshal was thus proceeding, Judge Terry rose to his feet, saying, as the marshal passed him, 'Don't touch my wife; get a written order.' The marshal, in effect, replied that he had order enough. Then Judge Terry said, 'No God damn man shall touch my wife;' and he tried to get between the marshal and his wife. The marshal went to take hold of Mrs. Terry's arm, when Judge Terry drew back and struck him with his right fist a severe blow on the face. The marshal then pushed Judge Terry with his hands. Then Judge Terry unbuttoned his coat, and thrust his right hand into his bosom through the open place of his vest. When I saw him make this motion I sprang towards him, and caught him by the right arm, and pulled his hand away from his vest, and pulled him back on a chair. Two other men took hold of him at the same time and we held him down. He was swearing

all the time, saying, 'God damn you, let me up; you sons of bitches, let me up;' and other exclamations of that character. However, we held him there until his wife was taken forcibly out of the room by Marshal Franks and his assistant. Then we let Terry up, and I went up with him to near the swinging doors connecting the court-room with the passage-way leading into the corridor. About five feet from the swinging doors, and in the court-room, I released my hold of Judge Terry's right arm, and let go of him, and he went through the door, and I held one side of the door open with my left hand, and this door was not closed until Judge Terry had drawn his bowie-knife, and was brandishing it in the passage-way leading to the corridor. When he got a few feet from the swinging doors into the passage-way, I heard some one say, 'Look out, he's got a knife.' I let go the swinging door and ran out, and caught him in the said passage-way by the right arm, in which he held his knife, and at the same instant a deputy-marshal by the name of Farish caught hold of Judge Terry. He violently resisted us, and we struggled from the passage-way into the corridor, and across the corridor into the door leading into the marshal's office. During this time Judge Terry shouted loudly, using such exclamations as 'Let go, let go, you sons of bitches; I will cut you into pieces; I will go to my wife.' We struggled into the space before the counter in the marshal's office, where we took Judge Terry's knife from him. I loosed some of his fingers, and Deputy-Marshal Farish loosed some, and a man standing by pulled the knife from Judge Terry's hand. The knife, including the handle, is  $9\frac{1}{2}$  inches long, the blade being five inches long, having a sharp point, and is what is commonly called a 'bowie-knife.' Immediately after this was done Marshal Franks came out from his inner office, where he had placed Mrs. Terry, and said, 'Has he got a knife?' Deputy Farish replied, 'He did have one, but it has been taken away from him.' Then the marshal allowed Judge Terry to go in and join his wife in the marshal's inner office, and he was there detained. I went back into the court-room, and remained during the reading of the opinion. The reading was finished about half past 12 o'clock. Terry's conduct throughout this affair was most violent. He acted like a demon; and all the time while in the corridor, and before the counter of the marshal's office, he used loud and violent language, which could be plainly heard in the court-room, and, in fact, throughout the building. Mrs. Terry resisted with all her power the efforts of the marshal in taking her from the court-room, and he was compelled to remove her forcibly. While being removed she screamed and shouted her abuse of the judges, saying they had been bought, and so forth; and also abused Marshal Franks, calling him a hireling, paid to do his dirty work, and words to that effect.

HENRY FINNEGASS.

"Subscribed and sworn to before me, this 13th day of September, A. D. 1888. F. D. MONCKTON,

"Commissioner United States Circuit Court, Northern District of California."

Deputy-Marshal Farish, in his affidavit, says:

"After Mr. Franks had gone out with Mrs. Terry, we released our hold of him, and he rushed out of the court-room. I followed close after him, and in passing through the passage-way leading from the court-room into the corridor of the court building, I noticed he had a bowie-knife in his hand. I grappled with him, and caught his hand; Detective Finnegan seizing him at the same time. He struggled, and tried to get his hands free, swearing and threatening all the time. We struggled together till we got to the outer door leading into the marshal's rooms, when Judge Terry, getting his knife into his left hand, which was disengaged, (I and others having hold of his right,) raised it above our heads, and with some expression I could not exactly understand said, in effect, 'I will cut you in pieces.' I jumped back, and as he turned to go in

the office, I cried out to shut the door, at the same time catching his arm, and with the assistance of Mr. Finnegass and another party, a stranger to me, we took the knife from him just as he was attempting to go in the inner door."

And again:

"Although I noticed Judge Terry closely during this affair, I did not observe any act or word on his part to restrain Mrs. Terry, after the order was made to remove Mrs. Terry, in what she was doing, or to have her go from the court-room; on the contrary, Judge Terry resisted the marshal, as I have stated. The marshal, so far as I could see, treated Mrs. Terry in every manner and respect politely and courteously."

Deputy-Marshall Harris, in his affidavit, says:

"I was closely observing Judge Terry and his wife when she interrupted Judge FIELD; saw Mrs. Terry say something to Judge Terry, to which he nodded, as if assenting to what she had said. Immediately after this Mrs. Terry rose to her feet, and commenced talking, as I have above stated. Judge Terry did not attempt in any way to stop Mrs. Terry, or prevent her from doing what she did, as I have above stated."

Deputy-Marshall Presbury, in his affidavit, says:

"Judge Terry, having been released from the grasp of those who held him, proceeded toward the door, feeling apparently for something within his waistcoat. I stepped to his side, and saw that he was drawing from his bosom a large knife, which he fairly exposed just inside of the court-room door. On emerging from the door he held the knife above his head, saying, 'I am going to my wife.' I walked beside him until he reached the outside door of the marshal's office, where his further progress was prevented by Chief Deputy Farish and two or more of the marshal's deputies, together with Detective Finnegass and others. After a struggle the knife was taken from him, and he was permitted to join his wife in the marshal's room. He remained there until an order was received from the court committing him and his wife to jail, whereupon they were taken from the building by the marshal and his deputies."

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge.

*S. Heydenfeldt, Esq.*, presented the petition to the circuit justice.

*John A. Stanley, Esq.*, submitted the following authorities from the supreme court of North Carolina on the point that a disavowal on oath of any intended disrespect to the court purges the contempt and entitles the offending party to be discharged: *In re Moore*, 63 N. C. 408; *Ex parte Biggs*, 64 N. C. 217, 218; *In re Walker*, 82 N. C. 98, 99.

FIELD, Circuit Justice. We have received a petition from David S. Terry, praying that the order of this court committing him to prison for contempt may be revoked. To pass intelligibly upon the petition a brief statement of the circumstances under which the order was made will be necessary. On the 3d of September, instant, the cases of Frederick W. Sharon, as executor, against David S. Terry and Sarah Althea Terry, his wife, and of Francis G. Newlands, as trustee, and others against the same parties, were before this court on demurrers to bills to revive and carry into execution the final decree in the suit of William Sharon *v.* Sarah Althea Hill, and were decided on that day. Shortly before the court

opened the defendants came into the court-room, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the judges; the defendant David S. Terry being at the time armed with a bowie-knife concealed on his person, and the defendant Sarah Althea, his wife, carrying in her hand a small satchel, which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the justice of the supreme court of the United States assigned to this circuit, who was presiding; the United States circuit judge of this circuit; and the United States district judge of the district of Nevada, called to this district to assist in holding the circuit court. Almost immediately after the opening of the court the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it, when the defendant Sarah Althea Terry arose from her seat, and asked him, in an excited manner, whether he was going to order her to give up the marriage contract, to be canceled. The presiding justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out in a violent manner that the justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it,—or words to that effect. It is impossible to give her exact language. The judges and parties present differ as to the precise words used, but all concur as to their being of an exceedingly vituperative and insulting character. The presiding justice then directed the marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The marshal thereupon proceeded towards her to carry out the order for her removal, and compel her to leave, when the defendant David S. Terry rose from his seat, evidently under great excitement, exclaiming, among other things, that, "No living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat, and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court-room. Soon afterwards Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor, on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it, (and it is immaterial which,) he succeeded in drawing his knife, when his arms were seized by a deputy-marshal and others present, to prevent him from using it, and they were able to wrench it from him only after a violent struggle. The affidavits of officers of the court and others present, filed herewith, detail the facts. For their conduct and resistance to the execution of the order of the court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt, and ordered to be imprisoned; the former for thirty days, and the latter for six months. The commitment of Terry recited the contemptuous conduct of Sarah Althea, and the order of the court directing

the marshal to remove her from the court-room, and that, while the marshal was attempting to execute the order, the said David S. Terry assaulted him in the presence of the court, and beat him; and also that said Terry wrongfully and unlawfully assaulted the marshal with a deadly weapon, with intent to obstruct the administration of justice. There were two matters recited for which Terry was adjudged guilty of contempt: *First*, resisting the marshal in the execution of the order, and beating him; and, *second*, unlawfully assaulting the marshal with a deadly weapon.

Section 725 of the Revised Statutes defines the powers of the courts of the United States in matters of contempt. It declares that "the said courts shall have power \* \* \* to punish by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of said court in their official transactions; and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." As thus seen, contempts embrace three classes of acts: *First*, the misbehavior of any person in the presence of the courts, or so near thereto as to obstruct the administration of justice; *second*, the misbehavior of any of the officers of the court in their official transactions; and, *third*, the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. The misbehavior of the defendant David S. Terry, in the presence of the court, in the court-room, and in the corridor, which was near thereto, and in one of which (and it matters not which) he drew his bowie-knife, and brandished it, with threats against the deputy of the marshal and others aiding him, is sufficient of itself to justify the punishment imposed. But, great as this offense was, the forcible resistance offered to the marshal in his attempt to execute the order of the court, and beating him, was a far greater and more serious affair. This resistance and beating of its officer was the highest possible indignity to the government. When the flag of the country is fired upon and insulted, it is not the injury to the bunting, the linen, or silk on which the stars and stripes are stamped which startles and arouses the country. It is the indignity and insult to the emblem of the nation's majesty which stirs every heart, and makes every patriot eager to resent them. So the forcible resistance to an officer of the United States in the execution of the process, orders, and judgments of their courts is in like manner an indignity and insult to the power and authority of the government, which can neither be overlooked nor extenuated.

The defendant, David S. Terry, now prays the court to revoke the order committing him. In his petition he sets forth that in the transactions in the circuit court on the 3d instant, upon which his commitment was made, he did not intend to say or do anything disrespectful

to the court or to the judges thereof, or to any one of them. He alleges that when his wife first arose from her seat, and before she had uttered a word, he used every effort in his power to cause her to resume her seat, and to remain quiet, and that he did nothing to encourage her in what he terms "her acts of indiscretion." That when the order for her removal from the court-room was made, he rose from his seat for the purpose of removing her himself, quietly and peaceably, and had no intention of disturbing or preventing the execution of the order of the court. That he never struck, or offered to strike, the marshal until the marshal had assaulted him, and had, in his presence, violently, and, as he believed, unnecessarily, assaulted his wife. That he neither drew, nor attempted to draw, any deadly weapon of any kind in the court-room; and that he did not assault, or attempt to assault, the United States marshal with any deadly weapon, in the court-room or elsewhere. He represents that after he had left the court-room he heard loud talking in one of the rooms of the marshal, and among the voices proceeding therefrom he recognized that of his wife; that he then attempted to force his way into that room, and, finding it barred by a crowd of men, so that the door could not be closed, he, for the first time, drew from inside his vest a small sheath-knife, at the same time saying to the crowd standing in his way, that he did not want to hurt any one, but that all he wanted was to get into the room where his wife was; that the crowd then parted, and he entered the doorway, where some one said, "Let him in, if he will give up his knife;" and he then immediately gave up his knife. The petitioner further alleges that in none of these transactions did he have the slightest idea of showing any disrespect to the court or to any of its judges, and that the fact that he lost his temper was a natural consequence of his being himself assaulted, when he was making an honest effort to enforce the order of the court, and of his seeing his wife assaulted in his presence. Upon this statement he asks the revocation of the order committing him to prison.

We have read this petition with great surprise at its omissions and misstatements. As to what occurred under our immediate observation, its statement does not accord with the facts as we saw them; as to what occurred at the further end of the room, and in the corridor, its statement is directly opposed to the concurring accounts of the officers of the court and parties present, whose position was such as to preclude error in their observations. According to the sworn statement of the marshal, which accords with our own observation, so far from having struck or assaulted Terry, he had not even laid his hands upon him when the violent blow in the face was received. And it is clear beyond controversy that Terry never voluntarily surrendered his bowie-knife, and that it was wrenched from him only after a violent struggle. We can only account for his misstatement of facts as they were seen by numerous witnesses, by supposing that he was in such a rage at the time that he lost command of himself, and does not well remember what he then did, or what he then said. Some judgment as to the weight this statement should receive, independently of the incontrovertible facts at variance with it,



may be formed from his speaking of the deadly bowie-knife he drew as a small sheath-knife, and of the shameless language and conduct of his wife as "her acts of indiscretion." No one can believe that he thrust his hand under his vest where his bowie-knife was carried without intending to draw it. To believe that he placed his right hand there for any other purpose—such as to rest it after the fatigue of his violent blow in the marshal's face, or to smooth down his ruffled linen—would be childish credulity. But even his own statement admits the assaulting of the marshal, who was endeavoring to enforce the order of the court, and his subsequently drawing a knife to force his way into the room where the marshal had removed his wife. Yet he offers no apology for his conduct, expresses no regret for what he did, and makes no reference to his violent and vituperative language against the judges and officers of the court while under arrest, which is detailed in the affidavits filed. There is nothing in his petition which would justify any remission of the imprisonment. The law imputes an intent to accomplish the natural result of one's acts, and, when those acts are of a criminal nature, it will not accept, against such implication, the denial of the transgressor. No one would be safe if a denial of a wrongful or criminal intent would suffice to release the violator of law from the punishment due to his offenses. Why did the petitioner come into court with a deadly weapon concealed on his person? He knew that as a citizen he was violating the law which forbids the carrying of concealed weapons, and as an officer of the court—and all attorneys are such officers—was committing an outrage upon professional propriety, and rendering himself liable to be disbarred. *Sharon v. Hill*, 11 Sawy 122, 24 Fed. Rep. 726. Therefore, considering the enormity of the offenses committed, and the position the petitioner once held in this state, which aggravates them to a degree not imputable to the generality of offenders, the court, with a proper regard to its own dignity, the majesty of this law, and the necessity of impressing upon all men that forcible resistance to the lawful orders of the courts of the United States will not go unpunished, however high the offending parties, cannot grant the prayer of the petitioner; and it is accordingly denied.

SAWYER and SABIN, JJ., concur.

## In re CHAE CHAN PING.

(Circuit Court, N. D. California. October 15, 1888.)

## 1. CHINESE—EXCLUSION ACT OF 1888—CONSTRUCTION.

The Chinese exclusion act, approved October 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act.

## 2. SAME—CONSTITUTIONAL LAW—EX POST FACTO LAW.

The Chinese exclusion act of October 1, 1888, is a valid act. It is not unconstitutional as being a law divesting rights fully vested under the several treaties between the United States and China, and the prior restriction acts of 1882 and 1884, to which it is supplemental, or as being an *ex post facto* law.

## 3. SAME—OBLIGATION OF CONTRACTS—CERTIFICATES UNDER ACT OF 1882.

Certificates issued under the restriction acts of 1882 and 1884 are not contracts between the United States and the Chinese laborers, to whom they are respectively issued. They are issued as evidence to identify parties entitled to privileges provided for in our treaties with China, and acts passed to give them effect.

## 4. SAME—TREATIES—ACTS OF CONGRESS—REPEAL.

With respect to matters proper for congressional legislation, treaties and acts of congress stand upon an equal footing as parts of the supreme law of the land, and a later inconsistent provision in either repeals the earlier in the other.

(Syllabus by the Court.)

Petition for Writ of *Habeas Corpus*.

The petitioner is a Chinese laborer, a subject of the empire of China. He resided in the state of California, and followed the occupation of laborer, at San Francisco, Cal., from 1875 until June 2, 1887. On the last-named day he departed from San Francisco for China, on the steamship Gaelic, having in his possession the certificate duly issued to him by the collector of customs of the port of San Francisco, in pursuance of the provisions of section 4 of the restriction act of 1882, as amended by the act of 1884. He sailed from Hong Kong, China, on his return to California, on the steamship Belgic, on September 7, 1888, and arrived at the port of San Francisco on October 7, 1888. On October 1, 1888, he was on the high seas, *en route* for California; and until his arrival at the port of San Francisco, at the date aforesaid, he had no notice, or means of knowledge, of the passage by congress of the exclusion act, which became a law on October 1, 1888. On his arrival at San Francisco, he presented to the customs officers his certificate so duly issued to him, as aforesaid, on his departure, under section 4 of the restriction act, as amended in 1884, and demanded permission to land. The collector refused to permit him to land, solely on the ground that, under the act of congress approved October 1, 1888, supplemental to the restriction acts of 1882 and 1884, the certificate was annulled and made void, and his right to land abrogated, and that the petitioner was thereby forbidden to again enter the United States. Upon these facts appearing in the petition the writ of *habeas corpus* was issued, and the petitioner produced in obedience to its commands.

*T. D. Riordan, Lyman I. Mowrey, and A. H. Ricketts, for petitioner.*

*J. T. Carey, U. S. Atty., contra.*

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

SAWYER, J., (*after stating the facts as above.*) The first question arising on the facts stated, is, is the petitioner embraced within the provisions of the act of congress approved October 1, 1888, forbidding the coming of Chinese laborers into the United States? Upon this point, it seems to us, there can be no doubt. The language of section 1 of the act, so far as it affects the petitioner, is, "that, from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been \* \* \* a resident within the United States, and who shall have departed \* \* \* therefrom, and shall not have returned before the passage of this act, \* \* \* to return to \* \* \* the United States." And of section 2, "that no certificate of identification provided for in the fourth and fifth sections of the acts to which this is supplemental shall hereafter be issued, and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer, claiming admission by virtue thereof, shall not be permitted to enter the United States." This language is clear and exact, and is susceptible of but one construction. The act, in express and unmistakable terms, fixes the date from which it shall begin to operate, and that date is "from and after the passage of this act; that is to say, October 1, 1888, when it became a law. In equally clear and explicit terms it provides upon whom it shall operate, and that is "any Chinese laborer, who shall at any time heretofore have been \* \* \* a resident within the United States, and shall have departed, \* \* \* and shall not have returned before the passage of this act,"—not every Chinese laborer who shall have departed and not yet have started on his return, but every Chinese laborer who shall have departed, and shall not in fact "have returned before the passage of this act." There is no possible ground under this specific language of inferring an exception in favor of those who were on the high seas at the date of the passage of the act. The act, by express provision, operates upon all within its terms from the moment it was approved by the president and became a law. Now, the petitioner had been a resident within the United States, and he had departed therefrom with his certificate duly issued in pursuance of section 4 of the prior restriction act, as amended, and he had not returned "before the passage of this act." He did not in fact return till several days after its passage. There cannot be any doubt that the act operates upon him, and, this being so, under section 1 it is unlawful for him to return to the United States, and by section 2 his certificate is declared to be "void, and of no effect," and it is provided that he "shall not be permitted to enter the United States." To admit him, therefore, would be to directly violate the unmistakable provisions of the statute. But it is said, it would be a great hardship, and a violation of the faith of the nation to, now, shut out those who were already on the way, relying upon the treaties and law as they were when they left China upon

their return voyage without any means of notice of the change until their arrival. Be it so. That is no concern of the courts, acting judicially, except so far as it bears upon the construction of an ambiguous statute. The responsibility of this hardship is not upon the courts. They do not and cannot make the law. That was a consideration to be addressed to congress and the president. It is the duty of the courts to administer, and enforce the law as they find it. Hardship affords no justification, or authority, for the courts to take out of the provisions of the statute by forced construction, matters that congress clearly, and, unmistakably, intended should not be excepted. That congress intended no such exceptions is not only apparent from the clear and unambiguous language used, but from its own action during the course of the passage of the bill through congress, and by the subsequent action of both the executive and congress. One of the grounds of a motion to reconsider in the senate before final action on the bill, was, that, there might be an opportunity to provide an exception of this very class of cases, but that body refused to reconsider for that purpose. So the president, in his message accompanying his approval, noticed the comprehensive terms of the act, and suggested the immediate passage of another act, or joint resolution making this very exception; but congress declined to act upon the suggestion. It is evident, therefore, both from the language of the act, and the action of the president and congress, that no such exception was intended. It would be a gross assumption of authority for the court to now ingraft the exception, so repudiated, upon the act.

It is next urged with great zeal by petitioner's counsel that if the petitioner is within the scope of the act, then the act is unconstitutional, and void—*First*, as divesting a right indefeasibly vested under the treaties and laws passed in pursuance thereof; *secondly*, as being an *ex post facto* law within the clause of the constitution providing that congress shall have no power to pass *ex post facto* laws. The certificate, it is urged, is a contract entered into between the United States and the petitioner in pursuance of the restriction act, which vests him with a right that cannot now be divested under the general principles of public justice, even though the constitutional provision against passing laws impairing the obligation of contracts is in terms only restrictive upon the states. We think this is not the correct view. There is no contract between the United States and individual Chinese laborers at all. The Chinese laborers obtain no rights under the acts of congress beyond what is secured to them by the treaties. There is no consideration moving from them, individually or collectively, under the act of congress, upon which a contract was founded. All the rights they have are derivative, merely, resting upon the stipulations of the treaty between the two governments, which are the contracting, and only contracting parties. Instead of enlarging their rights, the acts of congress are restrictive in character, and the restrictions were adopted in pursuance of the agreement allowing such restriction in the last treaty. The certificates are mere instruments of evidence, issued to afford convenient proof of the identity of the party entitled to enjoy the privileges secured by the treaties, and to

prevent frauds, and they are so designated in the last act. The act, in fact, restricted the evidence upon which their rights and privileges could be established. Before the passage of the restriction acts Chinese laborers could be admitted on any evidence competent under the ordinary rules of evidence; now, by the act of 1884, they are limited to the particular certificate prescribed. It was not a contract in any proper sense, but only an instrument of evidence to establish the identity of the party already entitled to certain privileges under the compact, not between them and the United States, but between the two contracting governments. There was no mutual consideration, or discussion of the terms of a contract between the United States and Chinese laborers, who were affected by the restriction acts. There was no meeting of two minds on the terms of an agreement. The Chinese laborers were not consulted at all in the matter. The restriction acts, and certificates provided for therein, are, simply, sovereign commands and prohibitions, to which the Chinese laborers affected were compelled to submit, willing or unwilling. To call these acts and certificates provided in pursuance thereof a contract would be an abuse of language. As between the two governments treaties are laws, and they confer rights and privileges as long as they are in force, and, doubtless. Some rights accrue and become indefeasibly vested by covenants or stipulations that have ceased to be executory and have become fully executed, as in the case of title to property acquired thereunder. But we do not regard the privilege of going and coming from one country to another as of this class of rights. The being here with a right of remaining is one thing, but voluntarily going away with a right at the time to return is quite another. The right of congress to legislate in such manner as to control and repeal stipulations of treaties granting this latter class of rights was clearly recognized in *Ah Lung's Case*, 9 Sawy 308, 18 Fed. Rep. 28, decided by Mr. Justice FIELD, and concurred in by myself. Says the court:

"A treaty is in its nature a contract between two nations, and by writers on law is generally so treated, and not as having of itself the force of a legislative act. The constitution of the United States, however, places both treaties and laws made in pursuance thereof in the same category, and declares them to be the supreme law of the land. It does not give to either a paramount authority over the other. So far as a treaty operates by its own force, without legislation, it is to be regarded by the courts as equivalent to the legislative act, but nothing further. If the subject to which it relates be one upon which congress can also act, that body may modify its provisions, or supersede them entirely. The immigration of foreigners to the United States, and the conditions upon which they shall be permitted to remain are appropriate subjects of legislation, as well as of treaty stipulation. No treaty can deprive congress of its power in that respect. As said by Mr. Justice CURTIS, in the case of *Taylor v. Morton*. 'Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and nobody other than congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects which the constitution has placed under that legislative power.' 2 Curt. 459. An act of congress then, upon

a subject within its legislative power, is as binding upon the courts as the treaty on the same subject. Both are binding except as the later one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects require. The courts cannot heed such complaint, nor refuse to give effect to a law of congress, however much it may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our legislation so as to be the proper occasion of complaint by the foreign government is not a judicial question. To the courts it is simply a case of conflicting laws, the last modifying or superseding the earlier."

This same principle was stated by me again, in *Ah Ping's Case*, 11 Sawy. 20, 21, 23 Fed. Rep. 329. In the *Head Money Cases*, 112 U. S. 598, 5 Sup. Ct. Rep. 247, the supreme court cites the case of *Ah Lung*, *supra*, upon the point stated in the passage quoted, and approves the doctrine stated, adding:

"It is very difficult to understand how any different doctrine can be sustained. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If this fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of congress, by its declaration that, 'this constitution, and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government, by which the treaty is made, which gives it this superior sanctity. \* \* \* In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification or repeal."

This doctrine was again repeated at the last term of the supreme court, with emphasis, in *Whitney v. Robertson*, 124 U. S. 193, 195, 8 Sup. Ct. Rep. 456. The court closes the decision with these conclusions:

"It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed in the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will."

The *Cherokee Tobacco Case*, 11 Wall. 616, and *U. S. v. McBratney*, 104 U. S. 621, 622, establish the same doctrine. See, also, *U. S. v. Benzon*, 2 Cliff. 513, upon the question of vested rights. We are satisfied that, under the doctrine established by the cases cited, the act in question is valid in the respect stated in the first branch of the point under discussion.

In support of the proposition, that the act is an *ex post facto* law, and, therefore, unconstitutional, counsel for petitioner rely upon the cases of *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, Id. 333. We were familiar with those cases, but we have examined them carefully, and are of opinion that they do not touch this case. We do not find any element of an *ex post facto* law in the act now in question. There is nothing in the nature of an offense in a Chinaman's departing from the country, and his departure is not made an offense; and there is nothing in the nature of punishment or of a penalty imposed for the act of having departed from this country, in providing, in the interest of the people of the United States, under a change of public policy, that he shall not return. There is simply a repeal by congress of a prior law found in the stipulations of the treaty with China.

We have, heretofore, found it our duty, however unpleasant, at times, to maintain, fearlessly, and steadily, the rights of Chinese laborers under our treaties with China, and the acts of congress passed to carry them out. That we have been right in law, is established by the fact that our decisions have been affirmed by the supreme court of the United States on every point of law and construction of the act that has been raised, or discussed before us in the courts and taken to that tribunal for its consideration. *That we have been right in fact, as well as in law*, in the view we entertained of the intention of congress, as expressed in the several restriction acts, is abundantly evidenced by the fact that at every session since our construction of the acts passed was made public in *Ah Quan's Case*, 10 Sawy 223, 21 Fed. Rep. 182, more than four years ago, congress has persistently refused to pass any law which conflicted with the stipulations of our treaties with China until the act now under consideration was hastily passed, after the government had failed to secure the desired objects by further treaty stipulations without a violation of those already existing. As we faithfully enforced the laws, as we found them, when they were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them in all their parts, now that they are unfavorable to them. In view of what has heretofore occurred with reference to the administration of our treaties and laws upon the subject under consideration, we deem it proper to express the hope, that, so long as we sit upon the judgment seat, we shall be endowed with sufficient courage and firmness to administer honestly, and faithfully, according

to its true import, any valid law that congress may, in its wisdom, see fit to enact upon this, or any other, subject. That is what the judicial department of this government is established for, and when it ceases to perform its whole duty fearlessly and persistently by reason of popular clamor, or other improper outside influences, it will have ceased to perform its proper functions, and failed to answer the purposes of its creation. It is not the function of the courts to abrogate an unsatisfactory law by arbitrarily refusing to enforce it. The only proper mode of getting rid of such a law, is, for congress to repeal or modify it. We entertain no doubt that the act in question is valid, and that the petitioner is expressly forbidden by its terms to enter the United States, and that it would be unlawful for him to do so. The result is that he is not unlawfully restrained of his liberty, and that he must be remanded; and it is so ordered.

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*In re YUNG SING HEE.*

(Circuit Court, D. Oregon. October 10, 1888.)

**1. CHINESE—CHILDREN BORN IN UNITED STATES—CITIZENSHIP.**

A person born in the United States of Chinese parents is, by the rule of the common law, and by force of the fourteenth amendment, a citizen of the United States, and, when restrained of his or her liberty of locomotion therein, may be delivered therefrom, on *habeas corpus*, by the proper national court. *Ex parte Chin King*, 35 Fed. Rep. 354, affirmed.

**2. SAME—EXCLUSION ACTS—CONSTRUCTION.**

Neither of the exclusion acts of 1882, 1884, or 1888 purport to exclude from the United States the descendants of Chinese, born within the jurisdiction thereof.

**3. CONSTITUTIONAL LAW—BILLS OF ATTAINDER—BANISHMENT.**

A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution, and therefore void.

(*Syllabus by the Court.*)

Petition for Writ of *Habeas Corpus*.

Paul R. Deady, for petitioner.

Lewis L. McArthur, for the United States.

DEADY, J. The writ was allowed in this case on October 8, 1888, and the hearing took place on the 10th of the same month.

The petition of Yung Sing Hee states that she was born in San Francisco on January 15, 1866, and is a citizen of the United States; that she is restrained of her liberty by John R. Hill, the master of the steamship Danube, on which she took passage from Vancouver, B. C., for Portland, Or., on October 6, 1888; that the collector of customs of this



port refuses to allow her to be landed from said vessel on the ground that she is a Chinese woman, without a return certificate, and that, under the recent exclusion act, her landing is prohibited under any circumstances.

The return of the master to the writ admits the fact stated in the petition as to the custody of the petitioner.

On the hearing the United States district attorney intervened on behalf of the United States, and contested the allegation that the petitioner is a citizen of the same, and entitled to land therein. On the hearing it was satisfactorily shown that Yong Soy Yat is a Chinese merchant of this city, where he has resided seven or eight years, as a member of the firm of Tay Chung Lung. That for the 19 years prior to coming here he lived in San Francisco, where he kept a store, and about 1863 was married to Ka Ho, a Chinese woman, at 729 Sacramento street, by whom he had two children, a boy and a girl; the former being born in 1864, and the latter in 1865. That about eight years ago the mother and the two children went to China on the steamer Oceanic, where the former died not long since, and the boy remains with his parental grandfather, at school.

The petitioner is this girl. She came from China on the Canadian Pacific steam-ship to Victoria, a short time since, and from there here on the Danube, as stated in the petition.

The testimony on which these facts are found, although given by Chinese persons, is consistent, reasonable, and convincing. It is probably much more entitled to credit than that on which hundreds of Europeans are every day admitted to become citizens of the United States.

The father was directly corroborated in the main by the testimony of two Chinese merchants of this city, who lived near him, and knew him and his family, in San Francisco, from about the time of his marriage until the departure of the latter for China; and a rigid cross-examination failed to impair in the least the probability of their statements, or to cast a shadow of suspicion on their honesty.

On this state of facts, both by the common law and the fourteenth amendment, the petitioner is an American citizen, and is entitled to come and go within the United States as any other such citizen. She was born within or subject to the jurisdiction of the United States, and is therefore a citizen thereof. See *Ex parte Chin King*, 35 Fed. Rep. 354, (lately decided in this court;) *In re Look Tin Sing*, 10 Sawy. 353, 21 Fed. Rep. 905.

This being so, she is not within the purview of any of the restriction acts, which do not apply to American citizens of Chinese descent, any more than to those of European descent.

The act of 1882 (22 St. 58) relates exclusively to "Chinese laborers," whether "skilled or unskilled;" and so does the act of 1884 (23 St. 118.) Section 15 of the latter act declares that it "shall apply to all subjects of China, and Chinese, whether subjects of China or any other foreign power." This clause was doubtless inserted to bring the Chinese residents of the British colony Hong Kong within the purview of the act;

but it also, by a necessary implication, limits its operation to Chinese who are subjects of China or some foreign power, not including such as are citizens of the United States.

The recent act of October 1, 1888, purports to be a supplement to that of 1882, and is confined in terms to "Chinese laborers." As to them, it changes the law so as to prevent, if literally construed, the return of a Chinese laborer to the United States under any circumstances; not even when he left the country on the faith of a treaty with this government, and its certificate, giving him the right to return, and is within the sight of the American shore, on his way back, when the act takes effect.

So harsh and unjust a measure as this concerning the intercourse between friendly nations maintaining diplomatic relations is something unprecedented in this age of the world, and can only be accounted for by the fact that a presidential election is pending, in which each political party is trying to outbid the other for the "sand lot" vote of the Pacific coast, and particularly for that of San Francisco.

Neither is the petitioner a laborer. Indeed, I suppose no Chinese woman is a "laborer" within the meaning of the statute. This one, at least, does not belong to that class. She is the daughter of a merchant, and the testimony is that she does not work at anything but sewing, and not at that for a living, but only for her own purposes. But still, were she not a citizen of the United States, and although she is not a "laborer," she would not be entitled to land, except on the certificate of her own government as to her identity and occupation or profession. 23 St. 116.

However, if the exclusion act is intended to apply to citizens of the United States of Chinese descent, it is so far beyond the power of congress to enact, and therefore unconstitutional and void. The constitution declares, (article 1, § 9,) "No bill of attainder or *ex post facto* law shall be passed."

A bill of attainder is a special act of the legislature, which inflicts punishment without a judicial trial. If the punishment is less than death, the act is called a "bill of pains and penalties." *Cummings v. Missouri*, 4 Wall 332. The phrase "bill of attainder," as used in the constitution, includes bills of pains and penalties. *Fletcher v. Peck*, 6 Cranch, 138.

Banishment or exile is a recognized mode of punishment. Rap. & L. Law Dict. "Banishment." The bill against the Earl of Clarendon, passed in the reign of Charles II., enacted that the earl should suffer perpetual exile, and be forever banished from the realm. Hume's History of England.

A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the constitution of the United States, prohibiting the passage of such bills, and is therefore void.

"Bills of this sort," says Mr. Justice Story, "have been most usually passed in England in times of rebellion or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Comm. § 1344.

"In these cases," says Mr. Justice FIELD, "the legislative body, in addition to its legitimate functions, exercises the powers and office of a judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." *Cummings v. Missouri*, 4 Wall. 323.

The petitioner is entitled to her discharge, and it is so ordered.

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*In re TONG WAH SICK et al.*

(Circuit Court, N. D. California. October 17, 1888.)

CHINESE—EXCLUSION ACT OF 1888—DEPARTURE FROM UNITED STATES.

Chinese subjects purchasing through tickets, and embarking in an American vessel, from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of the Chinese exclusion act of congress of October 1, 1888.

Petition for Writ of *Habeas Corpus*.

*T. D. Riordan*, for petitioners.

*John T. Carey*, U. S. Atty., *contra*.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

SAWYER, J. The three petitioners being Chinese subjects, residents of Washington Territory, embarked on the American steam-ship *Umattilla*, for San Francisco, Cal., since October 1, 1888, having purchased a through ticket. The steam-ship, with leave to do so, touched at Victoria, B. C. but the petitioners did not go ashore, or leave the ship. On her arrival at San Francisco, the collector of the port refused to permit the petitioners to land, on the ground that they had departed from the United States since the passage of the late exclusion act, the ship having stopped at a foreign port, and that the late act forbade their return. We are satisfied that there was no departure from the United States, within the meaning of the act. They left one American port for another, upon a through passage upon an American vessel, without any intention of landing in any foreign country. They were all the time within the jurisdiction of the United States, and, constructively, in the territory of the United States. An analogous question was decided by

Mr. Justice FIELD, with the concurrence of the circuit judge, in the case of *Ah Sing*, the Chinese cabin waiter, in 7 Sawy. 537, 13 Fed. Rep. 286, and the case of *Ah Tie et al.*, the Chinese laborers, 7 Sawy. 542, 13 Fed. Rep. 291. This is a stronger case in favor of petitioners. The petitioners are, therefore, unlawfully restrained of their liberty, and must be discharged, and it is so ordered.

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*In re JACK SEN et al.*

(Circuit Court, N. D. California. October 24, 1888.)

**CHINESE—EXCLUSION ACT OF 1888—CHINESE SEAMEN.**

A Chinese laborer, who ships on an American vessel, at an American port, for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States within the meaning of the exclusion act of October 1, 1888.

**Petition for Writ of *Habeas Corpus*.**

*T. D. Riordan*, for petitioners.

*J. T. Carey*, U. S. Atty., *contra*.

Before SAWYER, Circuit Judge.

SAWYER, J. The petitioners are 10 Chinese laborers, subjects of the emperor of China. They were in the United States on November 17, 1880, and have been residents of the country ever since. On August 29, 1888, the petitioners, at the port of San Francisco, shipped on board the steamship *Colima*, as part of the crew, for a voyage from said port to the port of Panama, in the state of New Granada, and return to San Francisco, the shipment being for the round voyage, and San Francisco the port of their discharge. The steamship *Colima* is an American vessel, sailing under the American flag, regularly engaged in the transportation of passengers and merchandise between the said ports of San Francisco and Panama. The said vessel sailed from the port of San Francisco for Panama and return on August 30, 1888, having said petitioners on board, as a part of her crew for the round voyage. She arrived at Panama on September 22, 1888, and sailed from Panama on October 1, 1888, on her return voyage to San Francisco, where she arrived on October 21, 1888, with said petitioners on board, as a part of her crew, the said petitioners having remained on said ship, and not landed therefrom in any foreign land from the time the ship left San Francisco till her return to said port. On their return to San Francisco, the collector of the port refused to permit them to land, on the ground that they had departed from the country, and under the exclusion act passed October 1, 1888, it had become unlawful for them to return to the United States. This writ of *habeas corpus* was thereupon issued upon their petition, to determine their rights under the act mentioned.

The only question is, had the petitioners departed from the United States within the meaning of that act? This is not a new question in this court. In *The Case of the Chinese Cabin Waiter, Ah Sing*, who went to Australia on the City of Sydney, touching at various foreign ports, without the certificate required to be obtained by every Chinese laborer, who "shall depart from the United States," Mr. Justice FIELD, after an elaborate discussion of the question, with the concurrence of the circuit judge, held that the petitioner was not within the provision of the act requiring a certificate, as he was all the while upon an American vessel, upon which he shipped in the United States for the round voyage to Australia and return to an American port, where he was to be discharged. *Case of Chinese Cabin Waiter*, 7 Sawy. 536, 13 Fed. Rep. 286. And in *The Case of the Chinese Laborers, Ah Tie and others*, who shipped on the same steam-ship at San Francisco for a voyage to Australia and return, where the petitioners went on shore temporarily, in Australia, with the permission of the captain, the same judges held, after mature consideration, that, going upon shore, not with an intent to remain ashore, under the circumstances of the case, with the permission of the captain, did not bring them within the provisions of the act. *Case of Chinese Laborers*, 7 Sawy. 542, 13 Fed. Rep. 291. I can add nothing to the reasoning of Mr. Justice FIELD in those cases. The point is substantially the same as in this case. The petitioners in the cases cited had not departed from the United States, within the meaning of the act requiring all "departing" Chinese to obtain the specified certificate, as the only evidence of a right to return. So, in this case, the petitioners have been within the jurisdiction of the United States during their entire voyage, being on an American vessel, and, in contemplation of law, all the time within American territory, without any intention of departing therefrom. There was no departure from the United States within the meaning of the act of October 1, 1888. They are unlawfully restrained of their liberty, and must be discharged; and it is so ordered.

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#### THE T. F. OAKES.

RAFFERTY *et al.* v. THE T. F. OAKES, (REED, Claimant.)

(Circuit Court, D. Oregon. October 18, 1888.)

#### 1. SEAMEN—DISCHARGE—BY CONSULAR OFFICER.

A consular officer of the United States may discharge a seaman, on the application of the master, for any cause sanctioned by the usages and principles of maritime law, as recognized in the United States, on the payment of the wages then earned; and all claim for wages for the remainder of the voyage is thereby cut off and barred.

#### 2. SAME—SHIRKING DUTY—INSOLENCE.

A premeditated and persistent shirking and slighting of duty, or a deliberate and continued attitude of insolence and defiance by a seaman, is a sufficient cause for discharge, particularly when it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty.

## 3. SAME—EVIDENCE—CONSULAR CERTIFICATE.

A consular certificate of the discharge of a seaman on the application of the master is only *prima facie* evidence of the material facts stated therein; and in a suit for wages for the unperformed part of the voyage by the discharged seaman, it may be shown that such discharge was illegal, or without sufficient cause.

(*Syllabus by the Court.*)

In Admiralty. Libel for wages.

John H. Woodward, for libelants.

Edward N. Deady, for claimant.

DEADY, J. This suit is brought by the libelants, John Rastery and Jorgen Olsen, against the ship T. F. Oakes, to recover the sum of \$150.65 each, alleged to be due them as wages for services, as seamen thereon.

It is alleged in the libel that on May 25, 1888, the libelants shipped on the Oakes, then lying at the port of San Francisco, for a voyage from there to Nanaimo, B. C., thence to Acapulco, and thence to a port of discharge on the west coast of the United States, the voyage not to exceed six months; that on said day the libelants agreed with the master of the Oakes, Edward W. Reed, to serve as able-bodied seamen on said voyage at the wages of \$40 a month, and signed articles to that effect; that the libelants performed their agreement, as seamen on board said vessel, until it arrived at Acapulco, when and where the master put the libelants ashore, without just cause, and without the payment of their wages; that the Oakes arrived at Portland on September 17, 1888, when and where she completed her voyage, and is now lying; and that, the premises considered, the libelants are each entitled to recover the sum of \$150.65.

The answer of the master and claimant, E. W. Reed, admits the allegations of the libel, as to the voyage of the Oakes and the shipment of the libelants as seamen thereon, but denies that the libelants performed their agreement, or that they were discharged without just cause, or without the payment of wages, or that there is anything due either of them on account of the voyage.

It is also alleged in the answer that during all the voyage the libelants were insubordinate, and refused to obey the lawful commands of the officers of the vessel, and by persuasion and threats prevented the rest of the crew from doing their duty thereon; that on account of said insubordination and misconduct, the libelants were taken before R. W. Loughery, the United States consul at Acapulco, Mexico, where they were "discharged, and paid in full all wages due them," on "account of said insubordination and continued disobedience to the lawful commands of the officers of the vessel."

The shipping articles, in addition to the description and duration of the voyage, provide that the crew must "load and unload all cargoes if required,"—"bend and unbend sails, trim, coal, and dock the ship at her port of discharge, if required, or pay for the same being done;" and that "no dangerous weapons or grog allowed, and none to be brought on board by the crew," nor any "money advanced during the voyage."

The articles also contain the general stipulation in the form of the

agreement given in the table A of the schedule to the shipping act just following section 4612 of the Revised Statutes, to the effect that the "crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands" of their superior officers, "whether on board, in boats, or on shore."

Attached to the articles is a certificate, dated August 11, 1888, given under the hand and seal of the United States consul at Acapulco, Mexico, R. W. Loughery, to the effect that the libelants on July 26th were duly discharged at that port from the ship T. F. Oakes of New York, "according to law," "for insubordination;" the master, C. W. Reed, "having deposited in this consulate" the sum of \$82.66 as wages for each of them, and \$80 extra wages.

It also appears from the testimony of the libelants that they are members of what is called "the Coast Seamen's Union of the Pacific Coast." A letter was found by the mate in the forecabin of the vessel at this port, dated "August 9, 1888," and addressed as follows: "John Raftery, and crew of T. F. Oakes—Dear Comrades." It purports to be written by one "H. Furwell" on paper with the title of this "Union," and the words, "Headquarters, San Francisco, Cal., 613½ East street," printed at the head of the sheet. It reads as follows:

"Your letter from Acapulco has come to hand, has been read in here in the office a dozen times, and has caused much merriment. It was thought here that he (the master of the Oakes) would try to get rid of you, and evidently he is trying pretty hard, but the policy which you have followed will make that just about impossible. With reference to weighing out the provisions for each man, Hutton says there *are* no law on the point, and no decisions either, and that the point is a delicate one, and had better not be touched; but one man should be present to see provisions weighed. About keeping up on afternoon watches, he says that Hoffman held that when work was necessary the men will have to do it, and further, that the men are not competent to judge whether it be necessary or not; so you, inasmuch as it will be a judge and not a jury's decision you would have in any suit for wages, it would not be safe to try. You have your *medicen* though, first in the coals and then at anything which comes along. You know as long as you pretend to work, as long as you make an effort, no matter how small, he can do nothing; as long as you work he can do nothing. If only twenty-five tons of coal get out per day you are doing as much as you can, you know; and that settles it.

"In taking in sails you may be an hour to do what could be done in five minutes. You may be 4 hours hoisting a top-sail, and he can do nothing; if his sails blow away you cannot help it, and so forth. You know pretty well how to do that, anyhow."

Then follows a page or so on the state of the sailor market in San Francisco, and the prospect for the winter.

A certificate under the hand and seal of the same consul at Acapulco, on August 15, 1888, addressed "To whom it may concern," was offered in evidence. It is to the effect that the Oakes arrived at that port on July 21st, with a crew reported by the master "as disposed to resist discipline and refuse duty;" that the libelants "were supposed to be the ringleaders, and after two or three days were discharged and paid off, believing that when they were removed there would be peace; on the

contrary, the next day nearly all the men refused duty," naming them. The master "was compelled to hire men from shore to unload the coal, of which there were 3,000 tons on board. The obdurate seamen refusing duty were sent to prison by me, and were kept confined by the captain of the port until the ship was ready for sea."

The libelants admit that soon after the arrival of the vessel at Acapulco they were taken before the consul at that port, and there discharged by the master, with the consent of the consul, for insubordination, and that the consul afterwards procured a passage for them on the steamer to San Francisco, and tendered them the balance of the wages deposited with him, which they refused to take.

By the general maritime law a master is authorized to discharge a seaman at either a foreign or domestic port for continued disobedience or insubordination, and such discharge terminates the relation of such seaman to the vessel and his right to compensation for the unperformed part of the voyage. *Hutchinson v. Coombs*, 1 Ware, 70; 2 Pars. Shipp. & Adm. 80.

By section 4580 of the Revised Statutes, as amended by the act of June 26, 1884, a consul is authorized to discharge a seaman on the application of the master, or that of the seaman. The causes for which he may discharge on the application of the seaman are specified, but not in the case of the application by the master. In either case, before a discharge is made, the consul must require of the master payment of the wages then due the seaman; but as I read the statute, the payment of extra wages is not required where a seaman is discharged for misconduct. Nor should it be. There is no ground on which such a seaman is entitled to any such consideration.

By section 1752 of the Revised Statutes the president is authorized to prescribe regulations concerning the duties of consular officers. In the book of "Consular Regulations," approved February 3, 1888, it is stated (section 178) that a master cannot lawfully discharge a seaman in a foreign port without the intervention of a consular officer, and that one of the usual cases in which a seaman may be discharged is his "misconduct." It is also provided therein (section 181:) "When a seaman is discharged in a foreign port, it is the duty of the consular officer to attach a certificate thereof to the crew-list and shipping articles," for which a form is given on page 573.

It appears, then, that the discharge of the libelants at Acapulco was in due form; and the only question is, was it done on sufficient cause, and what is the effect of it?

The causes for which a seaman may be discharged on the master's application not being specified in the statute, must needs be, in the language thereof, such as are sanctioned by "the principles or usages of maritime law, as recognized in the United States."

In my judgment a premeditated and persistent shirking and slighting of duty, as well as a deliberate and continued attitude of insolence and defiance to his superiors, on the part of a seaman, is such a cause; particularly where it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty. Such conduct is, in



effect disobedience and insubordination in its most injurious and provoking form.

The certificate of the consul is not conclusive evidence in this suit on that point, but it is *prima facie* evidence that the libelants were duly discharged for insubordination. In the case of the steamer *Uncle Sam*, 1 McAll. 77, it was held that the certificate of the consul to the discharge of the seaman does not preclude the court from inquiring into the cause of the discharge. But the certificate is made by a public officer, in pursuance of a statute, and is therefore *prima facie* evidence of the pertinent or material facts contained therein, as against the libelants. 1 Whart. Ev. §§ 640-643; *The Nith*, ante, 86.

And first, as to the letter from the secretary or agent of the "Coast Seaman's Union," H. Furwell. There is no doubt in my mind of its genuineness. The internal evidence is very satisfactory; and it is equally clear that it was written in reply to one from the libelant Raftery, as spokesman for the crew, from Acapulco, detailing the progress of the voyage, including the contest with the master for the rule of the vessel. But it is quite certain that the libelants never saw the letter, as they left Acapulco for San Francisco at the date of it. Under the circumstances, it is fair to presume that it was delivered to some of the "crew," to whom it was addressed, as well as Raftery. However, it betrays the *animus* and ideas of the "Union," of which these libelants are members and co-workers, and plainly discloses the illegal and dishonest practices and conduct to which a crew of that kind might and would resort, for the purpose of having their own way "on board ship," and getting along with as little work as possible.

The letter is material as showing the probable character of Raftery's to the "Union," to which it is a reply, as well as the probable state of mind and sense of duty, or want of it, in which the libelants went on board the *Oakes*. They already knew, as the letter states, how to idle along and consume a day in discharging 25 tons of coal instead of 250, to be an hour taking in sails that could be done in five minutes, to be four hours hoisting a top-sail, or let the sails blow away.

The oral evidence consists of the testimony of the libelants on their own behalf and that of the mate, who was also discharged, with his consent, at the same time they were; and the testimony of the master and second mate, now mate, for the claimant.

The libelants are young men. Raftery is entered in the articles as of New York, aged 27 years, and says he has been two and a half years on this coast. Olsen is entered as of Norway, aged 22 years. He says he has been five years at sea and two on this coast. He is apparently candid and outspoken, and, while claiming that he did his duty, substantially admits several instances of gross misconduct. Raftery is sullen and taciturn, and denies most of the instances of misconduct alleged against him in the testimony of the master and second mate.

The first mate appears to be a pleasant, plausible man, about 55 years of age, with considerable experience at sea. On his examination in chief he stated unqualifiedly that the crew was a good one, and did their duty well, and that there was much complaint of the food on the ship.

But on cross-examination he was forced to admit that the trouble about the food was not during the voyage, but only at Nanaimo, while the vessel was loading with coal, and that the material was sufficient in quantity and quality, but it was not well cooked; and also that he had made an entry in his log charging Olsen with misconduct and insolence to the master in the strait of Fuca, and signed one to the same effect, and more in the official log of the ship. My impression is that he is more concerned to support the case of the libelants than to tell the whole truth.

The treatment of the crew by the master and his officers was kind and considerate. The ship was well provided, and the voyage does not appear to have been a hard one. No complaint of any specific ill usage or injury is made by or for any one.

Raftery was in the habit of putting himself forward as spokesman for the crew or any member of it whenever an opportunity offered. He once said to the second mate, apparently in justification of such impertinence, that a "union" crew always had a leader, and he was the leader of that crew.

On one occasion, when the yards were being braced, the second mate said to the men handling the braces or ropes, "Run!" Raftery, who was next to the block, said, "No, don't run!" and the men didn't run.

On another occasion he refused to help serve out water because it was not yet 6 o'clock, as it was contrary to the coast rule to "turn to" before that time.

On the first day out from San Francisco, Olsen produced a loaded revolver, and discharged three barrels over the forecandle head. The master ordered him to give up the pistol, which he refused to do, until the articles were shown him, prohibiting the bringing of any "dangerous weapon" on board. His conduct in this matter was lawless and defiant. Presumably, the articles were read to him by the shipping commissioner when he signed them, and he brought the weapon on board, knowing he had no right to do so, and afterwards willfully discharged it in the face of the crew, apparently as a matter of bravado.

On coming out of the strait of Fuca, on the voyage from Nanaimo to Acapulco, Olsen was at the wheel, and steered so as to let the tug come broad on the bow of the vessel. The master called his attention to it. He answered, "All right," but did not change his wheel, as the master thought he should, when the latter said, "Put your wheel over," to which Olsen replied in an offensive manner, "I can steer as well as you can." Thereupon the master called another man to the wheel, who impudently said to him, "Olsen is as good a seaman as there is on the ship." On this the master called the crew aft, and said "he expected proper respect from them," which they all promised except Olsen, who said if the master did not treat them well they would make it cost him \$100 a day when discharging cargo; that they could put out 50 tons or 500 a day, just as they liked.

A short way out from Acapulco, the vessel lost three sails in a squall at night, which the second mate thinks was largely attributable to the slowness and the indifference of the crew.

The *Oakes* arrived at Acapulco on July 21st, and commenced discharging her cargo of coals with the aid of steam-power, the tubs being filled in the hold by the crew. And here both Raftery and Olsen persistently shirked the labor at which they were set—of filling the tubs. Instead of filling a shovel with coal, and putting it directly in the tub, they would slowly get a half shovelful, and, lifting it up leisurely, turn around, and rest it on the edge of the tub while they looked about, and then dribble it into the tub. On one occasion the second mate, looking down the hatchway, and seeing Raftery “soldiering” with his shovel, asked him ironically and reproachfully, “Don’t you want a spoon?” to which the latter impudently replied, “I don’t care if I do.”

Finally, on July 26th, the libelants were taken by the master before the consul at Acapulco, and, after an examination of the parties by that officer, they were discharged from the ship for insubordination, and paid off; the amount of the wages for two months and two days and one month’s extra wages being paid to the consul for them, as the law and regulations require.

Afterwards, on August 9th, the consul furnished them a passage on the regular steamer to San Francisco, and I suppose paid their expenses while on shore, as the law also requires, and tendered them the balance of their wages, which they refused.

The certificate of the consul is *prima facie* evidence of the justice of the discharge. And although this court may in this suit go behind it, and, on a proper case, determine otherwise, yet the proof must be sufficient to overcome the *prima facie* case. The consul has the parties before him, face to face, while the matter is fresh in the minds of all parties, and the truth is most likely to come to the surface, and his action should not be lightly disregarded or set aside. I am satisfied that his action in the premises was just and proper.

I have taken more pains and time with this case than the intrinsic difficulty of it demands. My reason for so doing is that I am strongly impressed with the idea that the whole trouble grows out of the methods and purposes of the Seamen’s Union of San Francisco. It appears to be organized for the purpose of controlling the conduct and employment of seamen on this coast, to the end that ships shall be navigated in the interest and at the pleasure of the forecabin, without any reference to the rights or interests of owners.

Acting on this anarchical idea, these libelants undertook to administer to the master the prescribed “medicine” for his refusal to submit to their dictation, by loitering and trifling over their work in discharging cargo at the expense of the ship.

But the law will not tolerate such conduct. The contract of the libelants bound them to be diligent and obedient in the discharge of their duties. They willfully and persistently violated this contract, and were properly discharged and paid off, getting even one month more wages than they were entitled to.

The decree of the court will be that the libel be dismissed, and that the claimant recover his cost.

## UNITED STATES v. LEWIS.

*(District Court, D. Oregon. November 10, 1888.)***1. COURTS—FEDERAL DISTRICT—JURISDICTION—CRIMES—REV. ST. U. S. § 563, SUBD. 1.**

Subdivision 1, § 563, Rev. St., does not confer jurisdiction on the district courts of any crime not otherwise defined by some statute of the United States.

**2. SAME—COMMON-LAW CRIMES.**

The courts of the United States have no common-law jurisdiction in criminal cases.

**3. SAME—ASSAULT ON THE HIGH SEAS.**

An assault with a dangerous weapon on the high seas is not a crime against the United States unless committed on board an American vessel, as provided in section 5346, Rev. St.

*(Syllabus by the Court.)*

Information for assault with a dangerous weapon on the high seas.

*Lewis L. McArthur*, for the United States.

*Edward N. Dady*, for defendant.

**DEADY, J.** The defendant is accused by the information in this case of the crime of assault with a dangerous weapon on the high seas, contrary to the statute in such cases made and provided, and alleged to have been committed as follows:

On October 27, 1888, the defendant was the master of the bark *Emblem*, then on the Pacific ocean, about 400 miles off the coast of Oregon, and did then and there assault and beat one Walter Toy, a seaman on said bark, with a dangerous weapon, to-wit, a deck-scraper.

The defendant demurs to the information for that the facts stated therein do not "bring the offense charged within the jurisdiction of this court."

Subdivision 1 of section 563 of the Revised Statutes gives the district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts or upon the high seas, the punishment of which is not capital, except," etc.

Section 5346 provides:

"Every person who, upon the high seas, \* \* \* within the admiralty jurisdiction of the United States, \* \* \* on board any vessel belonging in whole or in part to the United States or any citizen thereof, with a dangerous weapon \* \* \* commits an assault on another, shall be punished," etc.

Jurisdiction in this case is claimed under subdivision 1 of section 563. But this section does not confer jurisdiction on the district courts of any particular crime, but only of such as may be committed within their respective districts, or upon the high seas, and are cognizable under the authority of the United States. A crime is "cognizable under the authority of the United States" when it is triable in its courts by virtue of its laws.

It is long since settled that the courts of the United States have no common-law jurisdiction in criminal cases; that, so far as the United States are concerned, there are no common-law crimes; and that therefore its courts cannot take cognizance of any act or omission as a crime unless it has been made such by an act of congress. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Bevans*, 3 Wheat. 336.

The only act of congress making an assault on the high seas with a dangerous weapon a crime, is section 5346 of the Revised Statutes, (section 4 of the act of 1825;) and one of the elements of the crime, as therein defined, is that the assault must take place on board of a vessel belonging in whole or in part to the United States or some citizen thereof. The information does not disclose the nationality of the vessel on which the alleged assault took place. To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board an American vessel, and that fact must be alleged in the pleading.

As a matter of fact it is admitted in this case that the Emblem is a British vessel, and that the parties to the assault are British subjects. But this admission is unnecessary, for the American nationality of the vessel must be alleged.

That congress may go further, and authorize the punishment of parties for offenses committed on the high seas without reference to their nationality, or that of the vessel on which the same are committed, if they shall thereafter be found or come within the United States, may be admitted. *U. S. v. Palmer*, 3 Wheat. 630; *U. S. v. Bevans*, Id. 386; *U. S. v. Kessler*, 1 Baldw. 28; *U. S. v. Wilson*, 3 Blatchf. 438. But as yet it has not done so.

The celebrated case of *Reg. v. Keyn*, 2 Exch. Div. 63, is instructive on this subject. It was there held by seven judges to six that the crime of manslaughter, committed even within three miles of the coast of England, by a German subject on the person of a British one, was not within the jurisdiction of the admiral of England, because parliament had not made it so. The case was this: Keyn was in command of the German ship *Franconia*, on a voyage from Hamburg to St. Thomas. When within two-and-a-half miles from the beach of Dover, the *Franconia*, by the negligence, as the jury found, of the defendant, ran into the British ship *Strathclyde*, and sank her, causing the death of one of her passengers. It was agreed that the jurisdiction of the admiralty included all persons in British vessels on the high seas, along the coast, from low-water mark seaward; and by a majority of the judges, that the jurisdiction extends to all persons, whether natural born subjects or not, on board British ships, everywhere on the high seas, and to no others.

The decision led to the passage of the "Territorial Waters Jurisdiction Act" (40 & 41 Vict. c. 73, 1878,) which declares that the jurisdiction of the British crown extends and always has extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her majesty's dominions, to such a distance as is necessary for the defense and security thereof, and that any part of the open sea within one

marine league of low-water mark shall be deemed open sea within the meaning of the act. See 2 Steph. Hist. Crim. Law England, 29.

The assault alleged in the information is not a violation of any law of the United States, and therefore the demurrer is sustained, and judgment thereon will be given in bar of the action.

### SOUTHWORTH v. REID *et al.*

(Circuit Court, D. Wisconsin, W. D. 1888.)

#### 1. REMOVAL OF CAUSES—LOCAL PREJUDICE—ACT OF MARCH 3, 1887.

Act Cong. March 3, 1887, providing that where there is a controversy in any suit in a state court between a citizen of the state wherein the suit is brought and a citizen of another state, any defendant, a citizen of such other state, may remove the same to the proper United States circuit court upon it being made to appear to said court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which it may be removed under the laws of said state,—repeals, by implication, act 1867, (Rev. St. U. S. § 639,) which provides for such removal at the instance of either party, upon the filing of an affidavit in the state court, stating his belief that he cannot obtain justice in the state court by reason of prejudice or local influence, the two provisions being wholly inconsistent.<sup>1</sup>

#### 2. SAME—REQUISITES OF APPLICATION—PROOF OF PREJUDICE.

By the act of 1887, unlike the former act, such application must be made to the United States circuit court, and be supported by such proof as to satisfy the court of the truth of such allegations, and a case removed by the state court since the latter act took effect, upon such an affidavit as that prescribed by the former act, not showing that defendant could not obtain justice in some state court other than the one in which the action was instituted, to which he may, under the laws of the state, secure a change of venue, should, on motion of the plaintiff, be remanded to the state court.<sup>1</sup>

#### 3. SAME—DIVERSE CITIZENSHIP.

An action for damages for wrongful levy on the goods of plaintiff, who resides in the state in whose court the suit is brought, against the creditors causing the levy, residents of another state, their agent, and attorneys in the proceedings, is not removable by reason of the diverse citizenship of the parties, as some of the defendants reside in the same state with plaintiff, and the controversy is not separable. Following *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730.<sup>2</sup>

#### 4. SAME—REMAND—WAIVER OF RIGHT.

In such case the plaintiff does not waive his right to remand the cause by once obtaining a continuance in the federal court, as the question is jurisdictional.

At Law. On motion to remand to state court.

Action by Orville T. Southworth against Simon Reid, Thomas Murdock, August Fisher, Griffith J. Owen, Guy C. Prentiss, and Charles B. Miller, to recover damages for a wrongful levy on plaintiff's goods.

<sup>1</sup> For a discussion of the "prejudice or local influence" clause of the removal act of March 3, 1887, and a reference to the different rulings thereon, see *Malone v. Railroad Co.*, 35 Fed. Rep. 625, cited in opinion, and note; *Whelan v. Railroad Co.*, Id. 849.

<sup>2</sup> Concerning the removal of causes under the act of 1887, on the ground of diverse citizenship, see *Cooley v. McArthur*, 35 Fed. Rep. 372, and note; *Whelan v. Railroad Co.*, Id. 849; *Seddon v. Virginia, etc., Co.*, 36 Fed. Rep. 6.

On motion of defendants Reid, Murdock, and Fisher, the cause was removed to the United States circuit court, by order of the circuit court of La Crosse county. Plaintiff moves to remand the case to the state court.

*Fruit & Brindley*, for plaintiff.

*Eugene Clifford* and *Charles E. Shepard*, for defendants.

BUNN, J. This is a motion by plaintiff to remand the case to the state circuit court of La Crosse county, Wis., whence it originated. The action is brought by the plaintiff, a citizen of La Crosse, Wis., to recover \$20,000 damages alleged to have been sustained by reason of a tortious and unlawful levy upon his stock of goods made by the defendants under executions alleged to be unauthorized, and void, and which, with the judgments on which they were founded, were set aside by the state court. The defendants Simon Reid, Thomas Murdock, and August Fisher, in whose favor the levy was made, are wholesale merchants, residing in Chicago. Griffith J. Owen, their agent, resides in Columbia county, Wis., and Guy C. Prentiss and Charles B. Miller, their attorneys, reside at the city of La Crosse. The defendants Prentiss & Miller and Owen answer separately. After suit was brought in the state court for La Crosse county, and before the principal defendants, Reid, Murdock, and Fisher, had answered, they made petition to the said state court for the removal of the cause into this court—*First*, on the ground of diverse citizenship; and, *second*, on the ground of local influence and prejudice. And in May, 1888, an order of the court was made for such removal. The case has been noticed for trial once in this court by the defendant and a continuance had at the instance of the plaintiff. The plaintiff now moves to remand the case, for the reason that it is not a proper case for removal, on the ground of diverse citizenship of the parties, three of the defendants being citizens of Wisconsin, and of the same state as the plaintiff. And, second, that the application for removal on the ground of prejudice should be made to this court, and that before a removal can be had it must be made to appear in some way by evidence to this court that, from prejudice or local influence, the defendants asking for removal will not be able to obtain justice in the state court. Upon careful consideration I think the case should be remanded.

It is clear that, as regards the question of diverse citizenship as a sole ground of removal, this case does not come within the provisions of the statute, three out of six of the defendants being citizens of the same state with the plaintiff, and the controversy not being severable. The case in this respect is ruled by *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730.

The remaining question is whether the petition makes a proper case for removal under the local prejudice act as it now stands, and I am of the opinion that it does not. The application was made after the act of March 3, 1887, had gone into effect; but the petition is framed according to the provisions of the removal act of 1867, continued in section 639, Rev. St., and as though that statute was still in force, and unchanged. But it seems inevitable that the provisions of section 2 of the act of 1887,

being wholly inconsistent with those of the old act, repeal them. By the former act, when a suit is between a citizen of the state in which it is brought, and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition, he makes and files in said state court an affidavit stating that he has good reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in said state court. Section 2 of the act of 1887, as corrected by the act of August 13, 1888, provides as follows:

"And where a suit is now pending or may be hereafter brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice, or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right on account of such prejudice or local influence to remove said cause."

It will be seen that this provision is quite different from the former provision in its scope and meaning, in that it limits and restricts the right of removal in at least two essential ways, besides providing, in effect, that the application shall be made to the circuit court of the United States instead of the state court where the action is pending. Under the old act plaintiff or defendant might remove the case, while under the present law the right is restricted to the defendant. Again, under the act of 1867, all that was essential to deprive the state court of jurisdiction and confer jurisdiction on the circuit court was for the applicant to file the necessary bond and to make an affidavit stating that he has good reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in said state court. When an application was made, accompanied by such an affidavit and bond, the jurisdiction of the state court ceased without even an order of removal being made. It was not essential that the fact of prejudice be made to appear, or that any evidence whatever should be adduced. It was enough to allege the belief of the applicant. The court had no inquiry and no finding to make, and no conclusion to come to. Now, looking at the act of 1887, if this radical change in the language means anything it must mean that the fact of the existence of local prejudice or influence must be made to appear to the circuit court. And how can the fact appear to the court except by legal evidence submitted either by the examination of witnesses or by affidavits? The case to be made is wholly different from that under the former law. Then it was not essential that any proof should be submitted, the fact itself not being essential. It was enough if the party could swear that he believed, which has never been taken as legal proof of a fact. In Wisconsin, where the provision is so ample for the removal of a cause from one state court to another, on account of prejudice, it should rarely happen that the party could make it appear to this



court that he could not obtain justice either in the court where the action is pending or in some other court where it might be removed under the laws of the state. By the laws of the state, upon the application of either party who shall make an affidavit that he has good reason to believe, and does believe, that he cannot have a fair trial on account of the prejudice of the judge, the place of trial must be changed to some county where the causes complained of do not exist. There is also ample provision for changing the place of trial when there is reason to believe that an impartial trial cannot be had in the county designated for that purpose in the complaint. See Rev. St. c. 119, §§ 2622-2625, etc. Now, in order to remove a case into this court under the present strict though just law, it must be made to appear to the court that from prejudice or local influence, the party will not be able to obtain justice in the state court where the action is pending, nor in any other state court to which the defendant may, under the laws of the state, have the right to remove the same. I apprehend that in this state it would rarely happen that a proper case for removal could be made under this law.

In the action at bar no case is made. There is, indeed, little attempt to comply with the present statute of removal. On the contrary, the application for removal seems to have been made on the assumption that the act of 1867 is still in full force, unrepealed and unmodified by the act of 1887. The application is made to the state court. The affidavit is made by defendant Reid, who swears that he believes, and has good reason to believe, and that each of his co-defendants believes, and has good reason to believe, that, from prejudice and local influence, he and his said co-defendants Murdock and Fisher will not be able, nor will any one of them be able, to obtain justice in the circuit court of Wisconsin for La Crosse county, in which the action was pending, or in any court of the state of Wisconsin, to which he and his said co-defendants might under the state laws remove the action. In view of the ample provisions made for the removal of actions for prejudice or local influence under the state laws this affidavit of Mr. Reid is the equivalent of swearing to his own belief, and to the belief of his co-defendants, that there was no court nor county in the state of Wisconsin where the defendants could have justice done them. Now, it is possible that such a state of facts might exist. It is highly probable, however, that he could obtain ample justice in any one of 40 or more counties in the state, allowing that he could not in La Crosse county, where the action was pending. Of course, if he could make the fact of such universal prejudice appear to this court he might yet obtain a removal; but this should be done upon notice and application to this court, supported by competent evidence to bring the case within the act of 1887. As nothing of the kind is attempted, but the motion to remand is resisted on the ground that the application for removal and affidavit already made are sufficient, the case must be remanded to the circuit court for La Crosse county, whence it came to this court. The adjudged cases under the act of 1887 are somewhat conflicting, but this is the only view I am able to reconcile with the language of the statute. See *Fisk v. Henarie*, 32 Fed. Rep. 417, 35 Fed. Rep. 230;

*Hills v. Railroad Co.*, 33 Fed. Rep. 81; *Short v. Railway Co.*, Id. 114; *Malone v. Railroad Co.*, 35 Fed. Rep. 625. It is contended by the defendants that the defect, if any, in the petition and affidavit have been waived by the plaintiffs continuing the case one term in this court. But I think the question is more jurisdictional. No case for removal has been shown to exist, and the court cannot take jurisdiction by consent of parties. The action is remanded.

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OLMSTEAD v. MICHELS.

(Circuit Court, W. D. Missouri, W. D. November 5, 1888.

1. EQUITY—CANCELLATION OF INSTRUMENTS—INJUNCTION—BREACH OF CONTRACT.

Complainant, representing the members of a company proposed to be organized for the manufacture of glucose, called on defendants for the purpose of seeing the process. Before he was permitted to see it, a contract was presented to him by defendants for signature, which he at first declined to sign, as it contemplated the erection of an establishment with a capacity of 2,000 bushels, while his associates had spoken only of one with a capacity of 1,000 bushels, and that he had no authority to sign for them; but signed it on being told that he would not be personally bound by it, and that it was necessary, under a rule adopted by defendants, that no one should see the process unless a contract was signed, and with the understanding that it was to be the basis of a later contract between defendants and the proposed company. *Held* that, the scheme having fallen through without fault of complainant, defendants would be enjoined from an attempted enforcement of the contract, and that its cancellation would be decreed.

2. SAME—REFORMATION OF CONTRACT.

The fact that at the time the contract was signed complainant spoke of his ability to build a house with a capacity of 1,000 bushels, presents no excuse for a reformation of the contract in that respect, and its enforcement against complainant.

In Equity.

Bill by George P. Olmstead against Jacob Michels to enjoin the prosecution of an action for breach of a written contract, and for cancellation of the contract.

*Peak, Yeager & Ball*, for complainant.

*C. O. Tichenor*, for defendant.

Before BREWER and PHILIPS, JJ.

BREWER, J. Defendant commenced an action at law to recover damages for the breach of a written contract.<sup>1</sup> Complainant filed this bill to enjoin the prosecution of that action, and compel the cancellation of such contract. A brief statement of the grounds of decision is here given. The written contract is perfect in form, and signed by the parties. One ground upon which the complainant rests his bill is this: That this writing signed by the parties, and apparently a contract between them,

<sup>1</sup>Michels v. Olmstead, 14 Fed. Rep. 219.

was not intended as a contract, and was understood by neither of them to be binding. That parol testimony is competent to show that that which appears as a perfect written contract was not signed by the parties with the intention of making a contract, and that no binding obligation was assumed by either, is we think unquestioned. A familiar illustration is this: Suppose a gathering of young people in which a moot court is proposed for the amusement of those present, and a suit for breach of promise of marriage is the case to be tried in such moot court, and a young man and a young woman, for the purposes of such trial, sign what upon its face appears to be a contract to marry. Would it for a moment be doubted if, after the evening's amusement was ended, she should bring suit for damages for breach of such marriage contract, that parol testimony was competent to show the purposes for which the paper was signed, and that no real or binding obligations were assumed by either party in signing it. This, which is an extreme case, illustrates the principle upon which complainant rests, and we think the testimony shows that this case falls within that principle.

The facts, in a general way, were these: One Harris came from Detroit as a representative of defendant and two partners, to work up a company here for the manufacture of glucose by the dry process. After some negotiations, several gentlemen, complainant among the number, became interested, and talked of organizing a corporation for the purpose of putting up a building and engaging in such manufacture. Before any definite plans were matured, it was agreed that complainant should go to Detroit, and see the process. In pursuance thereof, he went with Mr. Harris, and there met the defendant and his partners. The talk here among the parties proposing to enter into the organization was the building of a 1,000-bushel house. After complainant reached Detroit, he was there three days without an opportunity to see the process. Talk was going on during these days between the parties, they suggesting the expediency of a 2,000-bushel house. Finally he expressed a desire to see the process before returning home. Then this written contract was produced by one of the three partners, and it was stated that they had agreed upon a rule that no one should see the process unless a contract was first executed. He declined to sign it; in substance saying that the parties who he represented never talked of a 2,000-bushel house, and that he had no authority to sign for them. He was told that he was not to be bound personally by it, but that the signature was necessary to comply with their rules; and probably, from the talk, this contract, thus signed by him, was understood to be the basis of a contract to be thereafter entered into between the three partners and the company to be formed in this place. With that understanding he signed the paper, saw the process, and came home and reported. Thereafter this defendant came on for the purpose of assisting in the organization of the proposed company, but the scheme fell through, and that not through any fault of the complainant. Of the four parties who were present at the time this paper was signed, complainant and defendant being among the number, all agree that the contract as it stands was not to be binding upon

the complainant. The defendant, and perhaps one witness, insist that complainant stated his ability to build a 1,000-bushel house, even if his associates failed to enter into the scheme, and insist that complainant was to be bound by this contract for a 1,000-bushel house. Inasmuch as all who were present, the complainant and the defendant among the number, agree that this contract, as it stands, was not to be binding, it is very obvious that the defendant ought not to be permitted to enforce it. It was not signed as and for a contract, but signed simply as an excuse, and to comply with the rule of defendant and his partners in respect to the disclosure of the process, and probably also as the basis of a contract to be thereafter entered into between the defendant and the proposed company.

Neither can there be, as defendant suggests, a reformation of the contract. Both parties knew what they were signing,—knew what the language of the instrument was. There was no mistake or misunderstanding in this respect; and whatever may be the truth as to the parol understanding in reference to the building of a 1,000-bushel house, it is not true that this contract by mistake was written for a 2,000-bushel house, instead of a 1,000-bushel house. Hence there is no excuse for the reformation of this contract. It must stand or fall as it is written; and, as all the parties agree that as written it was not to be binding as a personal contract, we think the complainant is entitled to a decree cancelling the instrument, and enjoining the action at law; and it is so ordered.

PHILIPS, J., concurs.

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FELIX *et al.* v. PATRICK *et al.*

(Circuit Court, D. Nebraska. October 29, 1888.)

1. EQUITY—LACHES.

Some half-breed scrip for government land, a blank power of attorney for its location and conveyance, and a blank quitclaim deed, were obtained from the owner by fraud, and came into the hands of defendant, who used the scrip to obtain a patent to land of which he was in possession. The patent was taken in the name of the owner of the scrip, which was not transferable, and the blank instruments were filled out, conveying the land to defendant. At that time the land was only of nominal value, but it afterwards became very valuable. *Held* that, the acts of defendant being in violation of the original owner's rights, there was no express relation of trust, and that the owner and her heirs, having contributed nothing to increase the value of the land, and having delayed to bring the action to declare the defendant trustee and to cancel the conveyances till after the period of limitation, were precluded by their laches.

2. LIMITATION OF ACTIONS—EXCEPTIONS—INDIANS.

Under the Nebraska bill of rights, § 13, providing that all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy, and under Rev. St. U. S. § 2126, relating to actions between an Indian and a white man, about a right of property, an Indian may come into the courts and litigate his title to land, and, where he is not shown to be uneducated or unfamiliar with the laws, the statute of limitations will run against him.

### In Equity.

Bill by Pierre Felix and others, heirs of Sophia Felix, against Mathewson T. Patrick and others, to declare defendants trustees of certain land.

*J. H. Parsons*, for Pierre Felix.

*J. C. Cowin, Shipman, Barlow, Larocque & Choate*, for Chas. Ogden.

*J. L. Webster, Ambrose Cavanagh, Crane & Atwell*, and *Geo. E. Pritchett*, for defendants.

BREWER, J. This case is submitted on demurrer to the bill. The facts, as alleged, are these: In 1854 one Sophia Felix was a half-breed Sioux Indian, residing near Mendota, in Minnesota. Under and by virtue of the treaty with the Sioux Indians of date July 15, 1830, and proclaimed February 1, 1831, and an act of congress approved July 17, 1854, said Sophia Felix was entitled to receive from the government scrip for the location of 480 acres. In 1857 this scrip was issued to her in separate parcels. The act provided that no transfer or conveyance of the scrip should be valid. Afterwards said Sophia Felix intermarried with one David Garnelle. On the 31st of March, 1860, some persons unknown, by fraudulent practices, obtained from her and her husband a portion of this scrip, good for a hundred and twenty acres, also a blank power of attorney, duly acknowledged, for the location of said scrip, and for the conveyance of the land after location; also a blank quitclaim deed, duly acknowledged. In these instruments the name of the attorney, the description of the land, and the name of the grantee were blank. In November, 1861, the defendant, Mathewson T. Patrick, obtained possession of this scrip and these blank instruments from some unknown persons. Prior to that time said Patrick had been in possession of the premises now in controversy, seeking to acquire title thereto by pre-emption, but had been unsuccessful, the land being within the corporate limits of the town of Omaha. After obtaining possession of this scrip, Patrick used it to enter the land, and July 3, 1863, the patent was issued in the name of Sophia Felix. The blanks in the instruments were filled with the name of an attorney, a description of the land, and the name of Patrick as grantee; and the attorney thus named in the power of attorney executed another deed in the name of Sophia Garnelle and her husband to him. These instruments were all placed of record. Patrick knew at the time of these transactions—indeed, was charged by law with knowledge of the fact—that the scrip was inalienable, and therefore was still the property of Sophia Felix, yet he used it for the purpose of securing title to the land to himself, and did not pretend and was not attempting to act as her agent. On July 25, 1868, congress passed an act confirming the title to certain lands in the city of Omaha which had been entered with Indian or half-breed scrip. The land in question was, however, in express terms exempted from the operation of this act. Afterwards, on February 2, 1869, another act was passed touching this land, which reads as follows:

“An act supplementary to an act entitled ‘An act to confirm the titles to certain lands in the state of Nebraska.’ Be it enacted by the senate and

house of representatives of the United States of America, in congress assembled, that the provisions and benefits of an act entitled 'An act to confirm the title to certain lands in the state of Nebraska, approved the 25th day of July, Anno Domini eighteen hundred and sixty-eight, be, and the same are hereby, extended to the east half and north-west quarter of the south-east quarter of section nine, township fifteen, range thirteen east, Sixth principal meridian, in Douglas county, Nebraska, and that the title of the same is hereby confirmed to the parties holding by deed from the patentee.'" 15 U. S. St. at Large, 269.

The tract lies, as heretofore stated, within the limits of the city of Omaha; has been platted into lots and blocks, and large numbers of lots sold to individuals, many of whom are joined as parties defendant. It has become of immense value; worth, as stated by counsel, from a million to a million and a half dollars. Sophia Felix Garnelle died on the 25th day of December, 1865, without children and intestate. Her husband, David Garnelle, died in 1882. Her mother died before her, and her father died October 22, 1876. The present plaintiffs are her brothers and sister and her sole heirs. Neither she nor her husband nor father nor these plaintiffs knew what had become of the scrip, or that it has been entered for this land, until the year 1887. The present plaintiffs became citizens of the United States for the first time on August 29, 1887, having then severed their tribal relations with the Sioux Indians. This bill was filed in the present year, and seeks to charge the defendants as trustees for the benefit of plaintiffs, and asks that the power of attorney and the two deeds be canceled as clouds upon their title, and the act of congress of February 2, 1869, in so far as it attempted to vest title in Patrick, be declared unconstitutional and void, and also that possession be delivered to them.

Several grounds of demurrer were urged and argued by counsel with great earnestness and ability before my Brother DUNDY and myself. The two principal ones are as to the effect of the act of congress of February 2, 1869, and the staleness of plaintiffs' claim. It will be noticed that the act of congress confirms the title "to the parties holding by deed from the patentee." Now, if the land, by reason of its location within corporate limits was not subject to pre-emption or private entry, as seems probable, (section 2258, Rev. St. U. S.; *Root v. Shields*, Woolw. 340; *Eldred v. Sexton*, 19 Wall. 189,) it may be that the patent in 1863 was improperly issued, and that the equitable title still remained in the United States; and a plausible argument is made that congress by this act of 1869 vested the title which still equitably remained in the government in Patrick, as an apparent, at least, grantee of the patentee. But I do not care to discuss this question, for to my mind the other defense is satisfactory and clear. Prior to 1861, Patrick had been in possession of these lands, seeking to acquire title from the government. In that year he obtained possession of this scrip, and in 1863 acquired the patent. Twenty-eight years after Sophia Felix had parted with her scrip, 27 years after defendant had obtained and used the scrip, 25 years after the patent had been issued, and when the lands, with the growth of the city of Omaha, had risen in value from a mere nominal sum to over a million

of dollars, these plaintiffs, who had done nothing to assist in the development and growth of the city, done nothing towards bringing about the increased value of the land, ask that this enormous property be given to them on the ground that their ancestor was defrauded of the scrip which originally paid for it. If an action at law had been instituted, the statute of limitations would long since have been a bar. Why should not equity follow the law and protect these defendants against this ancient claim? It is insisted that defendants are trustees and that plaintiffs are the *cestuis que trust*, and that no statute of limitations runs against the enforcement of a trust until at least the repudiation of the trust is known. This may be true in case of an express trust, but clearly there was none such here. An express trust implies a fiduciary relation consciously and intentionally entered into by some contract or agreement between the parties. But Patrick never intended to act or pretended to act as the mere agent of Sophia Felix. What he did, even if wrongful, and in violation of her rights, was done from the first for himself, and in his own behalf. The averments in the bill show that he never took this scrip intending to act as her agent, but that he took it wrongfully, and in violation of her rights. It is not even alleged that she parted with this scrip to an agent, but the averment is that it was by some fraudulent practices obtained from her. Defendant had no part in these fraudulent practices. It was through no wrong or fault of his that she was induced to part with it. Knowing, as we do, how land scrip passed in the market, the only fair understanding of the facts as disclosed by the bill is that this scrip was wrongfully obtained from Sophia Felix, and placed on the market, and that defendant seeking scrip wherewith to enter this land found and purchased this. He took it to use for himself, and not for her, so that none of the elements of an express trust enter into the transaction. Whether by reason of his knowledge of the fact that the scrip was inalienable, and therefore still the property of Sophia Felix, a constructive trust arose, it is scarcely necessary to determine. There are some authorities which would seem to deny the existence of any trust under the circumstances as disclosed. Thus, in 1 Perry, Trusts, 144, it is said: "But if one who stands in no fiduciary relation to another appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money." Also, see *Hawthorne v. Brown*, 3 Sneed, 463; *Ensley v. Balentine*, 4 Humph. 233; *Doyle v. Murphy*, 22 Ill. 502; *Steele v. Clark*, 77 Ill. 471; *Weer v. Gand*, 88 Ill. 490; *Garvey v. Jarvis*, 46 N. Y. 310; *Dixon v. Caldwell*, 15 Ohio St. 412; *Campbell v. Drake*, 4 Ired. Eq. 94. Still it must be conceded that other authorities tend in the opposite direction, and would hold this to have been a constructive trust. But in such cases equity will recognize the defense of laches and staleness of claim, under proper circumstances, and this is a case where it seems eminently proper to recognize and enforce such a defense. Under ordinary circumstances it does not seem probable that any one would seriously contend that a claim so stale could be enforced, or that equity would take property which had increased so enormously in value after this lapse of time, and give it to parties who had done

nothing towards such enhancement of value. But it is earnestly contended that a different rule should be applied in this case, because plaintiffs and their ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the government, and could not have asserted their rights to the property, even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws, and the methods of governmental business, or that they were not in fact as competent to look after their rights as any persons. We all know that many of these Indians, especially the half-breeds, are well educated, intelligent, and as fully competent to look after their business affairs as any persons; and the fact that they were Indians, and maintaining tribal relations, and were in a certain sense the wards of the government, did not debar them from a hearing in the courts of Nebraska. The thirteenth section of the bill of rights of this state reads as follows:

"Sec. 13. All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice, administered without denial or delay."

"Every person," is its language; so that the doors of the courts of this state were open to these plaintiffs as well as to any other person who had or thought he had any claims to property within this state. As a matter of fact Indians are frequent suitors in the courts of the various states. I recall three cases in the supreme court of my own state, Kansas, and have no doubt there were many more. In *Swartzel v. Rogers*, 3 Kan. 374, a suit to establish title to a half interest in certain lands, and for partition, was maintained by an Indian. In *Blue Jacket v. Johnson Co.*, Id. 299, an action was maintained by one of the chiefs of the Shawnee nation to restrain the taxation of his lands, and in *Wiley v. Keokuk*, 6 Kan. 94, an action for false imprisonment was also maintained by an Indian. The second of these cases was taken to the supreme court of the United States. *The Kansas Indians*, 5 Wall. 737. While the judgment of the supreme court of Kansas was reversed, the right of the Indian to sue in the courts of the state was not questioned. Indeed, it was impliedly recognized, for the court say:

"It is argued because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the secretary of the interior, that they submit themselves to all laws of the state."

Further, the Revised Statutes, in section 2126, carries the same implication. It reads:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."



At any time during the last 27 years these plaintiffs or their ancestors could have come into the courts of Nebraska and asserted their rights, and, as this scrip was of value simply for the entering of lands, they could at any time, by examining the records at Washington, have ascertained whether it had been used and by whom, and where the land for which it had been used was located. The means of knowledge were open before them. They had the right to sue, and the courts would have given them full protection. It would savor little of equity to permit them to come in now and take from these many defendants, most of whom are innocent of any intentional wrong, property of such enormous value, on the ground that their ancestor 28 years ago was swindled out of scrip of such trifling value,—a million dollars to-day for one hundred and fifty dollars 28 years ago. I cannot believe that equity demands or even tolerates this. The demurrer will be sustained.

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**NEW YORK & BOSTON RAPID TRANSIT CO. *et al.* v. PARROTT *et al.***

(*Circuit Court, D. Connecticut.* October 23, 1888.)

**INJUNCTION—WRONGS PREVENTED—RESCISSION OF CONTRACT.**

A contract was entered into between the A. L. Ry. Co. and the T. Co., in pursuance of which the latter received the controlling interest in the former's stock, and paid certain stock, notes, and money in return therefor to the A. L. stockholders, and assumed the building of its road. The T. Co. failed to build the road within the prescribed time, but no tender of the stock, money, or notes was made by the A. L. Co. At an adjourned annual meeting, which had been kept alive by successive adjournments, and at which no business was anticipated and the T. Co. was not represented, new directors were elected, and the company was, by stratagem on the part of the defendants and by surprise, placed in the hands of non-stockholders, who said that they would pay the debts and build the road. *See* *id.*, that the acts of the defendants were in fraud of the T. Co., and that an injunction should issue to prevent the carrying out of the arrangement.

In Equity. On bill for injunction.

The New York & Boston Rapid Transit Company and William M. Thayer against Henry R. Parrott and F. W. Parrott, 2d.

*Hyde, Gross & Hyde*, and *L. E. Chittenden*, for plaintiffs.

*S. E. Baldwin*, for defendants.

**SHIPMAN, J.** This is a motion for a preliminary injunction to restrain the defendants from the performance of acts alleged to be fraudulent and prejudicial to the rights of the plaintiffs as owners of a majority of the voting stock of the New York & Connecticut Air-Line Railway Company. The said company is a Connecticut corporation, and was incorporated for the purpose of building a railway from New Haven to the boundary line between the states of New York and Connecticut. The time for the completion of said road will expire on October 22, 1889. This date was established by a resolution of the Connecticut legislature, at its January

session, 1886. On November 12, 1884, Samuel E. Olmstead was the president of said company. He died in 1885. On November 14, 1885, Henry R. Parrott was elected president, and has ever since acted in that capacity. On said November 12, 1884, said Olmstead, Parrott, and Delas E. Culver of the first part, entered into the following written contract with the plaintiff Thayer and one Henry Levis of the second part:

"Whereas, the said parties of the first part control a majority of the subscribed capital stock of the New York & Connecticut Air-Line Railway Company and the said parties of the second part control a majority of the subscribed stock of the New York & Boston Inland Railroad Company, and both of said parties of the first and second parts desire to place the control of said companies in the possession of the New York & Boston Rapid Transit Company, or of some other construction company to be agreed upon. Therefore, the said parties of the first part agree to procure and assign to said construction company at least eighty (80) per cent. of the subscribed stock of the New York & Connecticut Air-Line Railway Company, and shall receive for said stock of said railway company (upon which at least ten (10) per cent. shall have been paid) eighty thousand dollars in cash, (\$80,000,) and two hundred thousand dollars at par, (\$200,000,) of full-paid stock of said construction company of a capital stock, not exceeding one million five hundred thousand dollars, (\$1,500,000;) and the said parties of the second part hereby agree to procure and assign to said construction company at least ninety (90) per cent. of the subscribed stock of the New York & Boston Inland Railroad Company, upon which at least ten (10) per cent. shall have been paid, and shall receive for said railroad company stock so assigned three hundred thousand dollars (\$300,000) of the full-paid stock of said construction company. Both of said railway and railroad companies are to be free from debt at the time of the transfer of said stock and control of said railway and railroad companies. The said transfer of stock, payment of money, and delivery of full-paid construction company's stock as aforesaid shall take place on or before January 15, 1885, or this contract shall be null and void, and of no effect."

This written contract was not carried out according to its terms. It was not completed on January 15, 1885. The New York & Boston Transit Company was not organized until January, 1886, at which time the Air-Line Company deemed that it had expended about \$200,000 in the construction and other expenses of its road, of which about \$120,000 had been paid in upon its stock, and it owed about \$80,000. Parrott, acting for and in behalf of the stockholders of the Air-Line Company, verbally agreed with the Rapid Transit Company that it should make good or pay this amount of \$200,000 to the stockholders of the Air-Line Company by delivering to them \$120,000 full-paid stock of the Transit Company, and \$80,000 in cash, with which to pay the debts of the Air-Line Company; that the capital stock of the Transit Company should be \$750,000; and that a controlling interest in the stock of the Air-Line Company should be furnished to the Transit Company. These modifications of the written contract were not reduced to writing, but they were verbally understood by the stockholders of the Air-Line Company on the one part and by Mr. Thayer and the Transit Company on the other. The object of the Air-Line stockholders was to have the \$80,000 of debts paid, and they were also to have \$120,000 full-paid stock in the Transit Company, while the Transit Company was to have the ownership of the

majority of the Air-Line Company's full-paid stock, and its control in return for their \$200,000. The existence of the foregoing terms of this mutual agreement and understanding was fully known by the leading stockholders and by all the directors of the Air-Line Company. As a matter of course, the Transit Company was to raise the funds to complete, and was to build the road. This was the object of its organization. It is not probable that any new agreement was entered into that it would build the road, for that was the original purpose and scheme of the parties to the contract. On November 12, 1884, and continuously thereafter to the present time, there were and are 4,511 shares of stock of the Air-Line Company, of which, on December 1, 1885, 200 shares only were full-paid stock, 100 being in the name of H. R. Parrott, and 100 in the name of C. V. Sidell. Upon the rest of the stock various percentages, from 10 to 35 per cent., had been paid, except that upon 45 shares 50 per cent. had been paid. On October 6, 1888, 2,101 shares appear by the stock certificates to have been fully paid. Upon the remaining stock, 300 shares standing in the name of H. C. Hepburn, and 2,110 shares standing in the name of B. B. Kirtland, only 10 per cent. has been paid. For these 2,410 shares no certificates have ever been issued. By the statutes of Connecticut, stock of railroad companies, which is not fully paid, is not entitled to a vote at any stockholders' meeting. Under the contract of November 12, 1884, and its modifications, the Rapid Transit Company or W. M. Thayer, paid to C. V. Sidell, treasurer of the Air-Line Company, at various times between December 12, 1885, and March 13, 1888, the sum of \$60,149.47 in money, which amount was received by said Sidell in behalf of the parties whom the said Parrott represents, and for whom he acts. Said Sidell, as treasurer, also received from said Transit Company its demand promissory notes, in different sums, with interest, dated December 1, 1886, in all for the sum of \$20,250, to sundry stockholders of the Air-Line Company, the respective amounts of said notes being the amounts due from said company, on December 1, 1886, to said respective stockholders. Fourteen thousand two hundred and fifty dollars of said notes were delivered by said Sidell to said Parrott on July 8, 1887, and by him were delivered to and received by the payees thereof, and all said notes are still outstanding. I do not find that the notes were received in payment and satisfaction of their debts against the Air-Line Company. On or about February 1, 1887, the Transit Company delivered to said Sidell, treasurer, under said contract, and the modification thereof, 2,400 full-paid shares of \$50 each of its stock, in certificates of varying amounts, in the names of different Air-Line stockholders, which certificates, with the exception of 3, for 189 shares in all, have been delivered by said Sidell to the parties therein respectively named. Said certificates so delivered were returned by the respective stockholders to Mr. Thayer, to be by him kept with other stock of said Transit Company together, so as to keep the control of the Transit Company in its then existing hands. From time to time stockholders of the Air-Line Company delivered to said Sidell, as treasurer, their certificates of stock in said company, duly assigned in blank,

and with executed powers of attorney for their transfer, for delivery to said Thayer or to the Transit Company under said contract. It is claimed by some of these stockholders, who have given affidavits on the subject, that said certificates were to be held in escrow, and were not to be delivered until said notes and said \$80,000 were fully paid, and sufficient proof was given that the road was to be built. There is nothing in evidence in writing in regard to a delivery in escrow, except a letter from said Sidell to said Parrott, dated July 5, 1887, in which he says:

"I wrote Mr. Thayer that we could not pass the control out of our hands until our notes were all paid, and that the agreement, as understood between us, would be carried out by us; namely, to place the control, (full-paid stock,) together with the notes in escrow, and as fast as the notes were paid, or any portion of the same, we would transfer the full-paid stock to his Co. in proportion to the amount paid. If there can be any better plan adopted, very well. Any way to get the matter closed up."

From the subsequent facts I think that it must have been in substance agreed or understood, subsequent to July 5, 1887, that all the stock of the Air-Line Company should not be delivered to Mr. Thayer, but that it should be transferred to his company, or delivered to him in some proportion to the amount which should be paid upon the \$80,000, and that a portion of said stock should be retained to enforce or compel the payment of all said notes.

Before July 22, 1887, certificates for 509 shares full-paid stock, duly assigned in blank, and with duly-executed powers of attorney to transfer, had been delivered to said Sidell, as treasurer, and had been by him with the knowledge and assent of said Parrott, delivered to said Thayer under said contract, who held said certificates until September 25, 1888, when he surrendered the same to Thomas N. Browne, who then claimed to be the secretary of said company, and who had the custody of the stock-books, and received new certificates therefor. On July 22, 1887, 900 shares of the stock of said Air-Line Company, 300 of the same belonging to William T. Black, and 600 belonging to Sheldon Collins, having been surrendered, new full-paid certificates for said 900 shares were issued to W. M. Thayer, trustee, and are still kept by him. These 900 shares were not full-paid stock when they were surrendered. Sixteen thousand four hundred dollars had been paid thereon, but new full paid certificates were issued therefor. I do not know why such certificates were issued and signed by Messrs. Parrott and Browne. There is some reason to infer that the payments and transfer of stock by the Rapid Transit Company were considered to be credited upon the stock received therefor, and that such stock became full paid. They were issued without any mistake of the facts in relation thereto, and no criticism seems to have been made on account of such issue until this litigation. Certificates for 345 more shares were delivered to said Sidell, as treasurer, under said contract. The certificates of 235 of these shares were assigned in blank, and powers of attorney were duly executed to transfer the same. Of these 345 shares, C. H. Lontrell, John C. Shaw, and C. D. Ingersoll owned 100 each, W. W. Douglass 25, and F. W. Ford and

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J. R. Jessup, 10 each. The custody of these certificates continued with said Sidell until September 20, 1888. On said last-mentioned day said Parrott also had the custody of 237 more shares, all duly assigned in blank, which had been placed in his hands or control for delivery to said Thayer under said contract. The names of all the holders of these 237 shares did not appear in the affidavits. On July 13, 1888, said notes had not been paid; and the Air-Line directors, thinking there was no apparent probability of the ability of the Transit Company to build the road, appointed Messrs. Parrott and Cowles a committee under the terms of the following resolution:

"Resolved, that Messrs. H. R. Parrott and George R. Cowles be appointed a special committee, with instructions to proceed to Boston at the earliest practicable day and lay the subject-matter of the report before the board of directors of the New York & Boston Rapid Transit Company as the sense of this board; and, further, that, unless satisfactory guarantees can be given by the said Rapid Transit Company, expressive of the tenor of said report, all understandings heretofore had between stockholders and officers of both companies shall be considered abrogated, and of no effect."

The concluding part of the report of a committee of the Air-Line directors, to which reference is made in said resolution, is as follows:

"In view of the limited time allowed by law for the construction and completion of the company's road, to-wit, fifteen months from the 1st day of July, 1888, and of the fact that no further extension of time can be had at the hands of the legislature of the state of Connecticut, which convenes in January, 1889, unless a large amount of work by way of construction is done, and an earnest of good faith evinced by this company, your committee would earnestly impress upon the board the necessity of its prompt action herein, and would suggest that, upon the said Rapid Transit Company's paying the sums due on the purchase of stock from the stockholders of the company prior to the 1st day of August, 1888, and commence and diligently prosecute the work of construction on the line of this company's road prior to said 1st day of August, 1888, and expend thereon in cash a sufficient sum to warrant this company in asking for a further extension of time from the general assembly, this company should enter into and execute an agreement with the Rapid Transit Company, fully setting out the obligations of both companies."

In order to obtain an extension of time, from the legislature of 1889, for the building of the road, it is probably important that the promoters of the enterprise should exhibit substantial financial ability, and a determination to build the road, and should have commenced the enterprise in a substantial and *bona fide* manner. Said committee went to Boston on July 24th. The vice-president of the Transit Company said that company could not then pay the notes due the Air-Line stockholders. The committee then made to the president and other gentlemen representing the Transit Company the two following propositions: (1) That they would return all the Rapid Transit stock and notes and money received by the stockholders of said Air-Line Company upon the said Transit Company's returning the stock which it held; or (2) it might keep said stock, and have all the remaining full-paid stock by paying the money which it had cost, and the debts of the Air-Line Company, and that said Air-Line Company's stockholders would give up their claims to

the Rapid Transit stock, which had been transferred to them. The gentlemen representing the Transit Company said that they were unable to accept either proposition. Nothing more was ever done under these propositions. No money or stock of the Transit Company was tendered or offered by the Air-Line Company. The Transit Company desired a delay of one month, and the committee agreed to favor delay till September 1st. On August 21st, said Parrott went to Boston again, but could not obtain either money or prospect of money. Before September 19th said Parrott had found some person or persons whom he deemed financially responsible, and who said that, if they were put in immediate control of the company, they would pay its debts, and would build the road. They did not propose to pay anything more for the control or to buy the stock. On September 14th a meeting of the directors of the Air-Line Company was called to be held on September 19th, at room 500 of No. 146 Broadway, the office of the secretary. The meeting was not held in that room, but a meeting of directors assembled in Mr. Sidell's office, in another room of the same building, at which Mr. Parrott made a report of his interviews with the Transit Company, and informed them of the proposal of the other party, whose name or names were not disclosed in the affidavits. The majority of those present at this discussion favored the new project of giving the new parties the immediate control of the company, and authorized the treasurer to issue demand interest notes, in all for \$19,100, dated December 1, 1886, to named stockholders of the company, for the amount of the debts of said company to said stockholders, being the same persons to whom the Transit Company had issued notes. At this meeting Mr. Parrott said that there were 582 shares of stock which had not been delivered to Mr. Thayer, and which should be returned, and he thought that the fairest way would be to divide these shares *pro rata* among all the stockholders who had taken Rapid Transit stock, which would give for every \$1,000 of Transit stock about \$400 of full-paid Air-Line stock. The directors present assented to these suggestions, and on September 20th Mr. Parrott took from the company's office the certificates for 582 shares for cancellation, and directed that other certificates for 582 shares should be made out to sundry stockholders, in general pursuance of the 40 per cent dividend plan. They were so made, and Mr. Parrott took them from the office to sign them. Seven certificates, for one share each, were made out in the names, respectively, of J. Walsh, J. W. Lessells, F. W. West, C. L. Seabury, Henry Kinsler, B. F. Cash, and H. Jansen, who were to represent in the new board the new controlling power. These persons had not previously been stockholders. No annual election of directors had been held since November 27, 1883. The by-laws provided that the annual meeting should be held on the third Friday of October in each year. An annual meeting was called to be held on that day in 1887, but at the wish of the Transit Company no directors were elected, and the annual meeting was kept alive by adjournment from month to month, only two persons being present. There had been no purpose or plan to elect directors at any of these various adjourned meetings. The last adjournment was, as is now apparently shown on

the record, to September 21, 1888. On September 20th Mr. Parrott stated to Mr. Browne, the secretary, that he could not close the negotiations unless a new board was elected on September 21st. At this meeting a new board was declared to be chosen, consisting of the seven persons whose names have been given, and Messrs. Parrott, Cowles, Lockwood, Winton, Coolidge, and F. W. Parrott, 2d, each of the last-named being former directors, except F. W. Parrott, 2d. Messrs. Lockwood, Winton, Cowles, and Coolidge resigned on the next day. In the place of Messrs. Lockwood and Winton Messrs. Armstrong and Baldwin were chosen, who have each declined to accept. Mr. B. F. Cash was appointed secretary and treasurer. Mr. Parrott did not inform Mr. Thayer, whom he saw in New York on the 20th, of the proposed election of a new board. Messrs. Sidell and Browne did not attend the meeting. Eight hundred and thirty-three shares were apparently represented at the meeting, of which 100 belonged to Mr. Parrott, and 5 belonged Mr. Parrott, 2d. To whom the remaining shares belonged, or in whose names they stood, did not appear.

It thus appears that, under a contract which was kept in existence and recognized by Mr. Parrott until a very recent period, the plaintiffs delivered into the control of the parties whom he represents, \$120,000 of fully-paid stock, about \$60,000 in money and \$20,000 in notes. The notes are unpaid, and the plaintiffs are apparently now unable to pay them, or to pay the debts which these notes represent, and there seems to be no present probability that they can build the road. Mr. Parrott, without returning or offering in any manner which can be considered a tender of the property which was received from the plaintiffs, determined to consider the contract at an end, and to deliver the control of the company into the hands of other persons not stockholders, upon their promise to pay the debts of the company, and to build the road. The delivery of the company into the hands of the new parties was accomplished by an election which was held under the form of law, but was none the less accomplished by stratagem and a surprise upon the plaintiffs. An election of directors was not and could not with reason have been anticipated by them to be held on September 21st. The previous adjournments were in pursuance of the plan, which had been theretofore adopted, of not electing a board, but of awaiting the directions of the Transit Company in that regard, which was recognized as having rightfully the controlling power and voice in the election of directors. Of the 2,101 voting shares it had, in the name of William M. Thayer, trustee, 900, and it had the certificates for 509 which could at any time rightfully have been placed in the name of Mr. Thayer or the Transit Company. The Transit Company had been apparently conceded to be the owners of a large majority of the voting stock, and to be entitled to the 582 outstanding shares in the hands of Sidell and Parrott whenever said notes were paid. This private delivery of the corporation into the control of non-stockholders, while Mr. Parrott and his associates retained all the money which had been delivered to them, was in fraudulent violation of the plaintiffs' rights. The plaintiffs' bill is framed upon the theory that the

contract of November 12, 1884, had been executed; that Parrott and his co-directors were holding over as directors merely in the interest and for the benefit of the plaintiffs, who were substantially the owners of the stock of the Air-Line Company; and that the action of Parrott was a fraudulent violation of the contract, and an intentional sacrifice of the rights of the plaintiffs, which could not be compensated in damages, for which an action at law afforded no adequate remedy, and the injurious effect of which could only be prevented by injunction. The bill was not intended to be a bill for specific performance. I do not find that the contract was an executed one, because I do not think that the unpaid notes were accepted in payment of the claims against the Air-Line Company; but I find that the plaintiffs had substantial pecuniary interest and ownership in said company, which the defendants wrongfully attempted to impair, and that from the further commission of like acts they should be restrained until a thorough and complete investigation shows either that I have been misled by affidavits, or that events which may hereafter take place have altered the present position of the parties. Let a temporary injunction issue against H. R. Parrott and F. W. Parrott, 2d, enjoining and restraining them, and each of them, from making any agreement or contract, or executing any document, or doing any other act or thing, either as directors, agents, or officers of said New York & Connecticut Air-Line Railway Company, or individually, which in any manner interferes with, affects, influences, or touches the interests of said plaintiffs, or of either of them, until the further order of the court in the premises.

**FULLER *et al.* v. DETROIT FIRE & MARINE INS. CO. *et al.***

(Circuit Court, N. D. Illinois. October 29, 1888.)

**1. INSURANCE—APPORTIONMENT OF LOSS—EQUITY—JURISDICTION.**

Where there is a claim against several insurance companies for the same loss, upon different policies, a court of equity has jurisdiction to apportion the loss among the respective companies, and require payment from each of the amount for which it is liable.

**2. SAME—PROOF OF LOSS.**

In such a case it is not necessary for the claimants to apportion, or attempt to apportion, the loss among the different insurers, in their preliminary proofs, although the policies require that the insured shall, in case of loss, furnish to the insurer a full and detailed statement of the loss and the amount claimed.

**In Equity.** On exceptions to master's report.

Action by William A. Fuller and others against the Detroit Fire & Marine Insurance Company and others, on fire and marine insurance policies on the steamer Buckeye, to ascertain and apportion the loss among the respective classes of defendants. After issue joined, the case was referred to a master, who filed his report in accordance with the reference, to which the different classes of defendants excepted.



*W. P. Black*, for complainants.

*Schuyler & Kremer* and *H. D. Goulder*, for marine insurers.

*E. H. & N. E. Gary* and *G. D. Van Dyke*, for fire insurers.

BLODGETT, J. This case is now before the court upon exceptions filed by the defendants to the master's report. The material facts set out in the bill and shown in the proofs are: That the complainants on the 28th day of February, 1885, became the owners of the steamer Buckeye, then lying in the port of Chicago, and on said day took out insurance against fire on the hull, boilers, engines, machinery, tackle, apparel, and furniture of said steamer, to the amount of \$12,000, as follows: Sun Fire Insurance Office of London, Eng., \$2,500; Louisville Underwriters of Louisville, Ky., \$2,500; Reading Fire Insurance Company of Pennsylvania, \$1,500; Fire Association of Philadelphia, \$2,500; Manufacturers & Builders Fire Insurance Company of New York, \$1,500; Citizens Insurance Company of Pittsburgh, \$1,500. These policies were all for the term of one year, and gave permission to navigate the great lakes and waters tributary thereto; also, to make ordinary alterations and repairs; and permitted other insurance. And on the 30th day of May, 1885, complainants took out marine insurance on said steamer, her engines, boilers, machinery, tackle, apparel, and furniture, as follows: The Mercantile Insurance Company of Cleveland, Ohio, \$5,000; Phoenix Insurance Company of Brooklyn, N. Y., \$5,000; the Detroit Fire & Marine Insurance Company of Michigan, \$5,000. In the body of the policies it was provided that the insurance was touching the "adventures and perils of the lakes, rivers, canals, fires, and jettisons that shall come to the damage of the said vessel, or any part thereof." In the policy of the Detroit Fire & Marine Insurance Company the word "fire" was erased from the clause above quoted in the printed form, and on the margin of the policy was stamped the following provision: "Warranted free from any claim for loss caused by or in consequence of fire," and substantially the same clause was stamped upon the margins of each of the other policies, but the word "fire" was not erased from the body of the printed form of the policies. For a day or two prior to the 12th day of June, 1885, the said steamer was engaged in taking on a cargo of about 8,000 partly-seasoned cedar railroad ties, at Houston's bay, near the Gran Manitoulin islands, on the north side of Lake Huron; and on the morning of the 12th of June the steamer left Houston's bay, at about half past 5 o'clock, for St. Michael's bay, where she was to take in tow a schooner for the port of Chicago. The steamer had on board a pilot and chart, and proceeded at a slow rate of speed, probably not to exceed four miles an hour; and when about half the distance between Houston's bay and St. Michael's bay she struck upon a rock, not laid down in the chart, and unknown to the pilot, and slid about half her length upon the rock before she stopped. Before she ran upon the rock she was drawing about 10 feet of water forward, and about 11½ feet aft. There was a heavy sea running at the time the vessel struck, which caused her to pound somewhat, as she rested upon the rock near her middle, and just forward of the for-

ward end of her boiler-room. The rock seems to have been an isolated one, and all around it was deep water. Fruitless efforts were made by the master and crew by means of her own machinery to back her off from the rock or to drive her over it. About one-third of her cargo was stored in her hold, and the remainder was upon her deck, and for the purpose of relieving her so that she could be got off the rock, if possible, about 2,000 of the ties forming part of her deck-load were thrown overboard. It was soon found, however, by her master and the crew, that the attempt to relieve her in this manner only caused her to pound the harder. Soon after she struck she was found to be leaking rapidly, and within less than an hour the water had made such headway as to put out the fires in her fire-box; and shortly after her fires were extinguished a fire broke out in the forward end of her boiler-room, which spread with great rapidity, and resulted in the complete destruction of the steamer and her machinery. Before the fire was discovered, a small boat and crew had been dispatched to St. Michael's bay to obtain the assistance of a powerful and thoroughly equipped Canadian tug, then lying at St. Michael's bay, and this tug came out to the assistance of the steamer while she was burning, but was unable to do anything towards getting her off, or to extinguish the fire. There is no dispute but what the loss was total, as nothing was saved to the complainants from the wreck. It is true that the proof shows that one small anchor was taken from the bow of the steamer by the crew of the tug which was summoned to her assistance, but the tug crew seem to have treated it as their own; at least they never delivered it to the complainant, and there is no serious contention that the loss was not total. Proofs of loss as called for by the terms of the respective policies were submitted in apt time by the complainants to the respective insurance companies; these proofs claiming that the extent of the loss sustained by the complainants from the destruction of the steamer was \$19,950. None of these insurance companies have paid or offered to pay the complainants any part of the loss thus sustained; the fire insurance companies insisting that the loss was wholly by a peril of the sea, while the marine insurance companies insisted that the loss was mainly a fire loss, and that the chief burden of the loss should fall upon the fire insurance companies. The marine insurance companies conceded that they were liable to the extent of the marine injury only; that is, the cost of getting the steamer off the rock where she was stranded, and to a port of safety, and of such repairs as would restore her to the condition in which she was at the time of the stranding. The bill asks that the court ascertain and determine the amount of the loss sustained, and the portion thereof which should be borne by the respective classes of insurance; that is, how much of the loss shall be borne and paid by the marine insurance companies, and how much shall be borne and paid by the fire insurance companies, and that the portion of the loss to be borne by each class be apportioned to the respective companies of such class. All the insurance companies were made parties to this bill, and appeared and answered, and, after issue joined, the case was referred to the master to take proofs and report his findings in the premises.

The master's report filed in pursuance of this reference in substance finds the extent of complainant's loss by the stranding and burning of the steamer to be \$18,000; that up to the time the fire broke out the loss was wholly a maritime loss, to be borne solely by the marine insurance; and he finds the amount of such loss to be \$6,000,—that is, he finds that it would have cost \$6,000 to have got the steamer off the rock, tow her to a port of safety, and make the repairs necessary to restore her to the serviceable condition in which she was immediately preceding the stranding. He also finds that the stranding was the proximate cause of the fire; and that the marine and fire insurance were concurrent, as to the loss by the fire, to the extent of \$9,000; and that the fire insurance companies are solely liable for the excess of the loss above the total amount of the marine insurance, which is \$3,000, and apportions the loss as follows: Marine loss from stranding alone, before the fire broke out, and to be paid solely by marine insurance companies, \$6,000; concurrent insurance, to be divided between the two classes of insurers, \$9,000, of which the marine companies are to pay five-ninths, \$5,000, and the fire companies are to pay four-ninths, \$4,000; and the amount to be paid solely by the fire companies, \$3,000.

Both classes of defendants have filed exceptions to the master's report, but I do not deem it necessary to consider them in detail, as most of them relate to the master's findings of fact upon the proof before him; and, after a careful review of these proofs, I am satisfied that his findings upon all the questions of fact are correct, and should be sustained. It is true there is much conflict in the testimony; a large portion of it being as to the cost of rescuing and repairing the steamer, and as to the probability of saving her, and as to the origin or cause of the fire and the value of the steamer. Very much of it consists of the opinions or judgments of witnesses more or less familiar with the subject upon which they testify, and I will merely say that it is my conclusion that the master has carefully analyzed this mass of testimony, and found the facts intelligently, according to the preponderance of the proofs. Others of the exceptions go to the finding of the master in regard to apportionment of the loss between the two classes of insurers, and, after a full discussion by the counsel for the objecting companies of the apportionment made by the master, and the rulings and reasons by which he reached that apportionment, I am of opinion that he has adopted the correct rule, and made a just and proper apportionment according to the relative liabilities of the two classes of insurers, and of the companies constituting those two classes.

Two questions of law are, however, raised by the exceptions filed in behalf of the fire insurance companies, which require some consideration: (1) Has a court of equity jurisdiction, upon the case made by the bill and proofs in this case, to apportion this loss among these respective defendants, and require payment from each of the amount for which it is liable? (2) Were the preliminary proofs of loss presented by the complainants to the fire companies a sufficient compliance with the conditions of the policies?

As to the first question, it is obvious that, in separate suits at law against each of these insurers, the complainants would have been required to establish by proof to a jury, or to the judge in case a jury was waived, the proportion of loss to be borne by each class of insurers, as well as the amount to be paid by each member of that class,—that is, how much of the loss, if any, should be borne alone by the marine insurance, and how much, if any, should be borne alone by the fire insurance, and how much, if any, should be borne by the two classes jointly; and it is clear that courts and juries might, and probably would, have differed widely as to the division of the loss between the two classes of insurers, if not as to the division between the members of such classes, and hence the complainants in suits at law would have been in peril of failing to recover perhaps a large portion of their actual loss by reason of different findings of juries or courts upon the same evidence. And, when several parties are liable to a contribution for the payment of a common debt or obligation, an apportionment of the amount to be contributed and paid by each has always been deemed within the field of equity jurisprudence. 1 Story, Eq. Jur. § 492. And the same learned writer, in section 478 of the same work, gives the reasons for such exercise of jurisdiction as follows:

“But there are many difficulties in proceeding in cases where an apportionment or contribution is allowed at the common law; for, where the parties are numerous, as each is liable to contribute only for his own portion, separate actions and verdicts may become necessary against each other, and thus a multiplicity of suits may take place; and no judgment in one suit will be conclusive in regard to the amount of contribution in a suit against another person; \* \* \* whereas in equity all parties can at once be brought before the court in a single suit, and the decree apportioning will thus be conclusive upon all parties in interest.”

And in a case of general average, where a part of the cargo of a ship has been sacrificed for the purpose of saving the ship and the remainder of the cargo, a court of equity has always been held the proper tribunal to apportion the contribution to be made by the ship, the freight, and the cargo saved, to compensate for the property sacrificed; and the reasons for such jurisdiction are fully stated as follows, in section 491 of the work from which I have just quoted:

“It may readily be perceived how difficult it would be for a court of law to apportion and adjust the amount which is to be paid by each distinct interest which is involved in the common calamity and expenditure. Take, for instance, the common case of a general ship or packet trading between Liverpool and New York, and having on board various shipments of goods, not unfrequently exceeding a hundred in number, consigned to different persons, as owners or consignees; and suppose a case of general average to arise during the voyage, and the loss or expenditure to be apportioned among all these various shippers according to their respective interests, and the amount which the whole cargo is to contribute to the reimbursement thereof. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to such reimbursement, according to their relative values. The first step in the process of general average is to ascertain the amount of the loss for which contribution is to be made; as, for instance, in the case of jettison, the value of the

property thrown overboard, or sacrificed for the common preservation. The value is generally indefinite and unascertained, and from its very nature, rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interest, the ship, the freight, and the cargo. These are generally differently estimated by different persons, and rarely admit of a positive and indisputable estimation in price or value. Now, as the owners of the ship, and the freight, and the cargo, may be, and generally are, in the supposed case, different persons, having a separate interest, and often an adverse interest to each other, it is obvious that unless all the persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once, and made binding upon all of them, infinite embarrassments must arise in ascertaining and apportioning the general average. In a proceeding at the common law, every party having a sole and distinct interest must be separately sued, and, as the verdict and judgment in one case will not only not be conclusive, but not even be admissible evidence in another suit, as it is *res inter alios acta*, and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which, of course, might be differently estimated by different juries, it is manifest that the grossest injustice or the most oppressive litigation might take place in all cases of general average on board of general ships. A court of equity, having authority to bring all the parties before it, and to refer the whole matter to a master to take an account, and to adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy; and it is accordingly the customary mode of remedy in all cases where a controversy arises, and a court of equity exists in the place, capable of administering the remedy."

And the same is stated in Adams, Eq. \*268, and *Garrison v. Insurance Co.*, 19 How. 312. In the latter case the jurisdiction of a court of equity to apportion and enforce payment of a loss, where there was a large number of insurers, was fully sustained, both on the ground of the right of a court of equity to apportion among contributors, and also to prevent a multiplicity of suits; there being fifteen insurers in that case, while here there are nine. These authorities, and others to which my attention has been called, seem to me to amply support the jurisdiction of this court to give the relief asked by this bill, while the complainants' remedy at law would almost necessarily be uncertain and incomplete. A court of equity, with all the parties before it, can do complete justice, not only as between the complainants and the two classes of defendants, but as between the defendants in the two classes in their relations to each other under their respective policies.

By the second point, the fire insurance companies insist that they are not liable, because, they say, that all the policies require that the insured shall, in case of loss, furnish to the insurer a full and detailed statement of the loss, and the amount claimed. In the proofs of loss served by the complainants upon the fire insurance companies, they simply state the value of the steamer, her engines, etc., and that the loss was total, and did not attempt to compute or state the share of the loss to be borne by each fire insurer. I do not think it was necessary for the complainants to apportion, or attempt to apportion, this loss among the different underwriters in their preliminary proofs. It was sufficient if they stated the amount of the loss and the amount of the insurance; and this they

did, leaving each underwriter to make the computation of its own share of the loss. I do not, therefore, deem either of the exceptions filed by the defendants to be well taken, and the same are each and all overruled, and the master's report confirmed, and a decree may be prepared in accordance with the recommendation of the report.

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PORTER *et al.* v. SABIN *et al.*

*Circuit Court, D. Minnesota. October 27, 1888*

1. RECEIVERS—ACTIONS—CORPORATIONS—STOCKHOLDERS.

In an action against former directors of a corporation, by stockholders, for loss incurred by the corporation on account of defendants' unauthorized indorsements of the company's name, it is not enough to show the failure or refusal of the receiver of the corporation to bring the action, but he must be made a party defendant in order that the corporation may be bound.

2. SAME—FEDERAL COURTS—JURISDICTION.

Where the state court refuses to permit the receiver either to sue or to be made a party defendant, the jurisdiction of the federal court fails.

*In Equity.*

Complaint by Henry H. Porter and Ransom R. Cable against Dwight M. Sabin, Joseph C. O'Gorman, the Northwestern Manufacturing & Car Company, and the Minnesota Thresher Manufacturing Company.

*Clapp & Macartney, J. M. Flower, and S. U. Pinney, for complainants.*

*George B. Young, Fayette Marsh, and Davis, Kellogg & Severance, for defendants.*

BREWER, J. This case is now submitted on demurrer to an amended and supplemental bill. Complainants are citizens of the state of Illinois, and stockholders in the Northwestern Manufacturing & Car Company, and bring this suit in behalf of themselves and all others in like estate. The defendants are all citizens of the state of Minnesota. Two of them, Sabin & O'Gorman, were directors of the car company, and had the entire management of its business. While so managing the car company, they used its credit by indorsing in its corporate name a large amount of paper for the benefit of third parties, which resulted in great loss to the car company. These transactions were so carried on as to give an undoubted right of action in favor of the car company against them. On the 10th of May, 1884, the car company failed, and one Edward S. Brown was appointed receiver in a suit by the creditors commenced in the state court. The complainants, as stockholders, applied to such receiver, and through him to that court, to bring a suit against the defendants Sabin & O'Gorman to ascertain and recover the damages sustained by the corporation by reason of their fraudulent and unauthorized acts, which application was denied. Thereupon this suit was brought by the filing of the original bill, and on the same day the complainants made a motion in that court

to be allowed to make the receiver a party defendant. They also subsequently moved to exclude from a contemplated order of sale all causes of action which stockholders might maintain in right of the corporation, and which the corporation itself or its receiver had refused to bring, both of which motions were denied; and that court entered an order directing a sale as a whole of the entire assets and plant of the car company, the description in the order being as follows:

"All the stock, property, things in action, and effects of the defendant the Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action; or to which the receiver may be entitled as the same shall exist at the time of the sale; including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash in hand, book-accounts, letters patent, choses in action, bills receivable, and of all property, assets, claims, liens, and demands of every name and nature, either in law or in equity, and wherever situated."

A public sale was made in pursuance of this order, and the property sold to the Minnesota Thresher Manufacturing Company. This sale was confirmed, and the property delivered about the 1st of January, 1888. The last-named company, which is made a defendant to this suit, was organized in 1884 for the express purpose of acquiring the property and continuing the business of the car company. During the winter of 1886-87 Sabin & O'Gorman obtained the control of the directory and management of the Thresher company, and, for the purpose of preventing an investigation into their management of the car company's business, made application to have the car company's assets sold as a whole, which application was successful; and also resisted the application of these complainants to have suit brought in the name of the receiver. To this bill the defendants have, as stated, filed a demurrer, and upon such demurrer the question arises:

It is conceded, and the law undoubtedly is as conceded, that the cause of action stated in the bill is one primarily in favor of the corporation, and that, upon the appointment of the receiver, such right of action passed to him, and he was the party to institute the suit. There can also be no doubt that under some circumstances a cause of action existing in favor of a corporation may be enforced at the suit of a stockholder. But in the view which I take of the case it is unnecessary to consider at large any of these questions. The pivotal question is whether this suit can be maintained without the presence of the receiver as a party. The authorities all seem to agree that where there is no receivership, and a stockholder is seeking to enforce by a suit a right in favor of the corporation, the corporation is an indispensable party defendant, and that, if for any reason the corporation cannot be made a party defendant, the suit must fail. The reason for this is that, unless the corporation is a party, it is not concluded by the judgment or decree, and the defendant may be subjected to another suit by it, and perhaps many suits by other stockholders; but when the corporation is a party, then the judgment or decree binds it, and the defendant is protected from further litigation

upon that cause of action. See *Samuel v. Holladay*, Woolw. 400; *Greaves v. Gouge*, 69 N. Y. 156; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Colquitt v. Howard*, 11 Ga. 569; *Insurance Co. v. Sebring*, 5 Rich. Eq. 342; *Davenport v. Dows*, 18 Wall. 626. In the last case the supreme court thus disposes of the matter:

"That a stockholder may bring a suit when a corporation refuses, is settled in *Dodge v. Woolsey*, 18 How. 340, but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder; and, if it be granted, the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholders were unsuccessful, to allow the corporation to renew the litigation in another suit involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

It is not enough to allege and show that the corporation has failed to bring suit, or refused upon demand to bring it; such facts disclose merely the right of the stockholder to maintain the suit. The same reason makes the receiver also an indispensable party, for, when appointed, he has, in place of the corporation, the right to maintain such an action; if he be not made a party, then the defendant may thereafter be subjected to a suit at his instance. This was recognized in the case of *Brinckerhoff v. Bostwick*, *supra*, in which the court uses this language:

"The bank was a proper, and even a necessary, party defendant. It continued to be a corporation notwithstanding the appointment of a receiver, and the receiver may bring actions in its name. The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy."

Now, when one is an indispensable party, the inability to make him a party does not have the effect to give the court jurisdiction of the action as against the other parties; but prevents it from taking jurisdiction. This is familiar law; and it matters not how this inability arises, whether because that party resides beyond the reach of the process of the court, or because through the action of some other tribunal it is impossible to make him a party. That the receiver cannot be made a party without the leave of the court is settled. *Barton v. Barbour*, 104 U. S. 126. Now, the state court which appointed the receiver, for reasons satisfactory to it, and which must be assumed were good and sufficient, not only declined to permit the receiver to sue at the time the application was made to it, but also declined to permit the receiver to be made a party defendant to this suit. Hence no decree can be rendered here binding the receiver, and none which would prevent the receiver from asserting the right of the corporation in a subsequent suit. He is an indispensable party, and this court is powerless to make him a party, and therefore



the jurisdiction of this court to proceed in this action cannot be sustained. I have not stopped in this opinion to consider whether the sale made of the assets of the car company transferred this right of action to the Thresher company. I have assumed that it did not, as claimed by counsel for complainant. It is not expressly mentioned in the order of sale, nor is it expressly excluded; the language of that order is general in its terms. If it were such an asset as is assignable, then the general terms of description would probably convey it, and the conveyance, being at a public judicial sale, would doubtless transfer a good title to the purchaser,—a title which could not be assailed by these complainants simply as stockholders in the car company. For these reasons I think the demurrer to the amended bill must be sustained. I have held this case for some time, and given the matter much thought, for I was impressed at the argument with the idea that somehow this action ought to be sustained; and only what seemed to me the settled laws of adjudication have forced me to a different conclusion. The demurrer will be sustained.

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SHERWOOD v. MOELLE

(Circuit Court, D. Nebraska. October 29, 1888.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—QUITCLAIM DEEDS.

A grantee in a warranty deed, whose grantor has a warranty deed, and who acts in good faith, and without actual notice, is entitled to protection as a *bona fide* purchaser, notwithstanding the existence of a quitclaim deed in the chain of title.<sup>1</sup>

In Equity.

On rehearing.<sup>2</sup> Bill by James K. O. Sherwood against Theodore J. Moelle to remove cloud from title.

Before BREWER, Circuit Judge, and DUNDY, District Judge.

Montgomery & Jeffrey, for plaintiff.

Harwood, Ames & Kelly, for defendant.

BREWER, J. This case is now submitted on petition for rehearing. When first submitted it was decided upon the proposition that one who takes title by a mere quitclaim deed cannot be considered a *bona fide* purchaser, and a decree was ordered accordingly in favor of the defendant and cross-complainant. In this petition for rehearing that proposition is challenged, as well as its application to the facts in this case. Of the soundness of the proposition as a general one I have no doubt, although it may be possibly subject to some limitations. It has been recognized

<sup>1</sup>As to the rights of a grantee of land under a quitclaim deed, or in whose chain of title there is a quitclaim deed, see *Lumber Co. v. Hancock*, (Tex.) 7 S. W. Rep. 724, and note; *Gest v. Packwood*, 34 Fed. Rep. 368, and note; *O'Neal v. Seixas*, (Ala.) 4 South. Rep. 745, and note.

<sup>2</sup>No opinion was filed on the original hearing.

by many courts, and frequently affirmed by the supreme court of the United States. In the recent case of *Johnson v. Williams*, 37 Kan. 179, 14 Pac. Rep. 537, Mr. Justice VALENTINE, who is one of the most painstaking and thoughtful judges I know, has collated the various authorities, and in the following guarded language states the conclusions of himself and the other members of that court, as well as the principal reasons in support of the proposition:

"We would think that in all cases, however, where a purchaser takes a quitclaim deed, he must be presumed to take it with notice of all outstanding equities and interests of which he could, by the exercise of any reasonable diligence, obtain notice from an examination of all the records affecting the title to the property, and from all inquiries which he might make of persons in the possession of the property, or of persons paying taxes thereon, or of any person who might, from any record or from any knowledge which the purchaser might have, seemingly have some interest in the property. In nearly all cases between individuals, where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim, and scarcely a shadow of claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration, and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed."

I do not care, however, to enter into a discussion of that general proposition, or consider what, if any, limitations thereof exist. That proposition is, I have stated, that no one who takes under a quitclaim deed can be considered a *bona fide* purchaser. The idea underlying the proposition is that when his grantor is willing to give him only a quitclaim deed, he impliedly notifies him that there may be outstanding equities, and that he is willing to place him only in the same position which he himself holds. Now, in the case at bar the complainant took under a warranty deed. His immediate grantor also took under a warranty deed. It is true, in the chain of title of record there appeared a quitclaim deed, but it was back of his immediate grantor's deed; and the question is whether, if remotely, in the chain of title there exists a quitclaim deed, subsequent purchasers in good faith lose the protection of the apparently valid and clear deraignment of title from the government by reason of the existence of such quitclaim deed. In view of the fact that in the early history of titles in the west many conveyances were by quitclaim this question becomes important. Fortunately for this case the question has been before the supreme court of this state, and determined. Such determination is doubtless controlling in this court. Even if the question were an open one, there are many substantial and weighty reasons for upholding the conclusions reached by that supreme court. I merely

content myself with quoting its language as found in the case of *Snowden v. Tyler*, 31 N. W. Rep. 661, as follows:

"3. It is claimed that the quitclaim deed from Shirk to Poe conveyed no title, and that *bona fide* purchasers from Poe were not protected. The rule no doubt is that a person who procures of another real estate, and receives a quitclaim deed only therefor, is bound to inquire and ascertain at his peril what outstanding equities exist, if any, against the title. The reason is his grantor will not warrant the title, even as against himself. Therefore it is a cause of suspicion. We are not prepared to hold, however, that a quitclaim deed, where the grantor has already conveyed, will not in any case convey title. It is not unreasonable to suppose that a quitclaim deed occurs in many titles where there is no outstanding equity. In this case the quitclaim deed in question was made by Shirk to Poe to supply a deed which was supposed to have been lost. It was made to the grantee of such of the heirs of Snowden as were of lawful age. Shirk, upon the record of Otoe county, apparently possessed the legal title to the land in controversy, and a conveyance from him to Poe, although in the form of a quitclaim deed, in form, at least, transferred the legal title to Poe. No one seems to have been in possession of the land, nor had any charge of the same; and the fact that more than eight years had elapsed from the time of the execution of the deed from Shirk to Snowden without the same having been recorded, certainly was a strong circumstance tending to show that the title still remained in Shirk. It is the policy of the law that titles to real estate should become matters of certainty, as far as possible, and that one who acts in good faith in purchasing, and pays the value of the property, shall be protected in his purchase. Any other rule would operate to prevent settlement and improvements upon lands. A party, therefore, who finds a complete chain of conveyances from the original grantee to his grantor upon the proper records of the county may rely thereon, provided he has no notice, either actual or constructive, of the equities affecting the title, and is a purchaser for a sufficient consideration. All those persons, therefore, who purchased from D'Gette and Warren, without notice, for valuable consideration, and their grantees, will be protected."

It may be added that the testimony clearly shows that the complainant acted in good faith, in ignorance of the outstanding title not apparent of record, and paid full value for the land, while, on the other hand, the defendant paid much less than the value, and probably bought with notice of complainant's rights. For these reasons the petition for rehearing is sustained, and a decree entered in favor of the complainant, quieting his title as prayed.

DUNDY, J., concurring.

## HUNT v. OREGON PAC. RY. CO.

*(Circuit Court, D. Oregon. October 29, 1888.)*

## 1. DAMAGES—FOR BREACH OF CONTRACT.

The party injured by the breach of a contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided such damages may fairly be supposed to have been within the contemplation of the parties when they made the contract, and are certain, both in their nature and in respect to the cause from which they proceed.

## 2. SAME.

The plaintiff sues the defendant for damages on an alleged breach of a contract whereby the former agreed, in consideration of certain payments, to be made as the work progressed, to construct 52 miles of railway for the latter. The defendant sets up a counter-claim for the failure to construct the road, and claims damages therefor: (1) For the loss of the use of the road; (2) for the loss of certain freight which it had made "arrangements" to carry over the road; and (3) for the sum it will cost to complete the road in excess of the contract price. On motion of plaintiff, the last two clauses were stricken out of the counter-claim; the one, as arising on a collateral contract not within the contemplation of the parties, and the other as being uncertain, and also contingent on the future construction of the road by the defendant.

*(Syllabus by the Court.)*

At Law. Action to recover damages.

*George H. Williams*, for plaintiff.

*John W. Whalley* and *William T. Muir*, for defendant.

DEADY, J. The plaintiff, a citizen of Ohio, brings this action against the defendant, a corporation formed under the laws of Oregon, to recover \$160,000 damages for an alleged breach of a contract entered into by the parties on August 8, 1887, whereby the plaintiff, for a consideration therein specified, undertook to construct two sections of the defendant's railway, on the eastern extension thereof, one of 42 miles in length, and the other of 10; the first 20 miles to be completed by November 15, 1887, the next 22 miles by April 1, 1888, and the last 10 by May 1, 1888. The breach alleged is that the defendant wholly failed to make payments on the work as it progressed, according to the agreement, or to furnish transportation, iron, steel, or ties, as provided therein; wherefore the plaintiff was compelled to give up the performance of the contract after doing \$80,000 worth of work thereunder, and did quit the work on December 12, 1887.

The answer of the defendant was filed April 5, 1888, and contains a counter-claim, miscalled a "further defense," founded on alleged breach of the contract in question by the plaintiff, wherein it is alleged that the plaintiff, after performing work and labor, and furnishing material to the estimated value of \$50,643.56, failed and refused to comply with said contract, and about December 10, 1887, abandoned the same, and notified defendant thereof; that the work is still unfinished, nothing having been done thereon since the abandonment by the plaintiff.

The counter-claim concludes with three demands for special damages:

(1) That the work cannot now be completed in less than a year, during which time the defendant will be deprived of the "use and operation" of that portion of its road, to its damage, \$50,000. (2) That the defendant, relying on the good faith of the plaintiff in the premises, made "arrangements" to carry over its road from the eastern terminus of the portion the plaintiff agreed to construct "a large amount of freight to and from the seaboard, at Yaquina bay, Or., during the season of 1888, to-wit, to the amount of \$50,000; and that, owing to the failure of the plaintiff to perform his contract, the defendants cannot carry said freight, to its damage, \$50,000. (3) That the defendants will be compelled to pay out large sums of money in excess of the contract price to complete the work that the plaintiff undertook, and in so doing will be put to a large amount of trouble and expense, to its damage, \$100,000.

The plaintiff moves to strike out of the counter-claim each of these claims for damages, and the allegations in which they are set forth, because they are (1) "irrelevant and immaterial," and (2) "for conjectural or speculative damages."

The questions involved in this motion have been thoroughly argued by counsel. The difficulty in this and like cases lies, not in the ascertainment of the law of the subject, but the application thereof. 1 Sedg. Dam. 65.

Counsel for the plaintiff and defendant both cite and rely on the cases of *Griffin v. Colver*, 16 N. Y. 489, and *Snell v. Cottingham*, 72 Ill. 161.

In the New York case it was held that, on a breach of contract to deliver a steam-engine at a certain day, for the purpose of driving a planing-mill and certain other machinery, the ordinary rent or hire which could have been obtained for the use of such mill and machinery, the operation of which was suspended for a week for want of the engine, might be recovered as damages, but not the estimate of what might have been earned by the use of the engine and machinery in the meantime, had the contract been complied with.

In the course of an able and interesting opinion in the case, SELDEN, J., states the general rule on the subject as follows: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained," subject to only two conditions: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to cause from which they proceed."

In the Illinois case it was held that, where a contractor fails to construct a railway within the time limited in the contract therefor, but does complete it afterwards, the measure of damages for the breach is the value of the use of the road from the time it ought to have been finished until it was done; but not the loss to the owner of the road, by reason of his inability to comply with a contract between himself and a third person for the use of the road from the time it should have been completed, even though the contractor may have known of the existence and

terms of such contract, unless he expressly agreed to such a measure of damages.

And still, the difficulty remains: Do the damages claimed in this case flow directly and naturally from the alleged breach of the contract? and are they proximate consequence thereof, and not speculative or contingent?

The tendency of judicial decisions seems to be in favor of allowing a party to show, if he can, that he has suffered some damage by the breach of a contract, either in gains prevented or losses sustained, whenever such gains or losses directly relate to or arise out of the subject-matter of the contract, and not something collateral thereto. *Ruff v. Rinaldo*, 55 N. Y. 664; *Hexter v. Knox*, 63 N. Y. 561; *Hinckley v. Beckwith*, 13 Wis. 34; *Shepard v. Gas-Light Co.*, 15 Wis. 349; *Davis v. Talcott*, 14 Barb. 611; 1 Sedg. Dam. 77; Field, Dam. p. 7, § 10.

Still, it has been found impracticable to devise any definite and comprehensive rule applicable alike to the facts of all cases. Therefore in each case the measure of damages must to some extent depend on its own circumstances. Field, Dam. p. 10, § 13.

The damages claimed on account of the estimated difference in the cost of constructing the road by the defendant and the contract price are, in my judgment, too uncertain to be allowed. It can only be conjectured what the cost of constructing the road some time in the future will be. Owing to the fluctuations in the price of labor and materials, it may cost more or less to construct the road in 1888-89 than in 1887-88. Besides this, they are contingent. The defendant may never construct the road; and until it does, and necessarily at a greater cost than the contract price, it cannot be said to have sustained any damage by the breach.

The contract gave the defendant the right, whenever, in the judgment of its general manager, the work was delayed so as "to imperil" its completion within the time limited, "to assume entire control of the work," and complete it; and "any outlay so incurred by the defendant in excess of the contract price of the work shall be a charge against any balance" due the contractor for work done under the contract. This provision in the contract indicates plainly that the parties did not contemplate the payment of any damages for the delay or failure to construct the road, until it was ascertained by the completion of the same what amount, if any, it cost in excess of the contract price.

The claim for \$50,000 damages, alleged to have been sustained by the defendant's not being able to keep its "arrangement" to carry that amount of freight over the road in 1888, cannot be allowed. It consists of gains prevented on a collateral contract for the carriage of freight over the road by the defendant. These profits, if realized, would not have been the direct fruit of the contract between the plaintiff and the defendant. They could not have been within the contemplation of the parties to the contract of construction at the time they entered into it. The authorities are at one on this point, and particularly the case of *Snell v. Cottingham*, *supra*.

The claim for damages for the loss of the use of the road presents a different question. Where, from the nature of the case, the value of such use can be shown with reasonable certainty, the authorities favor the allowance of the claim. See *Griffin v. Colver*, and *Snell v. Cottingham*, *supra*.

It is impossible to say, on this motion, in advance of the evidence, whether, owing to the condition of this piece of unconstructed road, the defendant can show with reasonable certainty, as in the case of the rent of an ordinary house or mill, what the use of the same was, or would have been, reasonably worth during the time its completion was actually delayed by the failure of the plaintiff to comply with his contract; but I think it ought to be allowed to try—to have the opportunity to do so.

The counter-claim does not directly allege that the defendant is the owner or operator of any railway of which the section the plaintiff contracted to construct is a part or extension to the eastward, but so much may be implied from what is alleged. Nor, granting the implication, does it appear therefrom where the western or other terminus of said road is, except as it may be implied from the statement in the second claim for damages, that the defendant had made arrangements to carry over said road from the eastern terminus "of the portion thereof the plaintiff agreed to build" "a large amount of freight to and from the sea-board at Yaquina bay."

Under these circumstances, the right of the defendant to damages for the loss of the use of the unconstructed road will depend on the nature of the case made by the evidence.

The motion to strike out is denied as to the first claim for damages, and allowed as to the other two.

### GOLDSMITH *et al.* v. HOLMES *et al.*

(Circuit Court, D. Oregon. November 5, 1888.)

#### 1. NEGOTIABLE INSTRUMENTS—ACTIONS—EVIDENCE—PAROL—RELATIONSHIP OF PARTIES.

The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol, whenever it is necessary to a correct determination of the right or liability of either of them thereon; and this may be done to enable a party to such an instrument to maintain an action thereon in the United States circuit court.<sup>1</sup>

#### 2. SAME—COURTS—FEDERAL JURISDICTION.

W. F. Owens, wishing to borrow \$10,000 of the plaintiffs, offered to give a note therefor, with the defendants as security; and, the plaintiffs consenting, he delivered them a note for the amount, signed by the defendants and payable to his order, which he at the same time indorsed, and also subscribed a waiver of notice and protest written thereon, and received the amount to his

<sup>1</sup>On the admissibility of parol evidence to explain signatures to and indorsements of negotiable instruments, see *Harrison v. Morrison*, (Minn.) 40 N. W. Rep. 66, and note; *First Nat. Bank v. Gaines*, (Ky.) 9 S. W. Rep. 396, and note; *Kulenkamp v. Groff*, (Mich.) 40 N. W. Rep. 57.

own use. The note not being paid when due, the plaintiffs brought this action against the defendants to recover the amount thereof. The defendants demur to the complaint for want of jurisdiction in the court. *Held*, that the plaintiffs are the payees, and not the assignees, of the note; and that there never was any assignment thereof, within the restriction on the jurisdiction of this court over an action to recover the contents of a promissory note contained in the last clause of section 1 of the judiciary act of 1887, (24 St. 553.)

*(Syllabus by the Court.)*

At Law. On demurrer.

Action brought by L. Goldsmith and Max Goldsmith against M. B. Holmes, John Dillard, and R. Phipps on a promissory note. Defendants demur.

*Lewis B. Cox*, for plaintiffs.

*Parish L. Wills*, for defendants.

DEADY, J. This action is brought by the plaintiffs, citizens of New York, against the defendants, citizens of Oregon, to recover the contents of a promissory note made by the latter for \$10,000.

It is alleged in the complaint that on or about August 1, 1886, W. F. Owens applied to the plaintiffs for a loan of \$10,000, and offered to give therefor a promissory note, with such additional parties thereto as should be approved by the plaintiffs, to which application, on the condition stated, the plaintiffs acceded; that thereupon, on August 9, 1886, Owens procured the defendants to "execute" and deliver to him a promissory note for that sum, payable, with interest, in six months, to his order, and signed by them as makers; that thereafter Owens indorsed said note by writing his name in blank thereon, and at the same time subscribed his name to the following indorsement thereon, "For value received I hereby waive, on the within, demand, notice, and protest," and delivered the same to the plaintiffs as security for the payment of the proposed loan, whereupon the plaintiffs accepted said note, and advanced thereon, to Owens, the sum of \$10,000; that the defendants "executed" said note for the accommodation of Owens, to enable him to procure said loan thereon, and not otherwise, and the latter was in fact the maker of said note to the plaintiffs, and never had any cause of action thereon against the defendants; and that said note is wholly unpaid.

The defendants demur to the complaint, for that (1) the court has no jurisdiction of the subject of the action, nor the persons of the defendants therein; and (2) the facts stated do not constitute a cause of action.

On the argument of the demurrer counsel for the defendants relied solely on the point that under section 1 of the act of 1887 (24 St. 553) this court has no jurisdiction of this action to recover the contents of the note in question, because an action could not have been maintained herein for such purpose "if no assignment or transfer" thereof had been made to them.

It is admitted that Owens is dead, and that in his life-time he was a citizen of Oregon; and that, the complaint being silent as to his citizenship, he must, for the purposes of this demurrer, be presumed to have



been a citizen of Oregon at the time of the delivery of the note to the plaintiffs. See *Morgan v. Gay*, 19 Wall. 81.

On the facts stated in the complaint, counsel for the plaintiffs contend that the case is not within the purview of the statute; that Owens was not the assignor of this note, but a joint maker with the defendants; that the plaintiffs are, in point of fact, the payees of the note, and the first holders of the same, for value; and that it was first put in circulation when delivered to them, and has never been assigned to any one.

The plain purpose of the statute is to prevent the holder of a promissory note or other chose in action, who, by reason of the citizenship of the parties thereto, cannot sue those liable to him thereon in the United States circuit court, from assigning or transferring the same to some one who can do so.

The note had no existence as a legal obligation until it was delivered to the plaintiffs. Prior to that it was but an inchoate instrument, which could only become binding by passing into the hands of a *bona fide* holder for value. *Brummel v. Enders*, 18 Grat. 894.

It was made by the defendants for the accommodation of Owens, and until he wrote his name on it, and delivered it to the plaintiffs, no one was liable on it, or could maintain an action thereon. It was in fact Owens' own note, with these defendants as his co-makers and sureties, on which he borrowed the money of the plaintiffs, and of which he was to all intents and purposes the maker.

Although an indorser in form, the law regards him as a maker; and therefore the holder of the instrument was not bound to give Owens notice of the non-payment thereof by the defendants, even if he had not expressly waived the same. 2 Daniel, Neg. Inst. § 1085.

The true relations between the parties to a negotiable instrument are not conclusively shown by its form; and therefore it may be proved by parol that they are otherwise. *Brummel v. Enders*, 18 Grat. 905; *Harris v. Brooks*, 21 Pick. 195; *Smith v. Morrill*, 54 Me. 48; *Bridge & Bank Co. v. Evans*, 4 Wash. C. C. 480; *Hubbard v. Gurney*, 64 N. Y. 457; *Sweet v. McAllister*, 4 Allen, 353; 1 Daniel, Neg. Inst. § 723; 2 Whart. Ev. § 1059.

For instance, it is said in the last case cited that it may be shown "that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties," citing *Clapp v. Rice*, 13 Gray, 403.

So, in this case, if Owens had paid this note when it became due, and then brought an action as payee thereof to recover the amount from the defendants, as makers of the same, they might have shown by parol the true relation between themselves and Owens; that he was in fact the principal in and maker of the note, and received the money thereon; and that they were only his sureties; and thus defeat the action.

Is there any good reason why the plaintiff may not, for the purpose of maintaining this action in this court, show that, notwithstanding the form of the note, they are in fact the payees of the same; that it has never been really assigned to any one, but was put in circulation by delivery

to them by Owens, one of the makers thereof, for money then loaned to him? I can conceive of none, nor has any been suggested in the argument.

The jurisdiction of this court is presumably a beneficial one, and therefore the law conferring it is not to be strictly construed, but rather the exception to it. The exercise of this jurisdiction tends to promote confidence and commercial intercourse between the citizens of the several states of the Union, by furnishing them a comparatively impartial tribunal wherein to adjudicate and enforce the controverted and unsatisfied claims growing out of such intercourse.

The facts showing the true relations between the parties to this note may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plaintiffs "to recover the contents" of this note from the defendants by an action in this court, and the liability of the defendants therein, are among these rights and liabilities. Therefore when it is necessary, to maintain the jurisdiction of the court in such an action, to show that the plaintiff, who upon the face of a note is in form an indorsee or assignee thereof, is in fact the payee of the same, it may be done.

On the facts stated in the complaint, the plaintiffs are the payees and first holders of this note. There never was any assignment of it; and the case does not come within the restriction of the judiciary act, nor the reason of it. The demurrer is overruled.

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GIBSON v. PETERS, (two cases.)

(*Circuit Court, E. D. Virginia.* October 30, 1888.)

These cases were reported in 35 Fed. Rep. 721. The opinion and supplemental opinion (page 729) there given by HUGHES, J., were followed by the entry of judgments for the plaintiff on the 18th day of July, 1888. As stated in the supplemental opinion filed by the district judge on that day, Judge BOND, the circuit judge who had presided at the trial, was still absent in Europe. On his return, and upon opening the court, the circuit judge, not concurring in the opinion of the district judge, nor in the judgments entered thereon, directed that the same be set aside and annulled. By sections 614, 650, U. S. Rev. St. the opinion of the circuit judge prevails, and the following order of BOND, J., is for the time being the law of the cases.

*Robert M. Hughes and Legh R. Page, for plaintiff.*

*T. S. Garnett, for defendant.*

BOND, J. In this action, wherein argument was fully heard by the circuit judge and district judge, together sitting and holding the said circuit court, the parties thereto having by their written stipulation filed

herein waived a trial by jury, and submitted the whole matter of law and fact to the judgment of the court on the 10th day of January, 1888, and the court having taken time to consider of its judgment, it appearing now to the court that an opinion in writing by the district judge was filed herein on the 2d day of July, 1888, and in accordance therewith the district judge directed a judgment for the plaintiff to be entered by the clerk of this court, and that such judgment was so entered of record by the clerk on the 18th day of July, 1888, without the concurrence of the circuit judge in the said opinion, or in the judgment so entered thereon, in which said opinion, and judgment the circuit judge does not concur, it is ordered by the court that the said judgment so entered for the plaintiff on the 18th day of July, 1888, as aforesaid, be, and the same is hereby, set aside; and the court, upon the request of counsel for the plaintiff asking the benefit of a certificate of division of opinion, doth continue this cause for the entry of final judgment for the defendant until the next term of this court.

A similar order was entered in the equity case.

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**AMERICAN BELL TEL. CO. v. CUSHMAN TEL. & SERVICE CO. et al.**

(Circuit Court, N. D. Illinois. October 29, 1888.)

**PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.**

A telephone patentee, who has put his device into extensive use, and is receiving an income therefrom, is entitled to an injunction against its infringement, though he has withdrawn it from a particular state because of legislative interference limiting the rate of charges.

*In Equity.* On motion for injunction *pendente lite*.

Bill by American Bell Telephone Company against Cushman Telephone & Service Company, for infringement of letters patent.

*West & Bond, Geo. L. Roberts, and Chauncey Smith, for complainant.*

*W. C. Goudy and C. A. Knight, for defendants.*

BLODGETT, J. This is a motion for an injunction *pendente lite* by reason of the alleged infringement of patent No. 174,465, granted to Alexander Graham Bell, March 7, 1876, and patent No. 186,787, granted to said Bell, January 30, 1877. The validity of the claims of these patents, of which infringement is charged, was sustained by the supreme court of the United States in what is known as the *Telephone Cases*, decided at the October term, 1887, and reported at length in 126 U. S. 1, 8 Sup. Ct. Rep. 778. Defendants admit that they use what is known as the "Cushman Telephone;" and the telephones made by that company were held by this court to infringe the complainant's patent, and the claims now in controversy, in the case of *American Bell Telephone Co. v. Cushman Telephone Co.*, decided in July last, (35 Fed. Rep. 734.) De-

fendants are engaged in furnishing telephone service and operating telephone exchanges in several cities in Indiana, and insist that an injunction should not be granted on this motion because, a few years since, the complainant's grantees or licensees established telephone exchanges and furnished telephonic accommodations in some, if not all, of those cities, but withdrew therefrom after the passage by the legislature of Indiana of an act limiting the rates of charges for the use of telephones and telephone service. I do not think the fact that the complainant's licensees or grantees have withdrawn their telephonic accommodations from these cities furnishes any excuse or defense for the infringement of these patents by these defendants. The law gives the owner of a patent the exclusive right to the use of the device covered by his patent; and the rule that because the patentee, or owner of a patent, cannot agree, with those who wish to use his device, as to the price to be paid for such use, authorizes another to pirate upon the patent with impunity, would be destructive of patent property.

Counsel for the defendants insist that the main question involved in this case is the validity of the Indiana statute regulating the charges for telephone service, but I do not consider that question involved in this motion. It was stated on the argument of this motion, and, I doubt not, truly, that this question is in the way to be presented at an early day to the supreme court of the United States, which is the proper tribunal to pass upon it. But it would be strange indeed if when A. is the undisputed or adjudged owner of a patent which B. wishes to use, but B. is not willing to pay the amount demanded by A. for such use, therefore C. can infringe the patent, and supply B. with infringing machines, and not be restrained from so doing when the validity of the patent and infringement are clear.

It was urged upon the argument that this court had decided in the former case of *Hoe v. Knap*, 27 Fed. Rep. 204, that a patentee who did not put his patent into use was not entitled to an injunction, and that decision was invoked on the argument of this application for an injunction. I, however, think that the case there made was another and widely different one from this. There the patentee had never made a machine, nor put his patent into use, nor allowed another person to put it into use. He had simply locked it up, so to speak, and kept the public from the benefit of it. Here the patentee has put his patent into extensive use, and is receiving a large income for such use at rates agreed upon between the owners of the patent and the user; so that this complaint does not stand as the complainant did in the case cited. An injunction will be granted according to the prayer of the bill.

## UNITED STATES v. FELDERWARD.

*(Circuit Court, D. Oregon. October 29, 1888.)***1. INDICTMENT AND INFORMATION—DESCRIPTION OF OFFENSE—STATUTORY EXCEPTION.**

Where a statute declares an act done in the absence of certain circumstances to be a crime, an indictment charging the commission of such a crime must negative the existence of such circumstances.

**2. PUBLIC LANDS—INCLOSING PUBLIC LANDS—INDICTMENT.**

An indictment under the act of February 25, 1885, (23 St. 321,) for unlawfully inclosing a portion of the public lands, must show that the defendant is not within any of the exceptions permitting such inclosure.

*(Syllabus by the Court.)*

**At-Law.** Indictment for unlawfully inclosing the public lands.

*Lewis L. McArthur*, for the United States.

*James F. Watson*, for defendant.

DEADY, J. Section 1 of the act of February 25, 1885, (23 St. 321,) prohibits and declares unlawful "all inclosures of the public lands \* \* \* by any person \* \* \* to any of which land \* \* \* the person \* \* \* making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land-office, under the general laws of the United States, at the time any such inclosure was or shall be made;" and section 4 of the act declares that any person "violating any of the provisions" of the act "shall be deemed guilty of a misdemeanor," and fined not exceeding \$1,000, and imprisoned not exceeding one year.

By the indictment in this case the defendant is accused of a violation of this statute in inclosing 640 acres of the public lands in township 20 S., of range 11 E., of the Wallamet meridian.

The defendant demurs to the indictment, because the facts stated therein do not constitute a crime.

The demurrer to the first count, because of a clerical omission, is confessed, while that to the second one is contested.

It is alleged in this count that on August 1, 1885, the defendant "did wrongfully and unlawfully erect and construct an inclosure on the public lands of the United States, by which he without any lawful claim or color of title acquired in good faith, inclosed 640 acres" of the public lands, as aforesaid.

The point made by counsel on the argument of the demurrer is that the pleading does not negative all the exceptions contained in the statute; that it is not enough to say that the inclosure was made "without any lawful claim or color of title acquired in good faith," but the indictment must go further, and negative the exception immediately following, by alleging that the inclosure of the land was not made under "an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States."

It is commonly said that where an exception is contained in the enacting clause of a statute the indictment must show that the defendant is not within it; but, if it is found in a subsequent clause or statute, then it is a matter of defense, to be shown by the accused. *Nelson v. U. S.* 30 Fed. Rep. 116.

In *U. S. v. Cook*, 17 Wall. 173, it is said that the exception must not only be in the enacting clause, but must be "so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted."

Dr. Wharton (Crim. Pl. § 241) gives this test: Does the statute create a general offense, or one limited to particular persons or conditions? In the first case the exception need not be negative, while in the latter it must be. And the determination of this question does not depend on the mere structure of the statute. "If it be clear that an act is only to become a crime when executed by persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed."

At the passage of the act of 1885 the public, or a large class thereof, were permitted and authorized by law to go upon and inclose portions of the public lands, with a view of acquiring title thereto under the pre-emption, homestead, and other acts of congress. An inclosure made under such circumstances is made under "an asserted right" to the land, and "with a view to entry thereof at the proper land-office" under the law applicable thereto. Then comes this act, and prohibits and makes criminal the making or maintaining of any inclosure on the public lands under any other circumstances. This, in my judgment, leaves the matter in a similar condition to that of the sale of spirituous liquors, where the same is prohibited and punishable if done without a license. An indictment for such a crime must charge that the sale was made without a license; and so here, an indictment charging a person with making an illegal inclosure on the public lands should allege that the act was done without the presence of the conditions or circumstances which justify or license it.

Neither is the crime defined by the act a "general" one. The crime it defines—an inclosure of the public lands—is limited to particular persons; such as have "no claim or color of title" to the land inclosed, "made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land-office, under the general laws of the United States."

The form of the pleading in this respect will make but little difference in the trial of the case, as slight proof of these negative allegations will shift the burden of proof onto the defendant. But in the mean time he cannot be legally accused of unlawfully erecting an inclosure on the public lands, and put on his trial therefor, unless it appears from the indictment that he is not within the exceptions contained in the act making such inclosure a crime. See *Nelson v. U. S.*, *supra*, where this question was considered by this court. The demurrer is sustained.

UNITED STATES *v.* MITCHELL *et al.**District Court, W. D. Pennsylvania. October 24, 1888.*

## POST-OFFICE—USE OF MAILS TO DEFRAUD.

For the purpose of deceiving an accident insurance company as to the date of the remittance of a sum of money necessary to save from forfeiture the certificate of one of the defendants, and to promote the allowance of his claim to indemnity, lost by the failure to remit in time, the defendants changed the date of the mailing stamp in the post-office where the letter was mailed, and stamped the letter with a false post-mark date, so as to give it the appearance of having been mailed several days sooner than it really was. *Held*, that the case was not within the intentment of section 5480, Rev. St., relating to schemes to defraud, to be effected by opening correspondence by mail, etc.<sup>1</sup>

On Demurrer to Indictment.

*M. F. Elliott*, for demurrer.

*The United States Attorney, contra.*

ACHESON, J. This indictment is under section 5480, Rev. St., which provides as follows:

"If any person, having devised or intending to devise any scheme or artifice to defraud, or [to] be effected by either opening or intending to open correspondence or communication with any other person \* \* \* by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the post-office establishment shall be punishable. \* \* \*

Discarding verbiage, the substantial facts to be extracted from the indictment are these: Austin Mitchell, one of the defendants, being the holder of a certificate of membership in the Guaranty Mutual Accident Association of the City of New York, received an assessment notice in writing, requiring him to pay to the association three dollars on or before April 19, 1887; in default of which payment his right to future indemnity would be lost. He neglected to comply with the requirement of the notice, and thus forfeited his rights. He subsequently set up a claim against the association for indemnity for an alleged accident happening to him shortly after April 19, 1887, and in furtherance of this claim inclosed the aforesaid assessment notice, with three dollars, in an envelope addressed to the said association at New York city. This letter was mailed at Millerton, Pa., on April 27, 1887; but in order to deceive the officers of said association, and induce them to believe that it had been mailed in due time, the defendants changed the date of the mailing stamp of the post-office at Millerton, by taking out the figures 27, and inserting 15, and stamped the envelope with the date, April 15, 1887, instead of the true date, April 27, 1887. While not expressly alleged in the indictment, the fact was stated by the district attorney at

<sup>1</sup>As to what constitutes the offense of using the mails to defraud, under Rev. St. U. S. § 5480, see *U. S. v. Watson*, 35 Fed. Rep. 353, and note.

the argument that one of the defendants was an employe in the post-office at Millerton.

Does section 5480 cover the case? I confess that the question has been to me one of some difficulty, but I have finally reached the negative conclusion. A careful study of the language employed has convinced me that it was not intended that this section should embrace every case where a letter promotive of, or connected with, a fraudulent design, may be sent through the post-office by the person engaged in or contemplating the fraud. As was said in *Brand v. U. S.*, 4 Fed. Rep. 395, the scheme to defraud within the meaning of said section is one which is to be effected by the deviser of it opening a correspondence by mail, or by inciting some one else to open such correspondence with him. To constitute the statutory offense, then, something more is necessary than the mere sending through the mail of a letter forming part, or designed to aid in the perpetration, of a fraud. The scope of the section was considered in *U. S. v. Owens*, 17 Fed. Rep. 72, 74, by Judge TREAT, who there said:

"It appears to the court that the act was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary; and not the supervision of commercial correspondence solely between a debtor and creditor."

And as showing that such was the true interpretation, a pertinent reference was made to the concluding clause of the section, which provides that the indictment may charge offenses to the number of three, when committed within the same six calendar months; but the court shall give a single sentence, apportioning the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument in the fraudulent scheme. It will be perceived that the statutory offense is complete when the letter is placed in the post-office. But in the case in hand the fraudulent act was committed after the letter had been placed in the post-office, and consisted in the misuse of the mailing stamp, whereby a false date was given to the post-mark. A penal statute is not to be extended by construction so as to take in doubtful cases. Whatever is not plainly within its provisions should be regarded as without its intendment. The demurrer is sustained.

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THE WYOMING.

THE DACOTAH.

BOSCHERT *v.* THE WYOMING.

SAME *v.* THE DACOTAH.

(*District Court, E. D. Missouri, E. D. October 20, 1888.*)

1. MARITIME LIENS—GOODS SOLD FOR SPECULATIVE PURPOSES.

There is no lien for salt purchased by the owners of a steamer to be taken to another port and sold upon speculation, the same not having been furnished as supplies.



2. **SAME—AFFREIGHTMENT CLAIMS.**  
A claim for merchandise, for which a steamer issued its bill of lading, but which it failed to deliver, may be classified and paid as an affreightment claim.
3. **SAME—DOUBLE CHARGES COLLECTED FOR FREIGHT.**  
A claim for the amount which the steamer compelled the consignee to pay in addition to the price of transportation which was agreed upon and paid in advance is allowable.
4. **SAME—WAGES OF MASTER.**  
The master has no lien for wages.
5. **SAME—SERVICES OF STEVEDORE—HOME PORT.**  
In the absence of statute there is no lien for a stevedore's services rendered in the home port, and not shown to have been rendered on the credit of the vessel.
6. **SAME—ADVANCES TO PAY LIENS.**  
Though money advanced to pay claims that are liens either under the maritime law or under a statute may become a lien, it must be clearly shown that it was advanced on the credit of the vessel to pay lien claims, and that it was so used; and if advanced to two vessels it must also be shown how much was advanced to each; but it is not necessary that each claim paid should be proved if it appears that the amount advanced was all disbursed in paying lien claims.
7. **SAME—PRIORITY OF CLAIM.**  
A claim for moneys expended at the request of the owners to discharge lien claims for supplies and wages will be allowed and classified as a claim for supplies.
8. **SAME—MONEY COLLECTED AS AGENT, AND EXPENDED FOR SUPPLIES.**  
Money collected by a steamer, as agent, from consignees, and used to pay ordinary running expenses, such as fuel and wages claims, may be treated as loaned on her credit to pay lien claims, though not amounting to a breach of the contract of affreightment.
9. **SAME—SERVICES—LACHES.**  
There is no lien for services rendered more than two years before the vessel is libeled, especially where the proof in support of the claim is otherwise unsatisfactory.
10. **SAME—SUPPLIES—LACHES.**  
Claims for wood furnished in July and August, 1887, at way landings at which the vessel touched very irregularly, amounting to \$67, are not stale on libel filed in April, 1888, there having been no apparent occasion for proceedings to enforce them, and the amount not justifying such proceedings, and no one having been prejudiced by the delay.

In Admiralty. Decision on claims.

Libels and intervening petitions for labor, materials, and supplies furnished. For opinion, on exceptions, see 35 Fed. Rep. 548.

*George J. Davis*, for libellant.

*Campbell & Ryan, Charles S. Hayden, Cochran, Dickson & Smith, and Charles G. B. Drummond*, for intervening libellants and petitioners.

THAYER, J. Claim No. 3,446, of James F. Ewing, agent, etc., and claim No. 3,447, of James F. Ewing, agent, etc., are disallowed. The petitioners sold the steamers a large quantity of salt, in one instance 200 barrels, in the other, 500 barrels. The salt was not bought as "supplies" for the steamers, and was not so furnished. It was bought by the owners of the same, to be taken up the river and sold on speculation. No lien exists in favor of such demands.

Claim No. 3,428, of Sells & Co. vs. Wyoming; claim No. 3,429, of Sells & Co. vs. Dacotah; and claim No. 3,448, of Halliday & Phillips

*Wharfbboat Co. vs. Dacotah.* These claims should be allowed, and it is so ordered. It appears that each steamer collected certain moneys from consignees on delivery to them of certain merchandise received for transportation. The money collected belonged to the several claimants. The steamers acted merely as their agents in making the collections. Before the return trip was concluded, the money so collected was used to pay ordinary running expenses of the steamers, such as fuel and wages claims. Claimants are now entitled to treat the money as loaned on the credit of the steamers to pay lien claims, even if the several acts did not amount to a breach of affreightment contracts.

Claim No. 3,438, of *James Sharp & Co. vs. Dacotah.* This claim will be allowed in the sum of \$27.36. The proof shows that the steamer issued its bill of lading for certain merchandise, including one tierce of lard, which it failed for some reason to deliver. It will be classified as an affreightment claim, and paid accordingly.

Claim No. 3,423, of the *Cleveland, Columbus, Cincinnati & Indianapolis Railway vs. The Dacotah*, is allowed in the sum of \$30. The steamer was paid in advance for the transportation of 240 kegs of nails from East St. Louis to Kansas City. It received the property, but compelled the consignee to pay \$30 in addition to the price agreed upon when it received the property.

Claim No. 3,437, of *E. J. Duncan vs. The Dacotah*, is allowed without comment, and classified as a supply claim.

Claim No. 3,454, of the *Washington Ferry Co. vs. The Dacotah*, and claim No. 3,455, of *Samuel E. Vaughn vs. The Dacotah*. The only possible objection to these claims is, that they are stale. The claims are for wood taken at way landings on the Missouri river, July 9, 31, and August 23, 1887. The libels were filed April 9, 1888. The claims are small, amounting to \$29.25, and \$37.50, respectively. The steamers touched very irregularly at the places where the wood was taken. There was no apparent occasion for taking steps to enforce the claims by legal proceedings, nor would the amount of the demands justify such proceedings. Furthermore, no one appears to have been prejudiced by the delay. For these reasons the claims will each be allowed and classified as supply claims. *Coburn v. Insurance Co.*, 20 Fed. Rep. 644, and *The Thomas Sherlock*, 22 Fed. Rep. 253-256.

Claim No. 3,435, of *Roche & Coyne vs. The Dacotah*, is a claim for unloading the steamer at St. Louis, Mo., "to enable her to proceed on her voyage." It is therefore a stevedore's demand. Whether a stevedore performs a maritime service, and is entitled to a lien for such service, is a question that has been decided differently in different districts. The authorities are referred to by Judge PARDEE, *The Esteban de Antunano*, 31 Fed. Rep. 924. In this district it has been heretofore held that such services are of a maritime character, and that a lien exists therefor, even in the home port, when the service is shown to have been rendered on the credit of the vessel, or when such fact is fairly inferable from the circumstances under which the service was rendered. *The Henry Ames*, U. S. Dist. Court, East. Dist. Mo., No. 2,444. There was no proof fur-

nished in this case that the service was rendered on the credit of the steamer; nor can such fact be inferred. On that ground alone the claim is disallowed, as the state statute does not make it a lien.

Claim No. 3,414, of William D. Shanks, *vs.* The Dacotah; claim No. 3,452, of George G. Keith *vs.* The Dacotah; claim No. 3,451, of George G. Keith *vs.* The Wyoming; and claim No. 3,453, of Henry Keith *vs.* The Wyoming. Of the above claims Nos. 3,452 and 3,453 must be rejected, because preferred by the master, who has no lien for wages.

Claim No. 3,414 will be allowed in the sum of \$200, the residue having been heretofore allowed and paid. The sum now allowed will be classified as a claim for supplies, inasmuch as it appears to have been expended at the request of the owners to discharge claims for supplies and wages that were liens against the steamer Dacotah.

Claim No. 3,451 is rejected. A portion of the same is not a lien. The residue of the claim is stale, being for services rendered more than two years before the steamer was libeled. The proof in support of the claim is otherwise unsatisfactory.

The residue of the claims, to-wit: Claim No. 3,400, of the P. P. Manion Blacksmith & Wrecking Co. *vs.* The Dacotah; claim No. 3,401, of John Jackson *vs.* The Dacotah; claim No. 3,405, of Ward and Brady *vs.* The Dacotah; claim No. 3,407, of Cairo City Coal Co. *vs.* The Dacotah; claim No. 3,412, of T. T. Lewis *vs.* The Dacotah; claim No. 3,402, of John Jackson *vs.* The Wyoming; claim No. 3,405, of Ward and Brady *vs.* The Wyoming; and claim No. 3,417, of T. T. Lewis *vs.* The Wyoming,—may be conveniently considered together. All of them contain charges for money said to have been advanced to pay wages or supply claims against the steamers. A question arises in each case as to the existence of a lien on account of the alleged money advancements. It is well settled that money advanced to pay maritime claims that are a lien by virtue of the maritime law, or a local statute, may itself become a lien against the vessel whose debts have thus been discharged. But in order to establish a lien for money advanced it must be clearly shown that it was advanced on the credit of the vessel to pay lien claims, and that it was so used. If money is advanced generally to aid in running a steam-boat or other craft, no lien arises unless it be for such specific portion of the money so advanced, as is clearly shown to have been used in discharging claims that were liens. Furthermore, if money is advanced to aid in running two steam-boats, no lien can be allowed against either unless the proof shows how much was advanced in behalf of each, and for what purpose it was used. A lien is of that nature that it must be made definite in amount by the person asserting it. *The Grapeshot*, 9 Wall. 129; *The Guiding Star*, 9 Fed. Rep. 523; *The Guiding Star*, 18 Fed. Rep. 264; *The Gen. Tompkins*, 9 Fed. Rep. 620; *The Thos. Sherlock*, 22 Fed. Rep. 254; *The Cumberland*, 30 Fed. Rep. 453. It is not essential, however, that each particular claim discharged by a money advancement should be proven, if it is established with reasonable certainty that the fund was all disbursed in the payment of a class of claims that were liens. Testing the claims by the rule last stated, I have no doubt

that the claims Nos. 3,407 and 3,405 against The Dacotah should be allowed in full, as well as claim No. 3,404, against The Wyoming. The money advancements embraced in these claims, are shown to have been expended in paying lien claims. These claims are accordingly allowed in full. Claim No. 3,407 embraces an item of \$129, and claim No. 3,404 an item of \$175, that are entitled to payment as wages claims, the money having been advanced and used to pay wages. I am also of the opinion that the claim of the P. P. Manion Blacksmith & Wrecking Company should be allowed to the amount of \$1,308.62, and no more. The evidence renders it reasonably certain that \$969.94 was advanced and used to pay off a lien for repairing the steamer's shaft, and that \$350 was advanced and used to pay for moving and erecting the shaft. The item \$213.06 is not satisfactorily established as a lien, and is disallowed. Tested by the rule above announced, claims Nos. 3,401 and 3,402 (preferred by John Jackson) are not established as liens, and cannot be allowed as such. The money was advanced generally to "Hunter Ben Jenkins, manager of steamers Wyoming and Dacotah." It is not shown with any degree of certainty that the money was all used, or that any definite portion was used in paying lien claims. Moreover, it is not shown with any certainty how much was so used in behalf of each steamer. Jenkins is unable to state how much was used in the payment of any particular class of claims, or what claims were in fact paid with the money so advanced, and Mr. Jackson has no knowledge on that subject. What has been said respecting claims Nos. 3,401 and 3,402 applies with even greater force to claims Nos. 3,412 and 3,417, in favor of T. T. Lewis, and both of the latter claims are accordingly rejected on the same grounds.

In the distribution to be ordered, wages claims will rank first, claims for materials and supplies next, and claims under contracts of affreightment thereafter. If there should be any surplus after the lien claims are satisfied, a question may arise whether the mortgagees are entitled to it, or whether it should be awarded to Jackson and Lewis. That question is reserved for further consideration if there shall be any occasion to determine it.

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### THE AERONAUT.

#### GEORGE v. THE AERONAUT.

(District Court, S. D. New York. October 11, 1888.)

#### MARITIME LIEN—SUPPLIES—OWNER PRO HAC VICE—PERSONAL CREDIT—HOME PORT—PRESUMPTION.

Material-men furnished supplies in New York to a vessel registered in Jersey City, but whose business home was in New York city, upon the order of charterers who were owners *pro hac vice*, and did business in New York, and  
v.36F.no.8—32

who had no authority, as between themselves and the general owners, to pledge the vessel for supplies. No reference in the negotiations was made to the ship as a basis of credit. *Held*, that the legal presumption was that the credit was furnished to the charterers personally, in the absence of any evidence of a common intent to charge the ship, and that no maritime lien arose for the supplies.

#### In Admiralty.

The Aeronaut was owned by Mrs. White, who resided in Jersey City. Her business was transacted by her husband in New York, which was the headquarters of the vessel. The steamer was chartered to the Newcomb Rapid Transit Company, a New Jersey corporation, for \$20 a day, payable in advance, to run between New York and South Norwalk, Conn. The office of the transportation company was in New York. The charterers were owners *pro hac vice*, and were to pay all the vessel's running expenses. Supplies to the amount of \$180.94, principally for the engineer's department, were furnished the vessel by the libelants, in New York, between October 15 and November 4, 1887. All the negotiations and orders for the supplies were made at the office of the charterers by and with the general manager of the company. The libelants had no dealings with the master, nor was he known to them. In the negotiations no reference was made to the ship as a source of credit.

*Wilcox, Adams & Macklin*, for libellant.

*Watson & Wallis*, for claimant.

BROWN, J. The libelants made no inquiries as to whether the charterers owned or had chartered the Aeronaut. A year or two previous they had furnished supplies to her on Mr. White's order, when she was running under his direction; but as it is not clear that the libelants had any recollection of these prior transactions with the vessel at the time of their negotiations with the rapid transit company, I shall not consider whether or not they were fairly put upon inquiry as to the relations of the transit company to the Aeronaut. Independently of this consideration, however, and treating the libelants as ignorant of the charter, the lien cannot be sustained, since the dealings were all directly with the charterers, the owners *pro hac vice*, in person, and in the same state where the supplies were furnished to the ship, and there is no evidence either of any intent on the charterers' part to pledge the ship for these supplies, even if they had power to do so, or of any act of theirs to lead the libelants to such a supposition. As the charterers had received possession of the vessel on the condition that they should pay for all supplies, they had no actual authority themselves to create a lien upon the ship for such supplies, in the absence of exceptional circumstances, and when, as here, the ship being so near her legal home port, and in her actual business home, had no need of the supplies for any interests of her own or of her general owners. This point was directly adjudicated in this circuit in the case of *The Secret*, 15 Fed. Rep. 480. The same principle was adjudged in the case of *The Turgot*, 11 Prob. Div. 21. In the case of *The India*, 16 Fed. Rep. 262, 21 Blatchf. 268, the supplies were not ordered

by the charterers in person, but by the agents of the ship, in a foreign port, and in a port of a different state from that of the charterer's residence, and business; and the observations of the court in that case are to be taken in reference to the facts of the case. In foreign ports, supplies furnished by material-men upon the order of the master or of the ship's agents without knowledge of any charter virtually forbidding any use of the ship's credit for such purposes, and without means of knowing of any such charter, are presumptively furnished on the credit of the ship. The general owner, in chartering the ship, takes the risk of such liens; because, under the general marine law, material-men, in dealing with the master or ship's agent in a foreign port, and in the course of her voyage, if they have no notice that the ship has means, are authorized to trust the ship, and are not bound to make inquiry beyond the necessities of the ship. Both parties are presumed to be dealing on the basis of the credit of the ship. But upon personal dealings with the general owners, or with charterers who are owners *pro hac vice*, for supplies to be furnished within the same port or state where the contract is made, the legal presumption is that the dealings are not with the ship, or upon her credit, but upon the ordinary personal responsibility of the owners, with whom the dealings are had, and no lien is, in such a case, sustained, unless a credit of the ship is proved to be within the intention of both parties, as was specially found by the court in the cases of *The James Guy*, 1 Ben. 112, 5 Blatchf. 496, and 9 Wall. 758, and *The Kalorama*, 10 Wall. 204. This subject, and the previous authorities bearing upon it, were fully considered by this court in the case of *Stephenson v. The Francis*, 21 Fed. Rep. 715, 719-723, and *Neill v. The Francis*, Id. 921. The same principles have been affirmed in numerous later cases in the courts of other circuits and districts. *The Norman*, 28 Fed. Rep. 383; *The Mary Morgan*, Id. 196; *The Cumberland*, 30 Fed. Rep. 449; *The Pirate*, 32 Fed. Rep. 486; *The Glenmont*, 34 Fed. Rep. 402, 404; *The Kingston*, 23 Fed. Rep. 200. The libelants' dealings in this case were all directly with the charterers in person. There is no legal presumption that aids the libelants in making out a maritime lien. They must stand upon the facts as they existed; and upon these facts, not only had the charterers, under the circumstances of this case, no authority to charge the ship for these supplies, but there is no evidence that they had the slightest intention of doing so. Nothing in the negotiations or in the ordering of the supplies points to the ship as an intended source of credit within the common intention; and the charterers could not have contracted on that basis in this case without fraud on the general owners. In its facts the case is almost precisely similar to the cases of *The Metropolis*, 8 Ben. 19, and *The Mary Morgan*, 28 Fed. Rep. 196; and, as in those cases, the libel must be dismissed; but, under the circumstances, without costs.

## THE JAMES FARRELL.

RICKARD v. THE JAMES FARRELL.

*(District Court, S. D. New York. November 1, 1888.)*

## MARITIME LIENS—REPAIRS—PERSONAL CREDIT OF OWNER.

A shipwright in Jersey City solicited work at the office of the ship-owner's representative in New York. The boat was afterwards sent to him, in Jersey City, to be repaired, in charge of the master. The libelant rendered his bill at the New York office, and received a note on account, and afterwards renewed the same. He made no claim against the boat until between 8 and 9 months afterwards, and the boat in the mean time had been mortgaged in good faith for a valuable consideration. *Held* that, though the negotiations in New York might not alone defeat the lien, under all the circumstances, the repairs must be held done on personal credit only.

## In Admiralty. Lien for repairs.

The canal-boat James Farrell was owned in New York by the wife of E. M. Parker. Her husband attended to the business of the boat, and had an office in this city. In March, 1887, the libelant, a shipwright in Jersey City, called at Mr. Parker's office, and inquired if he had any work to be done in his line. Mr. Parker afterwards sent for him to look at the Farrell, and give an estimate for repairs, which was done, and Mr. Parker said that the boat would be sent over soon. Not long after she was sent over in charge of the captain of the boat, and repairs were put upon her to the amount of \$289.66; the captain remaining in charge of the boat, and keeping the time of the workmen. The work was completed on the 10th of May, 1887; for which, at Parker's request, his note was taken for the bill, which was once renewed, but not paid; and the boat was libeled on the 29th of December. The return of the note was tendered by the libelant on the trial. On September 29, 1887, the claimant took a chattel mortgage from Mrs. Parker covering a coal-yard and a half interest in the Farrell, with some other property, as security for coal previously furnished, and for coal afterwards supplied on the faith of the security. The evidence indicates that the description of a "half interest" in the vessel was a mistake, and that the whole was intended to be mortgaged, and by a subsequent oral agreement was understood to be covered by the mortgage. For default of payment the mortgage was subsequently foreclosed, and all the mortgaged property, including the vessel, bought in by the claimant for much less than the debt secured. The answer set up a sale on personal credit, and a superior equity under the subsequent mortgage and foreclosure.

*Oscar Frisbie*, for libelant.

*Edward H. Kissum*, for claimant.

BROWN, J., (*after stating the facts as above.*) Though no one circumstance in this case might be deemed sufficient to exclude a maritime lien, yet, taking all the facts together, I think the work must be held done upon the personal credit of the owner, and not upon the credit of the

ship. Under the decisions, I should have upheld the lien, had there been no adverse circumstances save the previous negotiation for the repairs by the libelant with the owner's representative in New York; for the repairs were in fact made in another state, while the master there was in charge of the boat, and hence they were received by the master for the use of the vessel. *The Solis*, 35 Fed. Rep. 545; *The Hiram R. Dixon*, 33 Fed. Rep. 297; *The Chelmsford*, 34 Fed. Rep. 399, and cases there cited; *The Huron*, 29 Fed. Rep. 183; *The Aeronaut*, ante, 497; *The Christopher North*, 6 Biss. 414. The mere fact that the original negotiations were made with the owner in his own state may not afford a presumption that an exclusive personal credit was intended; or that the material-man in furnishing the repairs or supplies to the vessel, and to the master in another state, intended to waive the security of the maritime lien that the *lex loci* ordinarily affords for such benefits to the ship. See, however, the observations of Judge BUTLER in the case of *The Chelmsford*, supra. Here the further circumstances that the work was sought by the libelant at the office of the owner's representative in New York; that the bill was rendered there; that a note was there twice taken for payment; that the vessel was frequently present and subject to suit; and that, nevertheless, no libel was filed, nor any lien upon the ship claimed, until between eight and nine months after the work was done, and after the vessel had virtually passed into *bona fide* hands,—seem to me to require that the work should be held intended to be done on personal credit only, and not on the credit of the boat. *The Cumilla*, Taney, 400; *The Norman*, 28 Fed. Rep. 383, *The Transit*, 4 Ben. 138; *The Sea Flower*, 1 Blatchf. 361; *The Suliote*, (affirmed on appeal,) 23 Fed. Rep. 919, 924-927; *The Mary Morgan*, 28 Fed. Rep. 196; *The Glenmont*, 34 Fed. Rep. 402. On this ground the libel is dismissed, but without costs.

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CLYDE *et al.* v. STEAM TRANSP. Co.

(Circuit Court, E. D. North Carolina. August 18, 1883.)

1 MARITIME LIENS—UNDER STATE STATUTES—GENERAL NATURE.

The claim of a material-man for supplies and repairs furnished to a vessel in a home port is, if a lien be given therefor by a state statute, a maritime lien, and is entitled to the same precedence that a like claim for supplies and repairs furnished in a foreign port has by the law of nations.

2. SAME—PRIORITY—MORTGAGE.

The lien of a material-man for supplies and repairs furnished in a home port, given by a state statute, is entitled to priority over a mortgage on the vessel repaired, although such mortgage had been duly recorded before such supplies and repairs were furnished.

(Syllabus by the Court.)

In Equity.



*Simmons & Manly and W. W. Clark*, for petitioners.  
*F. H. Busbee*, for mortgagee.

SEYMOUR, J. This is a contest between material-men, who have furnished repairs to the steam-boat *Elm City* at her home port, and who have a lien under the North Carolina statute, and the owners of a prior recorded mortgage for the proceeds of the sale of the boat. The fund will not, in case the petitioners are first paid, be enough to discharge in full the amount of the mortgage.

There is no decision of the question which is of controlling force here, as the point has not been decided by the supreme court, nor by any circuit court of the Fourth circuit. In the Fifth circuit, (*The De Smet*, 10 Fed. Rep. 483, and *The Josephine Spangler*, 11 Fed. Rep. 440,) and in the Seventh, (*The Kate Hinchman*, 7 Biss. 238,) priority has been given to the mortgage; but the opinion of the circuit judge of the Fifth circuit is in favor of the lien of the material-man, and his decision for the mortgagee is based upon his unwillingness to reverse that of his predecessor, in the absence of any adjudication upon the point by the supreme court. The opinion of DRUMMOND, C. J., in the *The Kate Hinchman*, rests upon a misconception of what is said in *The Lottawanna*, 21 Wall. 558, and not upon that jurist's own opinion of the law. On the other hand, priority has been given to the lien, under state statutes, of the material-men, in the Second circuit, (*The John Furron*, 14 Blatchf. 24;) in the Third circuit, (*The Kingston*, 23 Fed. Rep. 200, and *The Venture*, 26 Fed. Rep. 285;) and in the Sixth circuit, (*The General Burnside*, 3 Fed. Rep. 228, and *The Guiding Star*, 18 Fed. Rep. 263.) The decisions cited, with others which have not been cited, but which are referred to in the above cases, will, if examined, show that the opinion which at first seemed to be, perhaps, the prevailing one, viz., that the lien given by state statutes to material-men in the home ports did not rank with maritime liens, which seems to have been founded upon English authorities, has gradually yielded to an opinion based upon the general principles of maritime law, and in part upon the justice of the position, in favor of the priority of the lien. Independently of any legislation, by both the civil law and the law of nations, material-men have a lien not only on proceeds, but on the ship itself; but by the common law of England, which is held to be binding on her admiralty courts, material-men have no lien upon an English ship *in specie* for the costs of materials supplied in England. Such is the rule, and such its limitations, as given in the case of *The Neptune, Cumberlege*, 3 Hagg. 136, 139. The general rule of lien on the ship for supplies is recognized. The exception is that it does not apply to an English ship for supplies furnished in England. The lien, as established by the civil law, was originally followed to its full extent in the admiralty courts of that nation, and it was only after a long contest that the exception in favor of English ships was introduced by decisions of the courts of common law and the house of lords in the reign of Charles II. Abb. Shipp. \*149n; Pritch. Adm. Dig. \*226, note 1. Although the continental practice would have suited better the condition of busi-

ness here, with respect to ship supplies, our courts felt themselves bound by the English precedents. In the English courts it was held that in admiralty Irish and Scotch were foreign vessels, and, following that authority, and also for reasons growing out of the nature of our government, the United States courts held the states to be foreign as to one another for purposes of admiralty jurisdiction. Yet it is difficult to sustain on reason a decision that, with respect to a boat running between Newbern and Norfolk, a material-man in Newbern shall not have, and a material-man in Norfolk shall have, a lien for supplies and repairs furnished to the vessel. The result might be to compel the owners of a boat belonging to the former place, if they happen to be as insolvent as was the corporation owning the Elm City, to have all their repairs done in the latter place. To remedy the evils resulting from this state of the law, many of the sea-board and lake states, and, among the former, North Carolina, gave by statute liens to material-men on vessels repaired in a home port. It was held, after some conflict and hesitation, that, while the state courts could not enforce such liens by proceedings *in rem*, the federal courts might. The only question which remained unsettled was as to the nature of the lien. If it be a maritime one it must stand on an equality with other maritime liens of the same class, and be preferred to a mortgage, even of earlier date; the latter not being maritime in its nature. Evidently the character of the lien depends on the nature of the contract. A contract to supply or repair a vessel, wherever made, was by the law of nations a maritime contract. The limitation put by the English courts upon the universality of the lien did not affect the nature of the contract, but only the remedy. When the lien is restored by statute it takes the same position it had before it was abrogated by judicial decisions. The lien of the material-man for supplies and repairs in a foreign port has precedence over a mortgage because it is a maritime lien. When by statute a lien is given for repairs in a home port, the subject of the contract being the same, and the remedy being made the same, it must have the same precedence.

It is said in behalf of the mortgagees in this case that they did not authorize the repairs put on the Elm City, and that the work was done pending an action by them as stockholders in the defendant corporation to dissolve the corporation, and as mortgagees to foreclose. I am assuming, what is not material to the decision, that both suits are by substantially the same parties. I know of no principle upon which it can be held that these facts affect the lien. If the plaintiffs had been successful in procuring the appointment of a receiver *pendente lite*, they would doubtless have temporarily stopped the progress of the repairs. But they have since purchased, at the price of about the face of their mortgage, at much less than what the Elm City either cost or was valued at in any of the affidavits read on the hearing of this case; and they have the benefit of the repairs. I know of no reason to suppose them not to be worth their cost to the present owners of the boat. It would, under the circumstances, be a hardship if the law did not allow the material-men to be first paid.

The fact that the lien of petitioners is a maritime one answers the contention that the material-men lost their lien by surrendering possession of the boat; and I therefore am not called upon to investigate the question made on the argument, of whether they surrendered the Elm City or it was taken from them.

The decision is not put upon anything peculiar to the case, but upon a general rule of admiralty law, viz.: The claim of a material-man for supplies and repairs furnished to a ship in a home port is, if a lien is given therefor by a state statute, a maritime lien, and has the same priority that a similar claim for supplies furnished in a foreign port has under the law of nations.

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### THE BELGENLAND.

#### EVANS v. THE BELGENLAND.

(District Court, S. D. New York. October 4, 1888.)

#### 1. COLLISION—DAMAGES—LOSS OF CHARTER—SUBSEQUENT CHARTER AT LOWER RATES—WAGES OF CREW.

If an existing charter is lost in consequence of a collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the ship-owner is entitled to recover, as an item of his damage, the difference in value of the two charters up to the time of the expiration of the original charter; also for the crew, who are necessarily under pay on contract during the detention.

#### 2. SAME—ADJUSTMENT OF COMPASSES.

The readjustment of compasses, rendered necessary by putting new plates in an iron ship to repair injury done by collision, is an allowable item of the ship-owner's damage.

#### 3. SAME—SHIP'S RATING AT LLOYD'S.

The expense of a new rating of a vessel at Lloyd's is a proper item of the ship-owner's damage.

#### 4. SAME—MASTER'S PROTEST.

The expense of a master's protest, when made in a foreign port, is allowable as an item of the damage caused by collision.

**In Admiralty.** On exceptions to commissioner's report.

*Butler, Stillman & Hubbard*, (W. Mynderse, of counsel,) for libellant.

*Biddle & Ward*, for claimants.

**BROWN, J.** Upon the commissioner's report assessing the damages by collision, the chief exception is to the allowance of \$1,540.97 for the loss of a charter, in addition to \$4,815.65, allowed for 35 days' detention, while the vessel was undergoing repairs. The collision occurred while the libellant's steamer, the *Hartlepool*, was on a voyage from England to Perth Amboy, N. J. She was then under charter, agreeing, after de-

livery of her cargo at Perth Amboy, to proceed to Port Royal, S. C., for a cargo of phosphate rock, to be taken to Europe, and to be ready to load at Port Royal by the 5th of June. The repairs made necessary by the collision detained her 35 days in New York, and, as she was unable to reach Port Royal by June 5th, and as freights had fallen, the charterers canceled the charter, as they had a right to do under its provisions. The capacity of the steamer was about 2,110 tons; the charter rate, 15 shillings per ton. The length of the charter voyage, reckoning from the time of leaving Perth Amboy, would be 38 days. The steamer, when repaired, went to Chesholm island, near Port Royal, for a similar cargo, at 12 shillings per ton, which was the best that she could do. The sum of \$4,815.65, allowed by the commissioner for 35 days' detention, is at the rate of \$137.59 per day, or 6d. per ton, the rate of demurrage specified in the original charter. The item of \$1,540.97 is for the difference of three shillings per ton between the two charters. I cannot sustain the allowance of both these items. The item for "demurrage" represents, or ought to represent, the full value of "the use of the vessel" for the first 35 days at charter rates. If it does so, that is all that the libellant is entitled to recover for that period; and the fact that 6d. per ton was all that the original charter required, would, if put in evidence as against the owners, be presumptive evidence that that was as much, at least, as the ship was worth during any such detention, even under the original charter rates. Beyond that, the most that the libellant could claim would be the difference of three shillings per ton on the freight for three days more, since that would reach to the time when the original charter voyage would have ended. The allowance of \$1,540.97 in effect gives the owner the benefit of the original charter rates for 73 days from the time of arrival at Perth Amboy, instead of for 38 days; while the market rates for the last 35 days were three shillings lower. If the item of demurrage stands, only three thirty-eighths of the second item should therefore be allowed.

The rule of damages in collision cases is *restitutio ad integrum*. The owner is entitled to indemnity for the loss of the use of his vessel while repairing. The value of this use is to be determined according to the business in which she is engaged. If she is under charter at fixed rates, that is her business for the time being, and the charter rates, less the ship's expenses in earning them, *i. e.*, her net freights, furnish the rule of indemnity. Per NELSON, J., *Williamson v. Barrett*, 13 How. 110-112; *The Potomac*, 105 U. S. 631; *The Mayflower*, 1 Brown, Adm. 380-387. This mode of ascertaining the damages in such cases has long been applied in this court. If the detention is less than the whole charter period, the owner recovers, not the whole net freights, but for the proportionate period only. *The Gorgas*, 10 Ben. 666. If the existing charter is lost in consequence of the collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the owner is entitled to compensation for this loss up to the expiration of the term of the original charter. He is entitled to this allowance, because he would not otherwise be indemnified for his actual loss, and because there is no legal rule

which precludes the recovery of his actual loss in such a case. The loss of the larger rate is the immediate consequence of the collision; and, the rate being fixed by the existing contract, this item of damage is not subject to the objection of being in the least uncertain, hypothetical, or speculative. The ship-owner is as plainly entitled to recover for such a loss as the cargo-owner for the loss of the market through the delay of the ship by negligence, or through collision. See *The Giulio*, 34 Fed. Rep. 911, and cases there cited; *The J. Nixon*, 2 Fed. Rep. 259. Compensation for difference in charter rates was allowed the ship-owner in the cases of *The Star of India*, 1 Prob. Div. 466, and *The Consett*, 5 Prob. Div. 229, which are quite like the present. No adjudications are cited to the contrary. See *The Lake*, 2 Wall. Jr. 52. The libelant is therefore entitled to compensation for the value of the use of the vessel during the 35 days' detention, computed upon the basis of her original charter rates, and also to the difference in her earnings for the three following days.

When the officers and men are under pay on contract, and cannot be otherwise profitably employed, the amount necessarily paid them during the ship's detention is also to be added, as one of the incidents of the damage. The libelant in this case gave no evidence to prove his damage by the method of showing the net freight that would have been earned. No evidence was offered of the expense of running the vessel, and only one witness was called to testify as to the value of her use. He states that \$150 per day would be a fair and reasonable sum. Whether this is based upon the charter rates then existing, or upon the original charter rates, is not stated; but he says it has nothing to do with "profits." This sum is probably intended to include the expense of the ship and crew as she was then equipped. The rate of demurrage reserved in the original charter was 6d. per ton per day; in the second charter, 8d. per ton, i. e., \$137.50 and \$181 per day, respectively. As the evidence of the charter rates, however, was objected to, and is not in this court held competent as against third persons, (*The J. A. Dumont*, 34 Fed. Rep. 428,) there is strictly no other competent proof before me on this point than the testimony of Mr. Spence, above referred to. The two items allowed by the commissioner amount to \$6,356; which (deducting an allowance for the additional three days) is at the rate of about \$170 per day for the 35 days. That the amount allowed, \$6,356, is too much, is apparent from the fact that the gross freight under the original charter for 2,110 tons at 15 shillings per ton, for 38 days' service, would amount to only \$7,738, i. e., only \$1,382 more than the amount of damages allowed. But \$1,382 is obviously too little to cover the additional three days, (which must be deducted,) and the increased expense of the ship for coal and other charges while on the voyage, over and above the necessary expenses while lying at the dock. If the second charter rate had been 9 shillings instead of 12 shillings per ton, the same mode of computing the libelant's damages would have made them exceed the entire gross freights for 38 days, allowing nothing for the running expenses while on the voyage. Upon the evidence, as it stands, the demurrage must be

adjusted at the rate of \$150 per day for 35 days; that sum, in the absence of other evidence, being taken to represent the actual value of the use of the vessel on the basis of her original charter rates, including such of the officers and crew as were attached to her while she was undergoing repairs; with a further allowance of \$121.40 as three thirty-eighths of the difference between the rates of the two charters upon her cargo of 2,110 tons, for the loss on the remaining three days of the original charter period, amounting in all to \$5,390. A few minor items were also excepted to.

1. *Adjustment of Compasses.* The testimony shows the liability to a change in the adjustment of the compass from putting new iron plates upon the ship. In this case 22 new plates were put upon the bows, not far from the compass. Reasonable precaution made the readjustment necessary, and this item of expense should therefore be allowed. The "overhauling" of the compass, so called, was not made necessary by the collision, and is therefore disallowed.

2. *Ship's Rating at Lloyd's.* It was conceded on the argument that a proper rating of the ship, and a certificate thereof, are necessary, in ordinary commercial dealings, to enable the ship to obtain employment at the market rates. The collision destroyed the rating she previously had, and therefore rendered a new rating necessary after she was repaired. The expense of this new rating was the direct result of the collision, and should therefore be allowed.

3. *Master's Protest.* The expense of a protest made in the home port as a mere means of collecting the insurance has been held in this court not recoverable, because insurance is a matter of contract wholly between the insurer and the insured, and is no part of the owner's interest in the ship. *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. Rep. 1150. But the master's protest, made in a foreign port, truthfully stating the details of any disaster to this vessel, is important in many ways to all interested. It is required by ancient, and, I think, almost universal, usage. Dana, *Seaman's Manuel*, 186; Abb. Shipp. \*380; 1 Kay, Shipm. 253; *Laws of Oleron*, 14; *Wisbuy*, 55. The expense is small, and when made in foreign ports, as in this case, it should be allowed. The other exceptions are overruled.

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### DARY v. THE CAROLINE MILLER.

(District Court, S. D. Alabama. October 15, 1898.)

#### 1. SEAMEN—DISCHARGE—SHIPPING ARTICLES—CONSTRUCTION.

Shipping articles providing for "a voyage from Philadelphia to Galveston and one or more ports in the United States, for a term not exceeding two months," stipulate for one voyage only, and not for one or more; and, a voyage having been made to Galveston and thence to Mobile, the seaman may there be discharged.

#### 2. SAME—WRONGFUL DISCHARGE—DAMAGES—WAIVER.

Where a seaman has been wrongfully discharged, and on the same day the master offers to take him back and carry him on the return voyage, and

thereby save him any loss which he may sustain from the discharge, a refusal to accept such offer is a waiver of all damages which might be recovered for the wrongful discharge.

**8. SAME—REMEDIES—WAGES NOT DUE.**

A seaman wrongfully discharged before the expiration of his term of service cannot maintain a libel for wages not yet due; but, having filed such libel, may amend it so as to claim damages for a breach of contract.

In Admiralty. Libel by Dary against the *Caroline Miller* for balance of wages due. On exceptions to libel.

*Smith & Gaynor*, for libelant.

*R. H. Clarke and Pillans, Torrey & Hanaw*, for vessel.

**TOULMIN, J.** It was conceded on the argument in this case that under the existing law the libelant was not entitled to recover one month's extra wages under section 4527 of the Revised Statutes, it being admitted that that section had been repealed so far as vessels engaged in the coastwise trade were concerned. Exceptions 1 and 2 are therefore well taken. The libel shows that the libelant shipped as a seaman on July 28, 1888, and was discharged on August 19, 1888, and paid up to and including that day. The libel was filed on August 20, 1888, and in it the libelant sues for the balance of the month's wages which he had begun to earn, but which were not due until the expiration of the month, to-wit, the 28th August, 1888; the wages stipulated for in the articles being \$25 per month. Clearly he could not sue for and recover the balance of his wages until they were due. His libel seeking to recover the balance of wages, being filed before they were due, cannot be maintained. But if he was wrongfully discharged,—that is, was discharged before the expiration of his term of service without cause,—he could maintain a libel for damages for a breach of contract, and he would be allowed now to amend his libel so as to claim such damages. Was he wrongfully discharged? It appears by the libel that he was discharged without fault on his part. Then, did the master have the right under the shipping articles to terminate the libelant's connection with the vessel? Could the libelant on the arrival of the vessel at Mobile have quit-  
ted her without the master's consent, and without rendering himself liable to be treated as a deserter? If, under the contract, he had the right to sever his connection with the ship, the ship possessed the same right. A case like this in principle was decided in the Southern district of New York, (*The Edwin*,) to be found reported in 23 Fed. Rep. 255. There the libelants shipped as seamen, and signed articles for a voyage from a port in South America to Hampton Roads for orders, and to any port or ports in the United States or Canada; the voyage not to exceed eight calendar months. The vessel proceeded to Hampton Roads, and there received orders, and thence sailed to New York, where she discharged her cargo. The libelants shipped in January, 1884, and arrived in New York in June, 1884. The libelants thereupon quitted the ship. The master, claiming that the shipping articles bound them to the ship for eight months, entered them in the log as deserters, and refused to pay the balance of wages up to the time they left. They libeled the vessel.

The court held that the articles provided for only one voyage, not for one or more voyages, during eight months; that the one voyage stipulated for ended at New York. The libelants were entitled to their discharge in New York, and could not, therefore, be treated as deserters. They were decreed their wages up to the time they left. In this case the articles provided for "a voyage from Philadelphia to Galveston and one or more ports in the United States, for a term not exceeding two months." The libel shows that the voyage was made to Galveston, and thence to Mobile, a port in the United States, where the libelant was discharged. The articles in this case did not stipulate for one or more voyages, but for one voyage only. It ended at the port of Mobile. It does not appear that the vessel had a cargo to be delivered at any other port. It appears she received a cargo at Mobile for New York, and was about to proceed to the latter port. But that was a new employment, and a new voyage; a different one from that on which libelant shipped. As, in my judgment, the voyage stipulated for was ended at the port of Mobile, either party had the right under the contract to terminate his relations with the other there. The discharge of the libelant was therefore not wrongful. But suppose it was wrongful, and he was entitled to recover damages therefor. It appears from the libel he was paid up to August 20, 1888, and that on that very day the master offered to take him back, and to carry him on to New York, as libelant claimed was his right to demand; but libelant declined the offer, and refused to restore his relations with the ship, and thereby save himself any loss which he might otherwise sustain by reason of such wrongful discharge. By such refusal he placed himself in default, and absolved the master from all obligations to him under the alleged contract. *Wood, Mast. & Serv.* 269. The exceptions to the libel are sustained.

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**FEE *et al.* v. ORIENT FERTILIZING CO.**

(*District Court, E. D. New York.* September 24, 1888.)

**1. SEAMEN—WRONGFUL DISCHARGE—DAMAGE—FISHING VESSEL.**

A master and crew wrongfully discharged by the owner of a fishing vessel from employment under a contract for the entire season, wages to be in the ratio of the quantity of fish caught, may recover damages for such discharge, based upon the amount they would have received as wages on the catch of the whole season, less the amount actually paid them, and any wages earned by them during the season after their discharge.

**2. SAME—RELEASE AND DISCHARGE.**

A receipt by the master in such case for his wages in full to the time of his discharge is no bar to a libel for wages for the residue of the season, the evidence showing that it was not intended as a settlement for the wrongful discharge.

**In Admiralty.**

Libel by John Fee, the master, and others constituting the crew, of the fishing vessel *D. K. Phillips*, to recover damages for wrongful discharge.



*Goodrich, Deady & Goodrich*, for libelants.

*Evarts, Choate & Beaman*, for claimant.

**BENEDICT J.** This is an action on the part of the master and crew of the fishing steamer *D. K. Phillips* to recover damages of the owner of that steamer for a wrongful discharge. The demand of the master, John Fee, will first be considered: The master was hired on the 12th of May to run the steamer *D. K. Phillips* on the following terms: Twenty-five cents per thousand for the first two millions of fish caught; thirty cents per thousand on two millions to two millions five hundred fish caught; thirty-five cents per thousand on two million five hundred thousand to three million fish caught; forty cents per thousand fish caught in excess of three millions. The master entered into the service of the defendant under this contract, took charge of its vessel, received for it a license as a fishing vessel, hired a crew, as usual, and engaged in the business of fishing for menhaden.

The contract entered into with the master was a contract for the season. Its terms show that by necessary implication. The usage, as proved in the case, confirms that construction. Under such a contract the master was entitled to run the vessel for the season, unless discharged meanwhile for proper cause. After a few weeks of service he was discharged, and the question of the case is whether he was discharged for a sufficient cause. The answer sets up drunkenness as one cause. The testimony wholly fails to prove this charge. Drunkenness is not proved, and no facts are proved to justify a reasonable suspicion of such misconduct on the part of the master. The second ground pleaded is that, in the year before, this master, while in command of the same steamer, then owned by a different corporation from the corporation here defendant, without the authority of the owner used the vessel on one Sunday to take a pleasure excursion with 15 or 20 of his own friends. If it be deemed proved that the master made an unauthorized use of the vessel on the former season, that violation of his duty to other defendants afforded the defendant no ground for rescinding its contract with the libelant. The only other ground on which the discharge is sought to be justified is incompetency, and of this there is no proof. It must therefore be held that the discharge of the libelant at the time it was made was wrongful, and a violation of the contract, which gave him a right of action for the damages sustained by reason thereof. A further ground of defense is that at the time of his discharge the libelant was paid for his services up to the day of his discharge, and he then gave them a receipt in full. But the evidence makes it plain that this was not intended to be a settlement of the libelant's demand for the wrongful discharge, and the receipt of the wages earned up to that time does not prevent him from recovering the damages arising from the refusal to permit him to earn wages for the season. As to the amount of the damages, the evidence shows that the actual catch of this steamer during that season was three millions of fish, and the amount that would have been earned by the master must be calculated on this basis. He must allow

credit for the amount received of the defendant by him, and the amount earned by him during the season subsequent to his discharge.

As to the demand of the crew, there seems to be no defense at all. They were employed by the master for the defendant. They were engaged for the season, and they were discharged without any cause whatever. They are each entitled to receive the amount they would have earned during a service of six months, less the amount of their actual earnings during that period, and any sums that have been paid them. If the parties cannot agree upon these amounts, let there be a reference to compute the amounts due the respective libelants upon the basis above indicated.

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THE W. A. LEVERING.

DARROW *v.* THE W. A. LEVERING.

(*District Court, S. D. New York.* October 22, 1888.)

**TOWAGE—NEGLIGENCE—STRANDING—HOISTING SAIL ON TOW.**

The schooner *M.*, which was lashed on the port side of the tug *W.*, and bound through the East River into Long Island sound, when about a half a mile from the passage between The Brothers islands, hoisted her foresail. The testimony was conflicting as to whether this was contrary to the orders from the tug or not. The view of the pilot of the tug to his port-hand was thereby somewhat obscured. In entering the passage between the Brothers, the *M.* struck on a reef projecting from the North Brother. *Held*, that the schooner was in fault for obstructing the view of the pilot of the tug by hoisting her foresail, that the master of the tug was in fault for continuing his course with his view obstructed, when he could have insisted upon the lowering of the foresail, or could have taken the passage to the north of the island, and that the damages should therefore be divided.

In Admiralty. Libel for damages.

*R. D. Benedict*, for libellant.

*Edwin G. Davis*, for claimant.

**BROWN, J.** The libellant's small two-masted schooner *F. H. Miller*, while in tow along-side the tug *W. A. Levering*, bound through Hell Gate to Long Island sound, was run upon the shoal that makes out from the south-west side of the North Brother island. The *Miller* was on the port side of the tug, and between them was another two-masted schooner, the *Cheseborough*. There was a good breeze from the south-west, and the tide was flood. As the schooners were to be left by the tow a short distance beyond the North Brother, the *Cheseborough*, about half a mile before reaching those islands, hoisted her mainsail and foresail. Her captain testifies that he understood by signal that he had the consent of the pilot in charge of the tow, although such assent is denied by the pilot. The

captain of the Miller, seeing the Cheseborough's sails hoisted, followed suit and hoisted his. The acting captain of the tug, who soon after took the wheel, and two other witnesses, testify that the captain of the Miller was notified not to hoist his foresail; the latter denied that he had any such notice. The captain of the tug also says that before the Miller's foresail was hoisted there was sufficient space left between the Cheseborough's foresail and mainsail for him to see where he was going, but that the Miller's foresail, when hoisted, closed up that space, so that he had a view on his port bow of only about two points range. The passage through The Brothers was the straight and usual passage for craft of this size. The passage is narrow, and, in the flood tide and a south wind, requires careful observation and good judgment to avoid the reef above referred to, when, as in this case, there were other vessels to the southward. Upon these facts I must hold both in fault. It was imprudent for the pilot to proceed through that passage with his view obstructed so much as it was. He should have insisted that the foresail of one or both of the schooners on the port side be lowered, or else have gone around to the northward of the Brothers islands. He might easily have done either. This obstruction of view was completed at least a quarter or a third of a mile before reaching The Brothers, so that there was plenty of time and room to go to the northward. It is clear that it was not insisted on that either foresail should be lowered, and the captain took the risk of going on with a very imperfect view of the north shore. On the other hand, I cannot discredit the testimony of the three witnesses, who state that objection to hoisting the foresail was communicated to the plaintiff's captain. Though the latter is not answerable for so much of the obstruction as was caused by the Cheseborough's sail, he is answerable for closing up the open space between it and the Cheseborough's mainmast; and I cannot find, against the testimony of the claimant, that the view through the open space, after the Cheseborough's foresail was up, was of no value. It seems to me that the captains of both schooners should have known that it was very imprudent and unjustifiable to obstruct the view of the pilot towards the port side in going past the reef between the two Brothers. The captains of both schooners evidently expected that they would go through that passage. Whatever other causes may have existed, such as the wind and tide and miscalculation, these difficulties must necessarily have been aggravated by the obstruction of the pilot's view; and I must therefore regard the plaintiff as contributing to the accident. Decree for the libellant for half the damages and costs, with a reference if the parties do not agree as to the amount.

GARRETT *et al.* v. NEW YORK TRANSIT & TERMINAL Co., Limited, *et al.**(Circuit Court, S. D. New York. October 17, 1888.)*

## INJUNCTION—COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION.

Where the state court enters a decree before an order in the United States circuit court to show cause why a temporary injunction should not issue is heard, making the acts sought to be enjoined a contempt of the state court if done, and rendering the process of the United States court merely ancillary, the injunction will be denied, and complainants left to their remedy in the state court.

In Equity. On motion to show cause.

Bill by Robert Garrett and others against the New York Transit & Terminal Company, Limited, and others.

*Wm. W. Macfarland*, for complainants.

*Francis L. Stetson*, for defendants.

LACOMBE, J. Complainants sued defendants in the supreme court of the state. Upon trial, at special term, the relief asked for in the complaint was granted as to some of the defendants, but was refused, and the action dismissed, as to others. Thereupon complainants brought suit in this court against the defendants who had prevailed in the state court, praying for the same relief. Upon beginning this suit, complainants obtained an order to show cause why a temporary injunction should not issue, forbidding the defendants from making any disposition of the property in controversy, or from incumbering the same in any way. This order to show cause was returnable on June 7, 1886, and until the return-day of the order defendants were by its last clause restrained from doing the acts sought to be enjoined. The return-day of the order to show cause has been adjourned by consent, from time to time, until now. Meanwhile an appeal was prosecuted in the state court, the decision of the special term reversed, and judgment for the relief prayed for entered against all the defendants. This judgment has been affirmed by the court of appeals.<sup>1</sup> Defendants, who have not obeyed the mandate of the state court, are now, it is alleged, in contempt of that tribunal, and motion to punish them for such contempt has been made. Upon the argument of this motion for a preliminary injunction, counsel for the complainant conceded that there was no act which, being committed by the defendants, would be a contempt of the temporary injunction now asked for, that would not also be a contempt of the decree of the state court. It is also practically conceded that the process of this court is sought only as ancillary to that of the state court, and that complainants have no expectation of prosecuting the case here to final hearing, and thereupon obtaining the permanent injunction prayed for. Under these circumstances, the complainants should be left to their remedy in the state courts; and their motion for a temporary injunction must be denied.

<sup>1</sup>Not reported.

PICKETT'S HEIRS *v.* FOSTER *et al.*

(Circuit Court, W. D. Louisiana. February, 1888.)

1. MORTGAGES—DEEDS OF TRUST—EXECUTED OUT OF STATE.

A deed of trust, executed in another state, on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage.

2. SAME—LIEN—TACIT MORTGAGE—GUARDIAN AND WARD.

Several years after the minors R. & B. were emancipated by marriage, and while they were in the enjoyment and control of their estates, their former tutor filed and caused to be homologated his final account against them. In the judgment the clerk recognized a tacit mortgage in favor of the tutor on his wards' property, dating from the beginning of the tutorship, which was never registered. *Held* that, whatever may be the legal effect of such a mortgage as between the tutor and his former wards, his tacit mortgage is inferior to the mortgage which they had contracted after their marriage, and while in full control of their property, with complainants.

3. SAME—LIEN—RECORDING.

The deed of trust in this case was originally registered in 1866. Not being reinscribed within 10 years thereafter, it was, as to third persons, extinguished, when, in 1885, it was again registered. This case discloses no facts which should forbid the application of the registry laws of Louisiana.

4. EXECUTORS AND ADMINISTRATORS—PUBLIC ADMINISTRATOR—ACTIONS—DISMISSAL BY SUCCESSOR.

The public administrator, to whom no letters of administration are shown to have been granted by the court, instituted a suit in the interest of a succession. Afterwards he resigned, and one of the defendants in the suit, having been appointed his successor, caused the suit to be called out and dismissed for want of prosecution. *Held*, that the suit was instituted without authority by the public administrator, and his successor in office was not charged with any official duties in relation to it; that his having the suit called out and dismissed, or his failure to prosecute it, does not make him in any capacity liable to the heirs of the succession.

(Syllabus by the Court.)

In Equity

*J. T. Ludeling* and *W. G. Wyly*, for complainants.

*C. I. & I. S. Boatner* and *A. H. Leonard*, for defendants.

BOARMAN, J. Complainants sue to enforce the lien of a deed of trust executed at Memphis, Tenn., to J. C. Pickett, on the Jonathan Morgan plantation in Carroll parish, to secure the payment of three promissory notes, amounting to \$18,000, with 6 per cent. interest, drawn by Mrs. Agnes Ricketts, and Bell; to have certain acts, sales, transactions, and mortgages, which were made from time to time by the defendants *inter sese*, declared without effect as to the plaintiffs; and for judgment *in personam*, against George Foster, formerly the public administrator of said parish, because of his failure to discharge certain official trusts imposed on him by law, as the public administrator of Carroll parish, for such a sum as will repair the damages caused by his unfaithfulness. The bill shows that the last of the notes became due January, 1869, and that the deed of trust executed to secure their payment was registered in Carroll parish January, 1866, and reinscribed in 1885; that J. C. Pickett died in Kentucky, and B. H. Lanier, as the public admin-

istrator of Carroll parish, brought suit December 23, 1873, in that parish, to foreclose said deed of trust on behalf of Pickett's succession; that in said suit Agnes Ricketts, Narcessa Bell, Ezra Wheeler, Thomas Roundy, and Augustus Ireland,—the latter three composing the firm of Ezra Wheeler & Co., of New York, and claiming to be part owners of said plantation,—and George Foster, then in possession, and claiming to be part owner of said plantation, were made defendants; that all said defendants pleaded to the said suit, styled, "B. H. Lanier, Public Administrator, *vs.* Ezra Wheeler *et al.*," June 2, 1874; that before any other proceedings were had therein, Lanier resigned his office, and George Foster, one of the defendants in that suit, was appointed and qualified as public administrator in his place, and he gave bond, May 6, 1875, according to law, in the sum of \$10,000; that said suit, after Lanier's resignation, came under the official administration of George Foster, and he was charged with the prosecution of it in the interest of all concerned. The complainants allege bad faith and fraud against George Foster, because, as they charge, he sought the appointment and place of public administrator for the purpose of causing the wrongful dismissal of said suit, and of otherwise obstructing the enforcement of their rights against the property which the said Foster then claimed to own; that he caused his own attorneys to demand that said suit be called and dismissed for want of prosecution; and that, when the plaintiffs were called, he answered that he knew nothing concerning the succession of James C. Pickett; that on December 4, A. D. 1875, his attorney wrote up, and the judge signed, judgment dismissing said suit for want of prosecution; that in order to despoil the estate of which he was the administrator, he, having had the suit wrongfully dismissed, fraudulently withheld all information from complainants with regard to the enforcement of their rights against said plantation. They allege that George Foster, public administrator, having control of the notes and deed of trust, was charged in fact and in law with trusts and duties that made him the trustee of complainants, the holders and owners of the notes and mortgage; that he wrongfully neglected to have the deed of trust reinscribed, so as to preserve their claims from being barred by prescription. They allege that notwithstanding said Foster occupied, possessed, and claimed to be the owner of said plantation since February 5, 1875, he has, from time to time, by fraudulent tax sales and other fraudulent schemes and devices, charged and fully set out in this bill, interposed, or caused to be interposed, certain named persons as the purchasers and owners, or as the mortgagees of a part or all of said plantation, "in order to screen and shelter" the same from the legal effect of said deed of trust, and to deprive complainants of their rights therein; that after the time had come when, in his opinion, the said plantation could no longer be subjected to complainants' mortgage, because the deed of trust was prescribed, he caused the several persons so interposed by him to reconvey the whole plantation to himself, and that he caused his wife to institute a collusive and fraudulent suit against himself for a separation of property, and for \$2,986, the amount she claimed that he owed her; that she

obtained judgment accordingly, and July 5, 1884, caused the plantation to be sold at sheriff's sale to satisfy her judgment, and she became the purchaser thereof for \$10,306, the amount of certain mortgages then outstanding against it, and paid in cash only the costs of her suit. The drawers of the notes acknowledge their indebtedness on the same. George Foster and his wife, answering, allege that the plantation was acquired by them in good faith, and for valuable consideration. They deny the claims of complainants, and Mrs. Foster pleads the prescription of five and ten years.

Such of the evidence as appears to be essential to the determination of this suit is substantially as follows: F. M. Goodrich, in 1855, became the tutor of the drawers of the notes when they were the minors Agnes and Narcessa Morgan. In 1859 he filed a provisional account, which showed himself, as tutor, to be indebted to the minors \$1,263.31. In 1862 the two minors were emancipated by marriage, and took possession of their property. The matter of the tutorship not being settled when the minors were married, the tutorship remained in *statu quo* until January 25, 1867, when Goodrich filed two petitions in the district court of Carroll parish,—one against Agnes Ricketts, the other against Narcessa Beel. In these petitions he alleges that since April 20, 1859, when he filed his provisional account, up to the 15th March, 1862, the minors had become indebted to him as tutor \$———; “that prior to the said 15th March, 1862, said minors became emancipated, and had taken possession of their property rights and credits, real and personal; \* \* \* that he presents accounts and vouchers showing the indebtedness alleged by him, about \$4,000 in the aggregate; \* \* \* and prays, after due and legal notice, that said account be homologated, and a judgment rendered in favor of your petitioner decreeing the balance due in favor of your petitioner \$———, with legal interest from the 15th of March, 1862; and that he be discharged.” The petitions were filed January 25, 1867. Several days before that date Mrs. Ricketts and Mrs. Bell made the following confession of judgment:

“I hereby waive service of the foregoing petition, copies of accounts, vouchers, citations, etc., and, having examined the before-mentioned accounts, and found them to be correct, acknowledge my indebtedness to petitioner as set forth, viz., \$3,498.71; and do further acknowledge this to be a full, complete, and final settlement for all liability of petitioner, as tutor aforesaid, and concur fully in the prayer of his petition. Done this 11th January, 1867.”

On the next day after the petition was filed, January 26th, the clerk signed the following judgment:

“By reason of the law and the evidence and within written release and acknowledgment of indebtedness, all hereto annexed, it is therefore ordered, adjudged, and decreed that the annexed final account and settlement of F. M. Goodrich, tutor of Agnes A. Morgan, now Ricketts, be, and the same is hereby, approved and homologated, and said tutor finally and fully discharged from said trust, and his bond as tutor canceled. It is further ordered, adjudged, and decreed that F. M. Goodrich have and recover of said Agnes Ricketts the sum of thirty-four hundred and ninety 71-100 dollars, with legal interest thereon from 15th March, 1862, the amount acknowledged to be due by her,

and that the legal tacit mortgage in favor of said tutor be recognized to date from December 3, 1855. Done and signed at Floyd, Carroll parish, Louisiana, January 26, 1867."

Similar proceedings were had for \$907 against Narcessa Bell, who, about this time, had married J. H. Green. Goodrich, in execution of his judgments, caused the plantation to be sold at sheriff's sale, September 5, 1868. J. H. Green bid in his wife's part of the plantation, and Goodrich bid in the other part, belonging to Mrs. Ricketts. On December 18, 1868, Goodrich caused the deputy recorder of Carroll parish to erase from the mortgage books the said deed of trust, and on same day sold the interest purchased by him to Mrs. Ricketts for \$4,000, payable in four installments, without warranty of title. Green carried on the planting interest for himself and wife. Mrs. Ricketts, shortly after making the purchase from Goodrich, married R. M. Scanlan, and reserved to herself the management of the planting interests. Both Green and Mrs. Ricketts became indebted to Foster & Gwyn, commission merchants in New Orleans. In February, 1868, Mrs. Ricketts, at private sale, sold her part of the plantation for \$36,934, to George Foster, a large part of the price going to pay her indebtedness to the said firm. In August, 1873, Green's part was sold by the United States marshal under execution issued in the suit of Ezra Wheeler & Co. v. I. H. Green, and was bid in by the plaintiffs therein for \$10,074. The marshal retained "\$422 for taxes," and the purchasers the balance of the sum. November 28, 1874, Foster's interest, for which he had paid Mrs. Ricketts \$36,000, was sold at a tax sale, for \$318 due by himself, to Gwyn for \$1,500, and the purchaser obtained from the state auditor a title ratifying the tax sale, July, 1875. The other interest, which had been purchased at the marshal's sale, in August, 1873, by Ezra Wheeler & Co., was sold at a tax sale for taxes, due by Green for 1873, to Gwyn for \$1,001. December 16, 1881, Gwyn, having become the purchaser of the whole plantation at said tax sales, sold it to George Foster for \$5,000. Mrs. Foster filed her suit against her husband, December 5, 1881, obtained judgment for separation of property, and for \$2,986, July 2, 1882; and the sheriff sold said plantation under her judgment. She bid in the plantation for \$10,306, the amount of certain mortgages, not including complainant's deed of trust, then on registry against it. She retained the purchase price, except the costs, which she paid; and the sheriff returned the writ, "unsatisfied," 8th July, 1884. In September, 1873, after the whole property had passed out of the hands of Mrs. Ricketts and Bell, Scanlan and Green to whom these ladies were then married, made a contract with James C. Pickett, administrator of Pickett's estate at Frankfort, to represent him as his agent to enforce the said deed of trust, and collect the notes. In this agreement they were allowed 75 per cent. of what they could recover, provided they paid costs. They brought the notes to Louisiana, and gave them to I. W. Montgomery, a lawyer, whom they employed under a written contract to sue for their recovery. Montgomery proceeded to sue in the name of the public administrator, Lanier. It does not appear that Lanier had received any letters of ad-



ministration in the succession of Pickett. The notes remained in the hands of Montgomery, and were not filed in the suit, and he did not advise them, nor did they inquire of him concerning the suit or the notes, for nearly 10 years. No inventory or appraisal was made in the succession of Pickett.

The pleadings, issues, and arguments, oral and written, of counsel on either side, suggest several questions, among which it seems necessary to consider only the three following questions: (1) Is a deed of trust, executed in another state, on property in Louisiana, to secure the payment of promissory notes, under the jurisprudence of Louisiana, entitled to the legal effect of a conventional mortgage? (2) Will the judgment signed by the clerk of the court in favor of Goodrich, tutor, against Mrs. Ricketts and Mrs. Bell, under which said plantation was sold, protect the purchasers or their assignees against complainant's mortgage? (3) Can a suit brought in the interest of a succession by a public administrator, under the laws of Louisiana, to whom no special letters of administration are shown to have been granted, be considered in law a pending suit, or have, under the facts in this case, any legal effect against Foster and other defendants in this suit?

1. The authorities abundantly warrant an affirmative answer to the first question. *Watson v. James*, 15 La. Ann. 386; *Frelson v. Tiner*, 6 La. Ann. 18; *Tillman v. Drake*, 4 La. Ann. 16.

2. The authority of a clerk to homologate a tutor's account, under the laws of Louisiana, depended on certain jurisdictional facts. Such accounts had to be filed, and the fact of filing had to be advertised for 30 days, and, if unopposed, they could be legally homologated by the clerk on the first Saturday of each month. Act No. 56, Sess. 1855. In this case, the clerk filed Goodrich's account on one day, and on the next signed the judgment herein recited. None of the requirements, which the history of this case shows to be so essential for the protection of the rights of third persons, seems to have been observed by the clerk. Whatever may have been the extent of his authority, under the facts in this case, to homologate Goodrich's unopposed account, it certainly never was intended by the legislature to invest a clerk of the probate court, or any judge thereof, when homologating a tutor's account, with judicial power to impose a legal or tacit mortgage on the property of a person in favor of a former tutor, when, in the tutor's petition asking for the homologation, it is shown that the minor has long since been emancipated by marriage, and has had for years before full control of all her estate, so as to affect property which, at the date of the tutor's judgment, had been mortgaged in pursuance of legal contracts made with other persons by the emancipated minors. In the absence of any proof, without the consent of the minors, and when as a matter of fact no such mortgage is sought or prayed for by the suing tutor, a judgment fixing a legal mortgage to date and take rank from the beginning of the tutorship, and one, too, that has never been registered, could not affect complainant's deed of trust or mortgage, which is shown to have been on record when Goodrich's judgment was signed. Whatever may be the effect of such a judgment as between

the several parties thereto,—that is, between the minors who were then emancipated and their former tutor,—or however much their subsequent acts, sales to, and transactions with George Foster and other defendants may forbid them, in good conscience or in law, to question his or their title or interest in said plantation, it will not be seriously contended that that part of the clerk's judgment giving such a mortgage to Goodrich can affect persons having such rights as complainants. The erasure by the parish recorder of the deed of trust now sued on was wholly without effect against any one. It is true that Lanier was the public administrator at the time he instituted the suit in the interest of Pickett's succession; that, when he resigned his office, George Foster became his successor in office, and was charged in law with the administration and prosecution of all suits legally instituted by his predecessor; and that he, as one of the defendants in that suit, knew that such a suit was on the court docket, and that the purpose of Lanier in bringing said suit was to have the plantation claimed by him (Foster) subjected to the payment of the notes now sued on; but whatever may have been his purpose in causing the dismissal of the said suit, or his conduct or gain in the various transactions which he and others had in relation to said plantation, there is nothing in this suit to show that he, as an individual, or as the public administrator, was at any time charged in law or in equity with trusts, in the interest of complainants, of a fiduciary kind. James C. Pickett, to whom the deed of trust was executed, lived and died in Kentucky. It is not shown that he had any property in Louisiana at the time of his death.

Defendants' counsel contends that if Pickett left a succession of any kind in Louisiana it was not such a succession as could come under the administration of the public administrator. It is not necessary to consider that point, because it seems to be clearly established by the courts in Louisiana that a public administrator, like any other person desiring to administer a succession, must, before he can do anything in or with the succession, in some way be authorized by an order of the proper court. The evidence does not show that he had such authorization, and we are not warranted in presuming that he had legal authority to institute said suit. Such authority must be affirmatively shown before he could legally act. The failure to show affirmatively that Lanier, as public administrator, was properly authorized to bring suit for Pickett's succession, is fatal to complainants' action against Foster *in personam*.

The deed of trust relied on by complainants was registered originally in January, 1866. Not being reinscribed within 10 years thereafter, it had, when it was reinscribed, in 1885, become extinguished as to George Foster or his assignees. The complainants are not shown to be or to have been the *cestui que trust* of Foster, and the evidence shows no good reason for not applying the law of registry in Louisiana in favor of himself and his assignees. Judgment for defendants.

CENTRAL TRUST CO. v. OHIO CENT. R. CO. *et al.* (McGOURKEY,  
Intervenor.)

(Circuit Court, N. D. Ohio, W. D. August 29, 1888.)

RAILROAD COMPANIES — BONDS AND MORTGAGES — PRIORITY — CAR TRUSTS —  
LEASES.

A contract was entered into between the trustee of an alleged car trust and a railroad company, whereby cars and locomotives were leased by the former to the latter, it agreeing to pay for every car and locomotive delivered an annual rent for the period of 10 years, at the end of which they were to become the property of the railroad company; the several payments of rental to be evidenced by obligations of the railroad company due at the time of the maturing of said payments, and delivered *pro rata* to the lessor at the time of the delivery of said rolling stock, with coupons for the payment of interest. The evidence showed that the trustee at the time of the execution of the lease neither owned nor possessed the rolling stock purported to be leased; that after the execution of the lease the railroad company furnished to the agent of said trustee the names of subscribers; that thereupon such agent made out subscription certificates, which were signed by said trustee as cashier, certifying that the holders would be entitled to so many thousand dollars of car-trust certificates when the subscription was paid in full. The money paid in on said subscription certificates was credited thereon and deposited in bank to the credit of the "equipment account" of the railroad company. When the installments were all paid on the subscription certificates, the railroad company scheduled the rolling stock under the said lease, and the trustee certified the car-trust certificates and turned them over to the holders thereof *pro rata*, or in full of their subscription if paid up. The railroad company obtained the rolling stock under its own contracts with the car builders. *Held*, that the car-trust certificates were, in legal effect, mortgage bonds, and as such inferior in point of lien upon such rolling stock, to a prior mortgage with an "after-acquired property" clause.

In Equity. On exception to report of the special master upon the intervening petitions of George J. McGourkey, trustee of car trusts.

*Geo. Hoadly and James Irvine*, for petitioner, McGourkey.

*Stevenson Burke and Doyle & Scott*, for the Central Trust Company and the Ohio Central Railway Company.

JACKSON, J. The original or main suit herein was brought by complainant to foreclose certain mortgages executed by the Ohio Central Railway Company, January 1, 1880, to secure \$3,000,000 of first mortgage bonds and \$3,000,000 of income bonds. The mortgage or trust deed securing the first mortgage bonds conveyed to said Central Trust Company of New York, as trustee, in very broad and comprehensive terms, all the line of railroad of the mortgagor, with all rights of way, road-bed made and to be made, track laid and to be laid between the designated terminal points, including all the stations, depot grounds, fences, rails, bridges, sidings, engine-houses, machine-shops, buildings in any way then or thereafter appertaining unto said described line of railroad, "together with all the engines, cars, machinery, supplies, tools, and fixtures now or at any time hereafter held, owned, or acquired by said party of the first part for use in connection with its line of railroad aforesaid." This mortgage, as well as the income mortgage securing the \$3,000,000

of income bonds, was duly recorded. The railroad company made default in paying the interest on said bonds, and the said trustee thereafter, in pursuance of and in conformity with the terms and provisions of said mortgages, commenced proceedings in this court to foreclose said mortgages by a sale of the property covered thereby. Such proceedings were had in the cause as resulted in a sale of the franchises and property of the said Ohio Central Railway Company in the summer of 1885, when, under a scheme of reorganization participated in by a large majority of the bondholders and a considerable portion of the stockholders, said property and franchises were purchased for this account, and then conveyed to a newly-organized corporation, called the "Toledo & Ohio Central Railway Company," which thus became the successor of the said Ohio Central Railway Company in and to franchises and property of the latter covered by said mortgages. At or about the time of commencing said foreclosure suit, John E. Martin was, on September 30, 1883, appointed receiver of the road and property of said Ohio Central Railway Company, and said receivership continued for the period of 21 months, extending from October 1, 1883, to June 30, 1885. The regularity of these proceedings, not being called in question or in anywise involved in the present controversy, need not be noticed with more particularity or detail.

On April 2, 1884, during the pendency of said foreclosure suit, George J. McGourkey, trustee, filed his two intervening petitions in the cause, alleging that under three certain lease contracts entered into and executed between himself and said Ohio Central Railway Company, bearing date, respectively, August 20, 1880, March 1, 1881, and March 1, 1882, he had leased and delivered to said railway company 27 locomotives, 3,300 coal cars, and 340 box cars, designated and identified by serial numbers mentioned, and the letters "O. C. C. T." marked thereon, for which the railway company had agreed to pay him certain rentals during the period stated in each lease, when said locomotives and cars were to become the property of said railway company. The petitions, after setting out the terms of said lease contracts, and the payments that had been made thereunder, both by the company and the receiver, alleged that said cars and locomotives had gone into the possession of said receiver, and were then being used by him in conducting the business of said railroad, and prayed that said receiver be directed by the court either to perform the covenants of said leases by paying the balance due petitioner thereunder, or that he be directed to deliver up said equipment, and pay petitioner for the use thereof; and asking for a reference to a special examiner to ascertain and report the value of such use. On the 18th of June, 1887, said McGourkey, trustee, filed a third petition in the suit, claiming that there was due him as rental under said leases from March 1, 1883, to October 1, 1883, when said equipment went into the hands of the receiver, the sum of \$124,000, which, though accruing before the receivership, should be paid him, because cash assets, personal property, and earnings to a large amount had come into the possession of the receiver, and been applied towards permanent improvements, new equipment, and

betterments placed upon the property, etc. The Central Trust Company, complainant in the foreclosure suit, and the Toledo and Ohio Central Railway Company, as the purchaser of the mortgaged property sold thereunder, answered said petitions, denying the title of McGourkey, trustee, to the equipment claimed by him, and disputing his right to any rental for the use of the same while in the hands of the receiver. A reference was directed to a special master, who took proof, and reported that the petitioner, McGourkey, trustee, should be paid about the sum of \$80,000 as rental while said equipment was used by the receiver between October 1, 1883, and June 30, 1885, in addition to what had been paid during said period, which amounted to about \$129,600. The petitioner and the complainant, together with the Toledo & Ohio Central Railway Company, each filed exceptions to said report; the petitioner claiming that he has a valid title to said equipment, and is entitled to a much larger rental therefor; and the complainant, in behalf of the first mortgage bondholders, and the Toledo & Ohio Central Railway Company in its own behalf, insisting that the title to said cars and locomotives was vested in said Central Trust Company, under and by virtue of the "after-acquired property" clause of the mortgage of January 1, 1880, executed to secure the railway company's first mortgage bonds. That said McGourkey, trustee, under and by virtue of said leases acquired nothing more than a lien upon said equipment, subject to the prior lien and title of said mortgage, and that he is not entitled to any rent or purchase money therefor as against said bondholders or their trustee; but, if mistaken in this view of their rights, that the surplus earnings derived from the receivership, and now in court, amounts to only about \$80,000, and that petitioner should in no event be awarded a greater allowance than such surplus earnings, as any greater allowance would have to be paid out of funds or property belonging to and purchased by the bondholders under the foreclosure suit. It is conceded by counsel for petitioner, McGourkey, (and, as the court thinks, properly so,) that complainant and the Toledo & Ohio Central Railway Company are not estopped by anything that has occurred during the progress of the foreclosure suit from setting up the claims they insist upon in respect to said equipment.

But counsel for complainant and the Toledo & Ohio Central Railway Company have gone further, and contended that the leases, under which petitioner asserts his claim to said equipment and to compensation for the use thereof while in the possession of the receiver, were a part and parcel of a fraudulent scheme contrived and put in operation by the pool or syndicate which originally organized the Ohio Central Railway Company. It appears that, in 1879, what is called the "\$3,000,000 pool" was formed to acquire and complete certain lines of railroad, which were to constitute the Ohio Central Railway Company. This syndicate, through its committee, composed of George I. Seney, Dan P. Eells and George F. Stone, representing the subscribers to said pool, contracted with Brown, Howard & Co., also members of said syndicate, to acquire and construct the lines that were to form said Ohio Central Railway Company; to organize

said company with a capital stock of \$5,000,000, and, when completed and organized, the company's capital stock of \$5,000,000, together with its first mortgage bonds for \$3,000,000, and its income bonds for \$3,000,000, were to be issued. This stock and these bonds, aggregating \$11,000,000, were to be turned over by Brown, Howard & Co. to the subscribers to said pool or syndicate, which was to and did pay to Brown, Howard & Co. the \$3,000,000 for acquiring, completing its lines, and organizing said railway company. Brown, Howard & Co. were also to furnish the road with \$560,000 worth of equipment. They completed and organized the company under this contract, received from the syndicate the \$3,000,000, and turned over to the pool the \$11,000,000 of stock and bonds of the company, which were distributed between members of the syndicate in proportion to their respective subscriptions to the \$3,000,000 pool; the result of the transaction being that the promoters of the enterprise obtained \$11,000,000 of the railway company's securities at and for an actual outlay of only \$3,000,000. The securities so received were at the date of issuance, or very soon thereafter, worth in the market largely more by several millions than the sum of \$3,000,000 paid out therefor. Following this transaction, and as a part of the same alleged fraudulent scheme, it is claimed that said syndicate having control of the railway company adopted and carried into execution a fraudulent plan and contrivance to make a third issue of bonds secured by mortgage upon the terminal property and facilities of the company at Toledo, and then take said terminal properties out of the operation of the first mortgage made to secure the first mortgage bonds. The report made by the officers of the company under the laws of Ohio, it is claimed, made an entirely different showing from that stated above, and showed ample assets in the company's hands to provide it with all necessary and reasonable equipment, but that, notwithstanding this, the same management, and largely the same individuals, contrived this further fraudulent scheme of making car-trust securities under a guise of leases for the purpose of further defrauding the public and securing still larger profits and advantages to themselves. While the transaction connected with the organization of the company under which the promoters of the enterprise obtained for themselves \$11,000,000 of the company's securities, and while the further transaction in connection with the "terminal mortgage," as it is called, are both open to grave suspicion as to their good faith, and subject to severe criticism, it is not perceived how they can affect the question now under consideration. The pool may have been overpaid, but how does this inure to the benefit of complainant or of the Toledo & Ohio Central Railway Company? The terminal properties at Toledo may by a fraudulent contrivance have been taken out of the operation of the first mortgage, but how can complainant or the Toledo & Ohio Central Railway Company, in this proceeding, either have that wrong corrected, or obtain any benefit therefrom? It may be true that the same parties who carried into execution said alleged fraudulent transactions are the same parties who originated the alleged fraudulent con-

trivance to raise money by means of the present car-trust leases, but the holders of the company's certificates or obligations issued under said leases are or may be entirely different persons, whose rights could hardly be affected (if their securities are negotiable, and were acquired for value before maturity and without notice) by the fraudulent conduct of the contrivers and originators of the scheme. The court does not see that the transactions connected with the organization of the railway company under which the promoters obtained the \$11,000,000 of its securities can be gone into, or has any direct bearing upon the present controversy. Nor is it perceived what effect can be given to the question discussed as to the validity or invalidity of the terminal mortgage in considering and determining the rights of the respective parties in and to the equipment and the rental thereof here involved. These prior transactions will therefore be left out of further consideration and discussion.

We are then brought to the important and controlling question in the case, viz., who has the superior right to or lien upon the equipment in controversy,—the petitioner, under the lease contracts, or those represented by complainant and the Toledo & Ohio Central Railway Company, under the mortgage of January 1, 1880? The first car-trust lease was executed August 20, 1880, and reads as follows:

LEASE A.

"Memorandum of agreement made this 20th day of August, A. D. 1880, between Geo. J. McGourkey, trustee, and the Ohio Central Railroad Company, whereby George J. McGourkey, trustee, agrees to lease to the Ohio Central Railroad Company, and the Ohio Central Railroad Company agrees to hire from him, eight hundred coal cars and fourteen locomotives, bearing the numbers, and to be made by the makers set out in the schedule hereto attached and made a part thereof, marked 'Schedule A,' and delivered at Columbus, Ohio, in accordance to specifications hereto annexed, such renting and hiring to be in respect of each of said cars and locomotives for the period of ten years from the date of the delivery of said cars to said railroad company, but subject, however, to the provisions and conditions hereinafter contained. The said rolling stock to be delivered as per the contract of said George J. McGourkey, trustee, with the said makers, but it is understood that the said George J. McGourkey shall in no way be liable for any delay that may arise in delivery of said cars by said makers, and said railroad company may for convenience make the contracts direct with said makers. The rental of said cars and locomotives payable to George J. McGourkey, trustee, lessor or assigns, by the Ohio Central Railroad Co., lessee, shall be as follows: The gross sum of one hundred thousand dollars on delivery of said cars and locomotives, and ratably in that proportion, counting twenty cars as equal to one locomotive in and for the delivery of any portion thereof to the persons authorized by the said railroad company to receipt for the same, and the receipt of such persons or person shall be final and conclusive evidence of the acceptance of such locomotives and cars to the satisfaction of the lessees, and in addition the full sum of forty thousand dollars (\$40,000.00) in each year from the date of this agreement of lease for the term of ten (10) years, together with interest on such yearly payments at the rate of eight (8) per cent. per annum, payable semi-annually on the 1st days of March and September of each year during said term. In case of default in the payment of any installment or installments of rent, on the day on which the same falls due here-

under, the said lessor or assigns shall have the right at their option to enter upon the premises of the railroad company to remove any and all locomotives and cars which shall have been delivered to said railroad company under this agreement and have the right to sell the same at public or private sale, and the proceeds to be applied to the payment of any and all installments of rent for said cars and locomotives for the whole of said term of ten (10) years limited and prescribed by this agreement, whether said installments shall have then fallen due or not, and notwithstanding said locomotives and cars shall have been taken possession of and removed and sold prior to the expiration of this lease; and if the proceeds shall be more than are sufficient to pay such unpaid installment of rent with interest and expenses, then the surplus to be paid to the Ohio Central Railroad Co., but if there should be any deficit the Ohio Central Railroad Company shall be liable to pay such deficit on demand. The lessees to keep said cars and locomotives in proper and complete repair and condition, less the fair wear and tear, and such repair and maintenance to be done to the satisfaction of the agent or engineer of the lessor. That at all times the name, number, and plate, or other marks and signs of ownership of the lessor, to-wit, 'Ohio Central Car Trust,' or the initial, to-wit, 'O. C. C. T.,' shall be fixed and retained upon each of the cars and locomotives aforesaid for the purpose of making the ownership publicly known, and, in the event of any such marks or signs being destroyed, the lessee will immediately restore the same; and that such other things shall be done as by the counsel of said lessor shall be deemed necessary or expedient for the full and complete protection of the rights of said lessor as owner of said cars. That said cars and locomotives are to be insured against fire to the amount ——— dollars, (\$—,) and the insurance is to be paid by the lessee, loss, if any, made payable to George J. McGourkey, trustee, as his interest may appear. The lessee shall replace any cars and locomotives lost by fire, and in that case it shall receive from the lessor the amount collected from the insurance company or companies on such loss. The several payments to be paid for rental to be evidenced by obligations of the lessee due at the time of maturing of said payments, as defined by this lease, and delivered *pro rata* to said lessor at the time of the delivery of said rolling stock, with coupons for the interest payment hereinbefore provided for.

"And the Ohio Central Railroad Company covenants and agrees to perform the agreements and undertakings in its behalf contained herein, and to pay promptly each and every obligation so to be given thereunder; and it is further agreed that in consideration of such several hereinbefore specified payments during the said term of ten (10) years, and all other sums of money due hereunder, and interest which may have accrued thereon, being fully paid to the lessor, and in consideration of ten (10) cents for each and every of said cars and of one (1) dollar for each and every locomotive being also paid by the lessee within thirty (30) days after the expiration of said term of ten (10) years, that then the said rolling stock, as described herein, shall become and be the absolute property of said lessee, without further conveyance or transfer. The said lessee agrees to pay the lessor or assigns not to exceed one hundred dollars per annum for the expense of an agent or engineer to examine the said cars. The lessee agrees to pay the expense of preparing the obligations to be given for the rental.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 20th day of August, A. D. 1880.

"GEO. J. MCGOURKEY.

[Seal.]

"THE OHIO CENTRAL RAILROAD COMPANY,

"By SAMUEL THOMAS, Vice-President.

"B. G. MITCHELL, Secretary."

[L. S.]



The lease contracts of March 1, 1881, and March 1, 1882, called, respectively, "Lease B, No. 1," and "Lease B, No. 2," were in substantially the same form, and contained substantially the same provisions, differing only as to the number of cars, amount of rental, and time of payment. They need not be set out in full. What is said in reference to Lease A will apply in all respects to each of them. Neither of said agreements were ever recorded. No schedule or schedules, as referred to therein, were attached to the instruments at the time or times of their respective execution and delivery. When Lease A was executed and delivered, neither McGourkey, trustee and lessor, nor the beneficiaries thereunder, if any such existed, either owned or possessed any cars and locomotives, as therein described and purported to be leased. Neither had he or his *cestui que trust* any existing contracts or arrangements with others for the making, building, or furnishing such cars or locomotives, either to said trustee or to the railway company. The transaction, as detailed by the trustee, McGourkey, and B. G. Mitchell, secretary of the Ohio Central Railway Company, who acted as the agent of said McGourkey in carrying out the plan, was in brief this:

After the execution of the lease certain officers of the railway company (Messrs. Eells, Brice, and Seney) would furnish to said Mitchell the names of the subscribers to the fund. Mitchell would thereupon make out a subscription certificate, which was signed by the Metropolitan National Bank of New York, as fiscal agent, or by McGourkey, cashier, certifying that the holders would be entitled to so many thousand dollars of the car-trust certificates, when the subscription was paid in full. The money paid in on said subscription certificates was credited thereon, and was deposited by said Mitchell in the Metropolitan National Bank to the credit of an account called the "Equipment Account of the Ohio Central Railroad." When the installments were all paid on these subscription certificates, and the general manager of the railway company furnished the trustee with a schedule of the number and marks of the equipment which the company had in its possession, and which it intended should be covered by and included in said lease, the trustee would certify the company's car-trust certificates or obligations, which said Mitchell would turn over to the holders of subscription certificates *pro rata*, or in full of their subscription, if then paid up. By the terms of the lease "the several payments to be paid for rental to be evidenced by obligations of the lessee due at the time of maturing of said payments, as defined by this lease, and delivered" *pro rata* "to said lessor at the time of the delivery of said rolling stock, with coupons for the interest payments hereinbefore provided for." These car-trust certificates or obligations of the company so issued after it had obtained rolling stock under its own contracts and arrangements with car builders or constructed by itself, were, in legal effect and operation, mortgage bonds, with coupons for interest attached. The fund thus deposited in the Metropolitan National Bank to the credit of the "equipment account of the Ohio Central Railroad," was from time to time placed within the reach and control of D.

P. Eells, the president of the railway company, in the following manner: Said Eells was president of the Commercial National Bank of Cleveland, Ohio, where he resided. Mitchell, the secretary of the railway company, was a clerk in the Metropolitan National Bank, and attended to all the details of the business for McGourkey, trustee, who was also cashier of said Metropolitan Bank. When Eells needed said funds for use of the railway company, Mitchell would transfer the same to the credit of the Commercial National Bank of Cleveland, and charge said "equipment account of the Ohio Central Railroad." Then the Commercial National Bank would credit the amount to the Ohio Central Railway Co., which kept a general account with said Commercial Bank. Said account of the railway company in said Commercial National Bank was made up of discounts made for it by said bank and of amounts so transferred to its credit from the "equipment account" fund. In what proportion the amounts standing to the credit of the railway company in the Commercial National Bank from time to time were made up of such transfers of credit, and of discounts made directly to or for the company, does not appear from anything disclosed in the evidence. Much of the equipment in controversy, after the same was received by the company under contracts between itself and the car builders, were paid for out of those funds and deposits standing in the Commercial National Bank of Cleveland to the credit of the Ohio Central Railway Company; the checks or drafts on which such payments were made, rarely, if in any instance, indicating that the payment was made for or on account of the car trust or of McGourkey, trustee. The account standing in the Commercial National Bank of Cleveland to the credit of the railway company was also checked or drawn upon from time to time for the general purposes of the company other than in the purchase or payment for equipment. The evidence does not disclose the existence of any organized car-trust company or association for whom McGourkey was to act as trustee, and who was engaged in the business of buying or constructing cars to be leased or sold conditionally to railroad companies. The so-called "car trust association" were merely the subscribers who agreed to take and pay for bonds with interest coupons attached, to be issued by the railway company, and be secured by mortgage upon certain described rolling stock which the company expected and intended to construct or acquire by purchase, and which it was to designate after being acquired by including it in a schedule to be furnished the trustee. Until such schedule was made by the railway company and furnished to the trustee to be attached to the so-called "lease," that instrument was wholly incomplete and inoperative. Lease "A" recites that the Ohio Central Railway Company "agrees to hire from him [McGourkey] 800 coal cars and 14 locomotives, having the numbers and to be made by the makers set out in the schedule hereto attached and made a part hereof, marked 'Schedule A,' and delivered at Columbus, Ohio, in accordance to specifications hereto annexed," etc. No schedule was attached when said instrument was executed and delivered. No specifications were thereto annexed; nor

does it appear that any cars were ever delivered at the place designated. On the 23d of February, 1881, six months after the execution of Lease A, Hadley, the general manager of the railroad company at Toledo, Ohio, appears to have furnished the trustee with the following statement:

"SCHEDULE A.

"Description of locomotives and coal cars owned by Ohio Central Car Trust Co., and leased by G. J. McGourkey, trustee and lessor, to the Ohio Central Railroad Company.

"14 locomotives marked 'Ohio Central C. T.' Numbered 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30. 800 coal cars marked 'Ohio Central C. T.,' numbered, viz.:

|                             |   |   |   |   |   |           |
|-----------------------------|---|---|---|---|---|-----------|
| From 100 to 300, inclusive, | - | - | - | - | - | 201 cars. |
| " 758 to 800,               | " | - | - | - | - | 43 "      |
| " 1,044 to 1,405,           | " | - | - | - | - | 362 "     |
| " 1,406 to 1,599,           | " | - | - | - | - | 194 "     |
| Total,                      | - | - | - | - | - | 800       |

"Received the above-described locomotives and cars.

"G. G. HADLEY,

"General Manager, O. C. R. R. Co.

"Toledo, O., February 23, 1881."

—Which was thereafter attached to said lease agreement of August 20, 1880. The 14 locomotives referred to in said schedule, except Nos. 29 and 30, were received and went into the service of the company between December 20, 1880, and February 5, 1881. Nos. 29 and 30 were not received by the company till March 3, 1881. It appears from the evidence that these locomotives were purchased or received by the railway company from the Brooks Locomotive Works of Dunkirk, N. Y., under contracts entered into in July, 1880, prior to the execution of Lease A. By the terms of these contracts between the railway company and the locomotive works four locomotives were to be delivered in July, 1880, three in September, 1880, five in December, 1880, and five in January, 1881. While the contract was being executed, and after a portion of the engines had been delivered, G. G. Hadley, the general manager of the Ohio Central Railroad Company, under date of September 29, 1880, wrote the contractors as follows: "We desire to place upon 14 of our new locomotives, now under construction by you, the following: 'Ohio Central C. T.' This should be upon a small plate, placed so as to be removed easily." There is no evidence to show that said 14 engines so marked, and subsequently included in said Schedule A, were paid for out of the fund paid into the Metropolitan National Bank by the subscribers to the car-trust certificates, which by the terms of the lease were not to be issued by the company till after said schedule was attached to the lease, or until after the locomotives were received and in possession of the company. But it does appear from defendant's Exhibit No. 79, that said locomotives numbered from 17 to 28, inclusive, were paid for by the Ohio Central Railroad Company by drafts of Hadley, its gen-

eral manager, upon H. P. Eells, the assistant treasurer of the railroad. There is no evidence as to how the 606 coal cars embracing the Nos. 100 to 300, inclusive, 758 to 800, inclusive, and 1,044 to 1,405, inclusive, were acquired, or when paid for, or out of what fund. These 606 cars were mostly received by the railroad company during the fall of 1880. As to the remaining 194 coal cars, embracing Nos. 1406 to 1599, inclusive, the contract for their construction was made by and in the name of the Ohio Central Railroad Company with the Peninsular Car Works of Detroit. By the terms of the contract, which bore date September 1, 1880, said cars were to be delivered, not at Columbus as provided in the lease, but at Toledo, Ohio, and were to be paid for by the railroad company at the price of \$410 for each car in cash, on the delivery of each lot of 25 cars. They were, in compliance with the contract, so delivered to and received by the railroad company between October 1, 1880, and December 16, 1880. These 194 coal cars were paid for by the Ohio Central Railroad Company; the drafts therefor being drawn by Mr. Andrews, the assistant treasurer of the company at Toledo, where the cars were turned over to the company. Under date of September 6, 1880, Hadley, the general manager of the Ohio Central Railroad Company, instructed the contractor to mark said 194 coal cars "Ohio Central," in large letters, and on the end of the sill in small letters, "Ohio Central C. T." In contracting for, receiving, and paying for these cars and locomotives embraced in Schedule A, which was certified by the general manager of the road on the 23d of February, 1881, months after the cars went into the possession of the company, no agency relation was disclosed by the railroad company. On the contrary, the car builders dealt with it as the only real principal, and were paid by it in the ordinary and usual course of business, so far as the evidence goes.

We come next to what was done under Lease B, No. 1, which purported to lease to the railroad company 1,400 coal cars. This lease was a separate and distinct transaction from the first. It was executed March 1, 1881, to secure the payment of what is termed therein "trust-certificates obligations" of the company to the amount of \$800,000, in 10 annual installments, with interest thereon, beginning with the 1st day of September, 1884. These annual payments are designated as the rental which the railroad company, as lessee, was to pay for the 1,400 cars, and, when paid, the title to the cars was to pass from the lessor to the so-called "lessee." The obligations sought to be secured in and by said lease were ordinary coupon bonds of the Ohio Central Railroad Company, which were "to be delivered to the said trustee" *pro rata* "at the time of the delivery of said coal cars." Neither the trustee nor the parties who should thereafter become the beneficiaries or *cestui que trust* under the lease, owned or possessed any cars, as therein described, at the time of entering into said lease agreement; nor was any schedule thereof attached to said lease at the date of its execution. On the 9th of December, 1881, nine months after the lease was executed, the following statement was made out by the general manager of the railroad company, and furnished the trustee, to be attached as Schedule A to said lease:

*"Ohio Central Railroad Co. Office of the General Manager.**"TOLEDO, O., Dec. 9, 1881.*

## STATEMENT A.

*"Showing Ohio Central Cars covered by car trust.*

| <i>"No. 2. Series B.</i>      |           |             |
|-------------------------------|-----------|-------------|
| Nos. 1600 to 2599, inclusive, | - - - - - | 1,000 cars. |
| " 2600 to 2799, "             | - - - - - | 200 "       |
| " 4000 to 4049, "             | - - - - - | 50 "        |
| " 4050 to 4199, "             | - - - - - | 150 "       |

Making a total of - - - - - 1,400 cars.

*"The above-described Ohio Central Cars have all been received and are now in service.*

*"G. G. HADLEY,**"Gen'l Manager, O. C. R. R. Co."*

Now, what is the history of these cars? The 1,000 cars numbered 1,600 to 2,599, inclusive, were constructed by the Peninsular Car Works, of Detroit, under a contract made with and in the name of the Ohio Central Railroad Company, bearing date January 1, 1881. Under date of February 1, 1881, Mr. Hadley, the general manager of the Ohio Central Railroad, instructed the builders to number said cars 1,600 to 2,599, inclusive, and to letter them "Ohio Central" in large letters, and "Ohio Central C. T." in small letters, on sills. It thus appears that these 1,000 cars were not only contracted for by the railroad company, but were directed to be numbered and lettered as being embraced within a car trust which had not then been executed, or even created. The cars were then sought to be brought within the operation of Lease B, No. 1, a month before said lease had any existence. Many of these cars were actually received by the railroad company before the execution of said lease. They went into possession of the railroad company under said contract with the builders at different dates between the 26th of February, 1881, and the early fall of 1881. These cars were paid for by the Ohio Central Railroad Company, so far as the proof goes, partly in drafts drawn by the auditor of the company on H. P. Eells, its assistant treasurer, and partly by the note of the Ohio Central Railroad Company. It is not shown that any portion of the fund raised on the obligations of the railroad company attempted to be secured in and by said Lease B, No. 1, were applied in paying for said cars. We come next to the 250 cars numbered from 2,600 to 2,799, inclusive, and 4,000 to 4,049, inclusive, embraced in said schedule. These were built by the Michigan Car Company under contract with and in the name of the Ohio Central Railroad Company, entered into December, 1880. They were to be paid for on delivery of each 25 cars. They were delivered to and received by the railroad company between April 30 and August 30, 1881. Under date of February 1, 1881, Hadley, the general manager of the Ohio Central Railroad Company, wrote the Michigan Car Company as follows:

*"GENTS: The new cars being constructed by you for this company will be numbered, viz.: 2,600 to 2,799, inclusive, 4,000 to 4,049 inclusive, lettered 'Ohio Central,' (as per sample car,) 'Ohio Central C. T.,' (in small letters on side sill.)"*

Here again the contract for the cars and the lettering antedated the existence of the lease or contract under which they were afterwards, in December, 1881, attempted to be brought by the schedule which the general manager then made out. But how were these 250 cars paid for? It is clearly shown by Mr. Anderson, the treasurer of the Michigan Car Company, that they were paid for by the Ohio Central Railroad Company; the mode of payment being by drafts of said railroad company on its assistant treasurer. These drafts were sent to the builders by the assistant treasurer of the railroad company along with receipts or vouchers for the payments, which the builders would sign, and return to the offices of the railroad. The remaining 150 cars, numbered 4,050 to 4,199, were built by the Peninsular Car Company under contract with and in the name of the Ohio Central Railroad Company, said contract bearing date February 11, 1881, and were paid for by the said railroad company; the builders receiving payment from H. P. Eells, the assistant treasurer of the railroad, and from the Commercial National Bank of Cleveland on drafts of the company. No instructions appear to have been given as to numbering or lettering these 150 cars, which were received and went into the possession of the railroad company in November, 1881.

It is urged on behalf of petitioner that the railroad company in making said contracts for this equipment acted, under the provisions of said leases, as the agent of the trustee. It is true that D. P. Eells makes that statement in deposition in a general way, but it is manifestly incorrect or untrue, because the contracts were in almost every instance made in advance of the creation of the so-called "agency." They antedated the leases which undertook to make the railroad company act as agent for the trustee.

Let us next consider the transactions which were had under Lease B, No. 2, executed March 1, 1882, which purported to lease to the Ohio Central Railroad Company 2,500 coal cars, 340 box cars, and 13 locomotives. The petitioner claims that 1,100 coal cars, together with the 13 locomotives and 340 box cars, were delivered by him to the company under this agreement, which, like the other leases, undertook to designate the equipment leased by Schedule A, thereto attached: The so-called "rental" to be paid under this lease was \$180,000 annually, beginning on the 1st of March, 1885, and running to the 1st of March, 1894, both inclusive. This rental, for reasons stated in the petition, appears to have been reduced at some time to \$100,000 per annum. When this instrument was executed neither the trustee, McGourkey, nor the parties who might afterwards become the holders of the railroad company's obligations, therein described and intended to be secured, either owned or possessed the cars and locomotives which the trustee purported to lease; nor was any schedule of the cars attached to the instrument at the date of its execution, but at some subsequent period (the exact time does not appear) there was made out and forwarded to said trustee by some one the following statement:

*"Ohio Central Railroad Company. (Memorandum.)*

## SCHEDULE A.

TOLEDO, O., , 188

## Ohio Central Railroad Car Trust Assignment.

## SERIES B.

|                                       |   |   |   |   |   |   |   |   |        |
|---------------------------------------|---|---|---|---|---|---|---|---|--------|
| 12 Locomotives, Nos. 31 to 42, inc. } |   |   |   |   |   |   |   |   |        |
| 1 " Bucyrus. }                        |   |   |   |   |   |   |   |   |        |
| Coal Cars, Nos. 1600 to 2599, inc. -  | - | - | - | - | - | - | - | - | 1,000  |
| " " 2600 to 2799, " -                 | - | - | - | - | - | - | - | - | 200    |
| " " 4000 to 4049, " -                 | - | - | - | - | - | - | - | - | 50     |
| " " 4050 to 4199, " -                 | - | - | - | - | - | - | - | - | 150    |
| " " 4200 to 5299, " -                 | - | - | - | - | - | - | - | - | 1,100  |
| Box Cars, " 3160 to 3499, " -         | - | - | - | - | - | - | - | - | 340    |
| Total, -                              | - | - | - | - | - | - | - | - | 2,840" |

—Which petitioner exhibits with said Lease B, No. 2, and claims to be a part thereof and descriptive of the equipment covered thereby; 1,400 of the cars embraced therein being Nos. 1,600 to 2,799, inclusive, and 4,000 to 4,199, inclusive, were embraced in Lease B, No. 1, and have already been considered. What is the history of 1,100 coal cars, numbered 4,200 to 5,299, inclusive, embraced in said schedule? On the 22d of October, 1881, the Ohio Central Railroad Company contracted with the Peninsular Car Company to construct said cars, which were to be delivered to the company at Toledo, during the latter part of 1881 and first of 1882. On the 15th of November, 1881, Hadley, the general manager of the railroad company, instructed said car company to number said 1,100 cars 4,200 to 5,299, inclusive. On the 25th of November, 1881, when the cars were being delivered and received, the Ohio Central Car Trust Association, "Series B," was substituted as the contractor for said cars in place of the Ohio Central Railroad Company, under the following agreement, viz.:

"This contract of Oct. 22, 1881, is by mutual consent this day modified in the following particulars:

"1st. The Ohio Central Railroad Company is released from the same, and the Ohio Central Car Trust Association, 'Series B,' is substituted as the party of the second part.

"2nd. The number of cars to be manufactured is reduced from eleven hundred and sixty to eleven hundred.

"3rd. Payment for cars is to be made at the option of the second party in cash on delivery in lots of one hundred cars each, or in the paper of the second party, indorsed by Geo. I. Seney and Dan. P. Eells, at sixty days from the date of delivery of cars in lots as above at Toledo.

"In case of paper being given, interest is to be allowed at the rate of six per cent. per annum.

"THE PENINSULAR CAR WORKS OF DETROIT.

"By FRANK J. HECKER, Vice Pres't and Man.

"THE OHIO CENTRAL RAILROAD CO.,

"By DAN. P. ELLIS, President.

"G. J. MCGOURKEY, Trustee.

"OHIO CENTRAL CAR TRUST, SERIES B.,

"By D. P. EELLS.

"Cleveland, Nov. 25, 1881."

The "Dan. P. Ellis" who signed said agreement for and in behalf of the Ohio Central Railroad Company is and was the same individual as "D. P. Eells," who executed it for the Ohio Central Car Trust Association, which was purely an ideal and imaginary concern so far as Lease B, No. 2, now under consideration, was concerned. That car trust under which these cars are now claimed was not then formed, and in respect to that there was no such Ohio Central Car Trust Association as that for which the said Eells undertook to agree with himself as president of the railroad company. This singular transaction occurring in advance of the execution of Lease B, No. 2, which formed, if formed at all, the car trust association, whose trustee now claims said cars under that lease, is open to much comment and unfavorable criticism. It presents itself in the questionable form of a preparation in advance to deal with property for which the company had contracted, and which was then being furnished it in some illegitimate or irregular way. Except 200 of said cars received in March, 1882, the entire number were received by the railroad company on and prior to February 9, 1882. How and by whom were they paid for? This does not clearly appear. Notes to the amount of \$489,500 were given the car company for the cars as each 100 were received by the railroad company. Said notes, except one for \$44,500, given March 10, 1882, at 63 days, all bore date, and many of them matured prior to, March 1, 1882. They were in the following form:

"\$44,967.25.

TOLEDO, O., Dec. 6, 1881.

"Sixty days after date, the Ohio Central Railroad Car Trust Association, Series B, promises to pay to the order of Dan. P. Eells and Geo. I. Seney, forty-four thousand nine hundred and sixty-seven 25-100 dollars at the Metropolitan National Bank, New York.

"Value received.

Certified Feb. 7, 1882.

"METROPOLITAN NATIONAL BANK.

"Ohio Central Railroad Car Trust Ass.

"By G. G. HADLEY, Agent.

"No. ——— Due ———"

—But by whom paid or out of what fund does not appear. Such of said notes as matured and were paid prior to March 1, 1882, were not paid out of the funds realized on the company's obligations secured in and by said Lease B, No. 2. In respect to the 340 box cars included in Schedule A to Lease B, No. 2, it does not appear how or from whom they were acquired by the railroad company, nor how or out of what fund they were paid for. Many of them were received by and in the possession of the company before Lease B, No. 3, was executed. As to the 13 locomotives embraced in said schedule, the following facts appear: The locomotive called "Bucyrus" was an old engine that belonged to the Ohio Central Railroad Company. It was repaired in the company's shop, with the company's material, and by employes in the service and pay of the railroad, and was sold by the president of the company to said McGourkey, trustee. It had been repaired and returned to service prior to the execution of Lease B, No. 2. Four other locomotives included in



said schedule, being Nos. 39 to 42, inclusive, were built by the Ohio Central Railroad Company in its shops at Bucyrus, with its own material, and by its own labor; and after being completed and in the service of the company they were transferred to said car trust. The mode and method of doing this is shown in plaintiff's exhibit. The proceeds of the sale of these five engines, which were clearly the property of the company, were largely used by the president, Eells, in paying off a note of the railroad company, on which he was indorser. Locomotives numbered 31 to 35, inclusive, as shown by defendant's exhibit, were billed to Brown, Howard & Co., the contractors under the construction contract, who were bound to furnish \$560,000 worth of equipment to the company, and were paid for by two checks and three ten-day drafts drawn by Hadley, the general manager of the railroad, on Watson H. Brown & Bro., of New York, bankers for Brown, Howard & Co. These locomotives were paid for on the 30th of December, 1881, and January 4, 1882, before car trust, Series B, No. 2, was executed or had any existence. The remaining locomotives, Nos. 36 to 38, inclusive, were billed to the Car Trust Association Ohio Central Railroad, under date of May 4 and 6, 1882, and appear to have been paid for by drafts of Brown, Howard & Co. on G. J. McGourkey, trustee Ohio Central Car Trust, at Metropolitan National Bank, New York; the date of payment being May 27, 1882.

Now, in the light of the foregoing facts relating to the equipment in controversy, and to the situation of the parties engaged in the transactions embodied in said lease contracts, what is the proper construction to be placed upon said instruments, and what is their true character? Are they what on their face they purport to be, "leases," by the trustee, or those represented by him, of equipment owned by him or them? Or are they merely mortgages of the Ohio Central Railroad Company, contrived and designed to cover rolling stock which it might subsequently acquire, and intended to secure to parties who would take its obligations called "Car-Trust Certificates," the repayment of the money advanced the company thereon? It is well settled that neither the name which the parties may give to an instrument, nor any particular provision, disconnected from all others, will determine the true character of the contract, but that the ruling intention of the parties, as gathered from the whole instrument, the situation of the subject-matter of the contract, and the circumstances surrounding the transaction, must be looked to in order to ascertain and determine its true character and meaning. Thus in *Heryford v. Davis*, 102 U. S. 235, a manufacturer of cars contracted to "loan" certain cars to a railroad company "for hire" at a stipulated price, payable in certain installments, for which the railroad company executed its notes, on the payment of which the car company was to "relinquish" the cars to the railroad company. It was also agreed that upon default on any of the notes the car company might, at its option, retake the cars and sell them, retaining for its own use all payments received up to that time, and keeping the amount unpaid out of the proceeds and returning the surplus, if any, to the railroad company. In construing this contract, Mr. Justice STRONG, speaking for the court, said:

"It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire for four months, and delivering them for use for hire, it is manifest that no mere bailment for hire was intended. \* \* \* It appears equally clear to us that the contract was not one for a conditional sale."

And after reciting the provisions of the contract the court proceed:

"In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, that the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtor for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale."

In *Frank v. Railroad Co.*, 23 Fed. Rep. 123, HALLETT, J., in discussing a contract of similar character, said:

"These instruments in the form of leases, and having somewhat the aspect of conditional sales, were a disguise of the real transaction between the parties. The rolling stock was not at any time owned or held by the parties assuming to lease the same, or by any one represented by such parties. Under the first contract the 'Philadelphia & Colorado Equipment Trust,' an association of shareholders to the amount of \$500 each, furnished money with which the railroad company either bought or constructed cars and locomotives for its own use. In like manner, under the contracts with the Rio Grande Extension Company, the railroad company bought or constructed rolling stock for its own use with money furnished by shareholders through the Guarantee Trust and Safe Deposit Company, to be returned with interest from the payments made under the contract by the railroad company. Thus it appears that the payees of these instruments cannot stand in the character assumed by them of lessors of the rolling stock, and, in so far as they may have any position in the law, they are to be regarded as mortgagees of the property."

In the present case the instruments under which the petitioner claims were clearly not contracts of bailment, contemplating merely the use of the equipment by the railroad company. The provisions of the contracts are wholly inconsistent with such a construction. Neither can the contracts be regarded as conditional sales of the rolling stock described therein, for the reason that such rolling stock was not at the time owned or held either by the trustee or those whom he might thereafter represent as the holders of the obligations issued by the railroad company and intended to be secured in and by said instruments. These obligations, called "Car-Trust Certificates," but in reality the coupon bonds of the Ohio Central Railroad Company, were not executed and delivered as evidence of the purchase-money price of the rolling stock, which the railroad company was buying from the lessor, who had no such rolling stock to sell, but they were the evidence of the company's indebtedness for money advanced for its use. It is true that the fund so advanced was to be used in the purchase, construction, or acquisition of equipment for the railroad company, and the obligations of the railroad company given for the repayment of the funds so furnished were to be secured by a lien on the rolling stock of the company. The payees or holders of these obligations, or their representative, McGourkey, trustee, cannot stand in the charac-

ter assumed by him, or them, of lessors of this rolling stock. The subscribers to the fund advanced to the company, and for which its obligations were issued, occupy simply the position of mortgagees, and the so-called "leases" constitute at best nothing more than a lien or security in the nature of a mortgage for the repayment of advances made the railroad company, and which its obligations given for the so-called "rental" were intended to repay. These mortgages made to secure the payment of its obligations, so incurred, covered and embraced, as we have already seen, rolling stock and locomotives to a large amount, which the company had previously contracted for, received and paid for, or constructed itself with its own material and labor. In respect to such rolling stock and engines thus previously contracted for by the company, and by it received and paid for, and also in respect to the five engines built at its own shops, with its own labor and material, and which after completion, as Eells, the president of the railroad company, states, were "conveyed" to the car-trust people, who paid for them after they were finished and in the possession of the railroad, it is clear that the complainant, the Central Trust Company, has the superior or paramount lien under the "after-acquired property" clause of the mortgage executed by the company January 1, 1880, to secure its first-mortgage bonds. In reaching this conclusion as to the true character and construction of said "leases," and of the relative rights of the trustee thereunder, and of the complainant under the "after-acquired property" clause of its mortgage, the court is not unmindful of, nor does it intend to disregard, the principle announced by the supreme court in *U. S. v. Railroad Co.*, 12 Wall. 362, that the rights of a party furnishing rolling stock to a railroad company, whether he retains the title thereto under a conditional sale or merely stipulates for a lien thereon for unpaid purchase money, are superior to those of a prior mortgagee claiming a lien upon or title to such rolling stock as "after-acquired property." It is not questioned that "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands." But as regards the bulk of the equipment in controversy, that principle does not avail or benefit the petitioner, for, as already shown, neither he nor those he represents had any title to or lien upon such portion of the rolling stock when the same came into the possession and control of the railroad company.

It is claimed for the petitioner that although the cars and locomotives in question were in most instances built for the railroad company under contracts made with the company and in its own name, and were first received by the company and paid for by its officers in the usual and ordinary course of business, the money so used in paying for the equipment came from the fund advanced by the subscribers for the car-trust certificates of the company, and that this use of the fund so raised created an equitable lien or resulting trust in or upon such rolling stock, which would be prior in right to the lien of complainant. Under the contracts for the construction of the equipment the cars were to be and were paid for on or after delivery to the railroad company. Now, so far

as the petitioner's rights depend upon the assertion of an equitable lien or resulting trust (if such a trust can be set up and enforced in respect to personal property) growing out of the alleged fact that the funds of his *cestui que trust* were used and applied in paying for this equipment, the burden of proof is upon the petitioner to show the particular car or cars and locomotives which were so paid for. He must trace his so-called "trust funds" into the identical cars and locomotives on which he asserts his equity or lien. This he has utterly failed to do, with the exception of the three engines Nos. 36, 37, and 38, in Schedule A to Lease B, No. 2. The evidence fails to show what particular cars and locomotives were paid for with the funds subscribed for the company's car-trust certificates, which were, in legal effect and operation, bonds of the company. But even if it had been or could be shown that funds raised as these were and placed to the credit of the "equipment account of the Ohio Central Railroad Company," and thence transferred to the credit of the company itself, were actually employed in paying for certain specific cars, it is still doubtful whether, in respect to such cars, the petitioner would thereby establish a right to a lien thereon superior to that of the complainant. The transactions involved in these so-called "leases" and the several car trusts formed thereunder, when analyzed, amount in substance and effect to nothing more than this: that money was loaned the company, for which it was to execute its bonds, which were to be secured by mortgage upon its rolling stock, such rolling stock to be selected and designated by itself at some future day, out of its general stock of equipment, and by its statement, called a "schedule," be attached to said mortgage. It was thus left to the officers of the company, many of whom, with its president, were interested in said car-trust certificates, to determine and indicate what cars and locomotives should come within the operation of these mortgages miscalled "leases." If a transaction of this character, and conducted as this business was, can be sustained, and held to confer superior rights to the lien of prior mortgages containing "after-acquired property" clauses sufficiently broad to cover the same property; then such "after-acquired property" clauses of mortgages will become idle and useless provisions, because by the easy contrivance of so-called "car trusts" and "car-trust certificates" of the mortgagor all subsequently-acquired property may be readily taken out of their operation. The present is readily distinguishable from that class of cases in which car companies, or manufacturers or other actual owners of cars, lease or conditionally sell, or sell absolutely, with lien retained for purchase money, certain equipment to railroads. It discloses a new contrivance for raising money and floating additional mortgage securities of railroad companies, which practically destroys all benefit of the "after-acquired property" clauses of modern mortgages. The court should hold parties claiming or asserting rights under such instruments as these under consideration to strict proof of their claims, if the transaction as conducted in this instance is upheld at all. The petitioner has, in the opinion of the court, shown a superior right to the three engines numbered 36, 37, and 38, inclusive, included in Schedule A to Lease B, No. 2. In re-

spect to the 1,100 coal cars numbered 4,200 to 5,299, inclusive, embraced in said schedule, the evidence leaves the question of the superior right as between petitioner and complainant in great doubt. Many of said cars were received and paid for before said Lease B, No. 2, was executed. The great majority of them were in the possession and service of the railroad company prior to March 1, 1882. How or by whom they were paid for does not appear; nor out of what particular funds. They were all contracted for originally by the railroad company. The president of the road subsequently, on the 25th of November, 1881, before the car trust under Lease B, No. 2, was ever formed, assumed the right to transfer that contract to a so-called "Ohio Central Car-Trust Association," not then in existence, which he undertook to represent. It is doubtful whether a transaction so suspicious, and conducted by the company's president, who was then, or shortly thereafter, the holder of car-trust certificates of the road to the amount of \$50,000, should be sanctioned and sustained. It is not, however, deemed necessary to the determination of the present controversy to decide the question as to who has the superior right and title to the 1,100 coal cars. No rental was due thereon by the company, under the terms of the contract, till March 1, 1885. The company, and the receiver appointed September 30, 1883, had the right to use said cars free of charge till default was made in the payment of the first installment, maturing March 1, 1885. So far as the petitioner has established any right to or lien upon the equipment in controversy, it clearly appears that he has already been paid therefor by the company, and the receiver more than he, or those he represents, were entitled to, and his claims for further payments, and for additional compensation for the use of said equipment by the receiver, are disallowed, and his exceptions to the report of the special master are overruled. Complainant's exceptions to the report are sustained. The petitions of McGourkey, trustee, will be dismissed at his costs. He will be further taxed with the costs of the reference to the special master. The fund in court will remain subject to the further order of the court, and complainant is left at liberty to take such steps as may be deemed proper to recover possession of the equipment in question.

### WOOD v. CONSOLIDATED ELECTRIC LIGHT CO.

(Circuit Court, S. D. New York. November 8, 1888.)

#### 1. BONDS—COUPON BONDS—MATURITY—DEFAULT IN INTEREST—PRESENTMENT.

Where coupon bonds contain a condition that if default in the payment of interest when payable and demanded continues for 90 days, the whole principal is to become due at the option of the holder, presentment and demand on January 2d, though premature as to the interest due January 1st, is due presentment as to that maturing July 1st previous.

#### 2 SAME—DEFAULT IN INTEREST—DEFENSES.

It is no defense to such default and its continuance that forgeries of the bonds were in circulation so executed as not to be distinguished from the

genuine, and all the bondholders except plaintiff had accepted new bonds so prepared as to prevent the possibility of fraud or loss, and that plaintiff, after presenting his coupons, and demanding payment, entered into negotiations for the protection of the obligor in case his coupons should, after payment, prove to be forgeries, and that the 90 days elapsed while these negotiations were pending.

At Law. On demurrer to answer.

Action on 19 bonds brought by Walter Wood against the Consolidated Electric Light Company.

*Biddle & Ward*, for plaintiff.

*Broadnax & Bull*, for defendant.

WALLACE, J. The answer, which has been demurred to, cannot be held sufficient upon the notion that it sets up facts which constitute an equitable defense to an action at law. Although, by the Code of Civil Procedure of this state, equitable defenses may be interposed in actions at law, this practice does not obtain in the federal courts, and the act assimilating the practice and pleadings in actions at law in these courts with those of state courts does not introduce it. *Montejo v. Owen*, 14 Blatchf. 324. If the facts alleged were an equitable defense, the defendant might avail itself of them by a bill in equity filed to stay the prosecution of the suit at law. But they do not constitute an equitable defense, and the theory that the cause of action is one in the nature of a penalty or forfeiture, and that the facts are such as would move a court of equity to relieve the defendant, is without foundation.

The complaint counts upon 19 bonds, for the aggregate sum of \$12,500, part of an issue of coupon bonds for \$200,000, created by the defendant, dated January 1, 1885, and payable 10 years from date, with interest at 6 per cent., payable semi-annually on the 1st day of July and the 1st day of January in each year, at the office of the defendant, in the city of New York, upon the presentation and surrender of the coupons attached. The bonds contain a condition that, in case default is made, and continues for 90 days, in the payment of any installment of interest when payable and demanded, the whole principal is to become due immediately, at the option of the holder. The complaint avers the presentation of coupons for the installments of interest which became due July 1, 1877, and January 1, 1888, for payment and surrender, demand of payment, and a default by which the installments of interest are in arrears for the space of more than 90 days. The defendant, by its answer, asserts in substance that it has always been ready and willing to pay the interest as it matured, but that spurious coupons in imitation of those annexed to the bonds were put in circulation so executed that they could not be distinguished from the genuine, and it prepared new bonds and coupons to take the place of the original, so executed as to prevent possibility of fraud or loss, and all the holders of the original bonds had accepted the new ones, in exchange, except the plaintiffs, and that the plaintiff, although he did not consent to an exchange, but had caused his coupons to be presented for payment, had entered into nego-

tiations with defendant looking to its protection in case his coupons after payment should turn out to be forged, and while these negotiations were pending the 90 days elapsed. The facts set forth in the answer do not show that the plaintiff attempted or intended to mislead the defendant into the belief that he would not avail himself of his option to treat the whole principal of the bonds as due and payable in case of a default in paying the interest, nor do they by the remotest implication impute any inequitable conduct to the plaintiff. They show a case in which the defendant, by mere negligence, permitted the 90 days to elapse without paying the interest due according to the terms of the bonds, relying upon the forbearance or good nature of the plaintiff not to insist upon the terms of his contract. The averment of the readiness and willingness of the defendant to pay the interest goes for nothing in view of the admitted fact that the coupons for the interest due July 1, 1887, were presented at the proper place to the defendant on January 2, 1888, and, after payment was demanded and refused, were suffered to remain unpaid for more than 90 days thereafter prior to the commencement of the action. Stipulations like those in the present contract, providing that, upon failure of a promisor to pay an installment when due, according to the terms of the contract, the whole debt may be treated as due by the promisee, are common, and the courts have repeatedly refused to relieve against them. *Sterne v. Beck*, 11 Wkly. Rep. 791; *Robinson v. Loomis*, 51 Pa. St. 78; *Steel v. Bradfield*, 4 Taunt. 227; *James v. Thomas*, 5 Barn. & Adol. 40; *People v. Superior Court*, 19 Wend. 104; *Plank-Road Co. v. Murray*, 15 Ill. 337; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577. In *Van Noyes v. Clark*, 7 Paige, 179, Chancellor WALWORTH, after observing that the parties have an unquestionable right to make such a stipulation, says that, if by the mere negligence of a promisor to perform his contract he suffers the whole debt to become due and payable according to stipulation, "no court will interfere to relieve him from the payment thereof, according to the conditions of his own agreement."

It remains to consider whether the answer, although not good as an equitable defense, sets up facts which are a defense at law. The pleader seems to have assumed, and the case has been argued upon the assumption, that it was incumbent upon the plaintiff to show that he presented his coupons for payment on the particular day they became due in order to establish a default on the part of the defendant, and upon the theory that the coupons carry days of grace the defendant relies upon the averment that they were not presented at any time other than upon January 2, 1888, for payment as a defense, insisting that presentment upon that day was not due presentment of those payable July 1, 1887, or those payable January 1, 1888, and, consequently, that the defendant is not in default. It was held in *Evertson v. Bank*, 66 N. Y. 14, that coupons similar in form to those annexed to the bonds in suit have days of grace like ordinary commercial paper, and the opinion proceeds upon the ground that the bonds themselves are in all respects invested with the quality of negotiable paper, including the incident of days of grace. It is not necessary to question the correctness of this adjudication for the purposes

of the present case, for if it be conceded that the coupons payable January 1, 1888, were presented before the expiration of the days of grace, it suffices to enable the plaintiff to recover that those payable July 1, 1887, were also presented January 2, 1888. The holder of commercial paper is not required in an action against the maker or acceptor to aver or prove presentment, but it devolves upon the maker to show non-presentment as matter of defense by proof that he was ready to pay the paper at the time and place of payment, and was always ready afterwards to do so. *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Wallace v. McConnell*, 13 Pet. 136. The same rule applies to actions upon coupons. *Walnut v. Wade*, 103 U. S. 683. It does not follow, however, that it is not incumbent upon the plaintiff to make presentment of the coupons in order to charge the defendant with a breach of the condition in question. By the terms of the bonds the default of 90 days in payment of interest, by which the whole principal is to become payable immediately, is a default in the payment "when such interest shall become payable, and be demanded." This language makes the default depend upon a precedent demand of the interest. It does not require a demand to be made on the very day the interest becomes payable. It means that the obligor shall not be liable beyond the amount of interest due until a specific demand of the interest is made by the bondholder. If the bondholder does not demand the interest, he can, nevertheless, maintain an action upon the coupons, which can only be defeated by proof on part of the obligor that the coupons would have been paid at any time upon presentment at the proper place. If he does demand payment of the interest when it becomes due, or at any time thereafter, the demand implies that he intends no longer to waive his rights, but insists upon the strict fulfillment of the condition. Upon this construction of the contract the 90 days commenced to run January 2, 1888, as to the July interest previously due. The demurrer is sustained.

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CHOTEAU v. HARVEY.

SAME v. UNION PAC. RY. Co.

(Circuit Court, W. D. Missouri, W. D. November 9, 1888.)

1. DOWER—ASSIGNMENT—LIMITATION OF ACTIONS.

An action for the assignment of dower is an action to recover real estate, within the meaning of the Missouri statute of 1847, (Rev. St. Mo. 1879, § 3219,) and is barred by the 10-years limitation of that act.

2. SAME—STATUTES—RETROSPECTIVE OPERATION.

The limitation law of 1847 was in force at the time of the adoption of the Missouri Code of 1849, and the provision of said Code (Laws Mo. 1849, art 2, p. 74, § 1.), that "this article shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statute now in force shall be applicable to such cases," etc., had reference to the limitation law of 1847, so as to bring within its purview an action for the assignment of dower accruing prior to its adoption.



**At Law.**

Actions for the assignment of dower, instituted by Berenice F. Chocteau against William Harvey and the Union Pacific Railway Company.

*Slaughter & Taylor*, for plaintiff.

*Karnes & Krauthoff*, for William Harvey.

*John W. Beebe* and *Charles Monroe*, for Union Pacific Railway Company.

Before BREWER, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, J. This is an action for the assignment of dower. The plaintiff's husband is alleged to have died seized of the land in question in 1838, at which time plaintiff's right of dower attached so as to have been asserted in this form of action, had she chosen to do so. The above facts appearing on the face of the petition, the defendant demurred on the ground that the action was barred by the statute of limitations. The question to be decided is, does the statute of limitations prescribed by the statute of this state apply to this action?

Section 3219, Rev. St. Mo. 1879, declares that "no action for the recovery of any lands, etc., or for the recovery of the possession thereof, shall be commenced, had, or maintained by any person, \* \* \* unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person, under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action." This statute was enacted in 1847, and has continued in this form in the successive revisions to this date. It has long been a mooted question in this state as to whether or not this statute applies to the action for the assignment of dower. It, perhaps, is not too much to say that it was the prevailing opinion of the profession, based upon adjudications of the courts, that there is no statutory limitation as to such action; but the question has recently been reviewed and determined by the supreme court of this state in the case of *Robinson v. Ware*, 94 Mo. 678, 8 S. W. Rep. 153, in which it is held that the action for assignment of dower is, in effect, an action to recover real estate, and is barred by the 10-years limitation. It is important in relation to the question here presented to briefly advert to the argument and ground of that decision. It holds under the statute respecting the action for dower, where the widow, as in this case, shall be deforced thereof, that it is an action for the recovery of real estate, and that the action performs the double office of the allotment of the dower interest and of ejectment for the possession thereof; that the proceeding "comes literally within the words, 'an action for the recovery of lands, or for the recovery of the possession thereof.'" After alluding to the fact that under statutes prior to 1849 it was supposed that the statute of limitations did not apply to such actions, it is asserted that the practice act adopted in 1849 "abolished all distinctions between actions at law and suits in equity, and declared that thereafter there should be in this state but one form of action, which is denominated a 'civil action.'" This Code repeals certain sections of the Revised Statutes of 1845 concerning the limitation of personal actions, and substitutes others. It is then maintained that "this history of the legislation shows clearly

that it was the policy of the legislature of 1849 to fix a period of limitation for all civil actions," and, of consequence, as dower is a civil action, it must be held subject to the operation of the 10-years limitation. The cause of action under consideration in that case, having accrued after the statute of 1849, was subject to its operation. The federal courts, in construing state statutes, as a general rule, where no newly-acquired interests or rights have attached upon earlier rulings on the statute, will follow the construction given by the highest courts of the state where such statute has been enacted. The plaintiff, while recognizing the binding force of this decision, undertakes to except from its operation this action on the ground that her cause of action accrued in 1838, long prior to the adoption of the limitation law of 1847 and the practice act of 1849. This contention rests upon the ground that in the act of 1849 (section 1, art. 2, p. 74, Laws Mo. 1849) it is expressly provided that "this article shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statute now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form." This exception has, in effect, been carried forward and incorporated in every succeeding revision of the statute. The argument of plaintiff's counsel is that, as prior to the act of 1849 there was no statute in force in this state placing any limit upon the right of action for assignment of dower, the right remained intact and wholly unaffected by any subsequent statute of limitations. It is to be conceded to this contention that there are decisions in other jurisdictions which seem to support it. *Libbitt v. Maulsby*, 71 N. C. 345; *O'Mulcahy v. Florer*, 27 Minn. 449, 8 N. W. Rep. 166. But, giving effect to the phraseology of the Missouri statutes, and the construction repeatedly placed thereon by the supreme court of the state, we do not feel at liberty to follow the cases cited. As already stated, the statute limiting real actions, in the form as it now appears in the latest revision, appeared in the laws of Missouri, 1847, p. 94, § 1, in an act entitled "An act to quiet vexatious land litigation." That act contained no reservation saving the right of actions already commenced, or which had accrued; but it must be kept in mind that, according to the present holding of the supreme court in *Robinson v. Ware*, *supra*, the language of this statute, being the same as the present statute, did in its terms and effect cover the action of dower as one "for the recovery of lands."

Without stopping here to consider whether that statute would have applied to the plaintiff's cause of action, which had not then run 10 years, or whether she would have had 10 years thereafter in which to bring her action, it is sufficient to say that this section of the statute of 1847 was in force at the time of the adoption of the Code of 1849, and that the language "but the statutes now in force shall be applicable to such cases" evidently had reference to the statute of 1847, which was in force at the time of the adoption of the act of 1849. It is true that, in *Littleton v. Patterson*, 32 Mo. 357, the court held that the action for dower was not barred by the act of 1847. No attention was given to the act of 1849 in this decision, but it was predicated solely of the act of 1847. The 10-

years limitation, when the action was brought, had not run under the act of 1849, but had run under the act of 1847, as the husband died January 4, 1849, and the suit was begun February 23, 1859. It is not apparent to our mind, as suggested by counsel for plaintiff, that Judge BLACK, who delivered the opinion in *Robinson v. Ware*, concedes that the act of 1847 was rightly construed in *Littleton v. Patterson*, for he says:

"We believe such an action would have been held to have been barred in the case of *Littleton v. Patterson*, *supra*, either by the first section of the act of 1847, or this general clause in the act of 1849, had the court been called upon to consider the statutes as a whole."

And it will be perceived that the whole line of argument in the opinion in *Robinson v. Ware* was opposed to that pursued by the court in *Littleton v. Patterson*, predicated of the construction given to the statute of 1847, which was supposed to have been modeled after the statute of Hen. VIII., and James I., for the opinion says:

"As a general rule, when we adopt a statute from another jurisdiction, we take it with the construction which has been given to it in that jurisdiction; but where one or more sections are formulated after these old English statutes, we must construe our own enactments in the light of the whole body of our statute law upon the same general subject."

The opinion then proceeds to show that, by the practice act of 1849, the scheme and policy of the act was to make the statute of limitations applicable to all civil actions, and the period of 10 years prescribed in the then existing law applicable to all actions for the recovery of real estate or any interest therein. In the revision of 1855, which was re-enacted in 1857, (Laws Mo. 1856-7, pp. 76-80,) this statute of limitations was continued, and the saving clause was expressed in section 15, art. 3, as follows:

"The provisions of this act shall not apply to any action commenced, nor to any cases where the right of action or of entry shall have accrued before the time when this act takes effect, but the same shall remain subject to the laws then in force."

In this form this provision continues in the statute to this day. Again, however, it is contended, with zeal and ability, on the part of plaintiff's counsel, that the expression "the same shall remain subject to the laws then in force" has reference to the time when the cause of action accrued. On the part of the defendant it is contended that the word "then" has reference to the law in force at the time when the act of 1855 took effect. This contention of defendant is, we think, well sustained, both upon the grammatical construction of the provision, as well as the repeated decisions of the supreme court. Judge SCOTT, delivering the opinion of the supreme court in *Callaway Co. v. Nolley*, 31 Mo. 398, said:

"The construction put upon the existing statute of limitations as to real actions is that, where ten years have elapsed from the taking effect of the act, the action is barred, although it first accrued under some act of limitations which gave a longer period in which to bring it."

This precise question came up for consideration and determination again in *Billion v. Walsh*, 46 Mo. 492. After quoting said section, the court say:

"What are the laws here referred to? The laws in force at the time the act took effect, or at the time the right of action accrued? The plaintiff assumes the latter position, and claims that her right of action accrued in 1832, upon the death of Connell, when the limitation act of 1825 was in force, giving twenty years in which to sue, after the removal of disabilities, and that this latter act is the one that fixes the rights of parties. The position assumed is not sustainable. It is at variance with the letter and spirit of the law, and the whole tendency of legislation on this subject for the last generation."

After adverting to the various limitation statutes the court conclude by saying that the term "then" in section 15 of the act of 1855 "is the law in force at the time of its enactment, [and is] to govern when the right of action had then already accrued. \* \* \* The legislature, not wishing to disturb the law of 1847, instead of enacting that the law of 1845 should govern in cases where the right of action had then already accrued, enacted that the law in force at the time the revised act should take effect should apply to and govern such cases. The law of 1847 was then in force, and consequently must control in all cases where the right of action had accrued at the time the subsequent act went into operation, provided the period limited in the act had run after its passage." So BLISS, J., in *Gilker v. Brown*, 47 Mo. 110, 111, held that said section 15 "can have no reference to any acts of limitation beyond the act of 1847." Evidently for the reason that that law was then in force. We have not overlooked the line of decisions cited by counsel holding that, where the statute of limitations in force at the time the cause of action accrued gave, for instance, 10 years in which to bring suit, and the subsequent statute shortened the period, the former period of 10 years was secured to the party by virtue of the saving clause in said section 15. *Neilson v. Chariton Co.*, 60 Mo. 386; *Abernathy v. Dennis*, 49 Mo. 469; *School Directors v. Goerges*, 50 Mo. 194; *McCartney v. Alderson*, 54 Mo. 320. The holding in these cases comes clearly within the construction already given to said section 15, as the statute under which the causes of action accrued in those cases was the statute or law in force at the time of the enactment of the new statute. It is a *non sequitur*, however, that as, at the time the plaintiff's cause of action arose, there was no statute of limitation as to the action for assignment of dower, the right remains unlimited by reason of the saving provision of said section 15. As already attempted to be shown, the act of 1849, having declared, in effect, that all civil actions for the recovery of land, which includes the action for dower, shall be subject to the limitations now imposed by statute, i. e., the statute of 1847, the legal effect was the same as if, in 1849, the legislature had in express words declared that causes of action for the recovery of dower interests accrued anterior to 1849 should be subject to the period of limitation prescribed in section 1 of the act of 1847. It may be conceded to plaintiff's contention that the act could not be retroactive in its operation under the state constitution. It was so far pro-

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spective in its effect as to allow to the party whose cause of action arose prior thereto 10 years from the date of the statute in which to bring her action. This position is fortified, we think, by the authority cited by counsel, *Sayre v. Wisner*, 8 Wend. 661. The legislature having enacted that a widow should demand her dower within 20 years after the death of her husband, it was held that the limitation did not apply where the husband died previous to the new statute going into effect. But at the same time it was held to be "strictly within the reason of the rule of construction above alluded to to say that it may be applicable to cases of previous death, but not till twenty years after the statute takes effect." The plaintiff in this case at bar has slept upon her rights nearly 30 years since the act of 1849, and, while the conclusion reached in this opinion is not free from doubt, it seems to us to accord with the recent decision of the supreme court in *Robinson v. Ware*, and other cases cited; and, so holding, the demurrer to the petition is sustained.

BREWER, J., concurs.

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*In re Risch.*

(District Court, E. D. Texas. 1888.)

1. EXTRADITION—INTERNATIONAL—EVIDENCE OF CRIME.

Under the treaty between the governments of the Germanic confederation and the United States, made in the year 1852, providing for the extradition of criminals, which stipulates for the delivery of persons charged with crime upon such evidence of criminality as, according to the laws of the place where the fugitive is found, would justify his apprehension and commitment for trial, if the crime had there been committed, it is sufficient that a *prima facie* case be made, such as, in the absence of explanation, would justify conviction, or such evidence as, in case of trial and conviction thereon, would sustain the verdict.

2. SAME—HOMICIDE—MURDER.

Upon application for the extradition of prisoner as a fugitive from Germany, charged with murder, it was proved that prisoner was a near neighbor of deceased, knowing his financial condition; that deceased was on the day prior to his disappearance engaged in moving his property to prisoner's house, to leave it in his charge during an intended journey, and to prevent seizure by creditors; that he was last seen in the night at prisoner's house with him and his sons; that a servant sleeping in the house was awakened by sounds indicating the use of violence to, and the distress of, a human being; that there were opportunities for the removal of the body from the house to a forest, where, eight months after, it was found, bearing indubitable marks of death by violence, and that such death occurred about the date of disappearance; that property of deceased known to have been in prisoner's possession never was accounted for; that deceased had a considerable sum of money, which there was evidence to indicate was in prisoner's possession; and that, in a few days after deceased's disappearance, prisoner unexpectedly left for America, where he purchased a home, spending money, but not as much as he was supposed to have obtained from deceased, living frugally with his family, bearing a good reputation, but going under an assumed name, until his ar-

rest. *Held*, that under the treaty with Germany of 1852, and statutes of the United States concerning extradition, the evidence was sufficient to hold the prisoner for delivery to the German authorities.

At Law. Application for extradition of Ludwig Risch, *alias* Ludwig Rischkee, or Ludwig Rischky.

M. E. Kleberg, for the German Empire. Burns & Burns, for defendant.

SABIN, J. The defendant and one Louis Risch, *alias* Rischkee, or Rischky, are charged with the murder of Franz Schmalinsky, alleged to have been committed by them on the 23d day of April, A. D. 1883, at Griesel, in the district of Crossen, in the kingdom of Prussia, in the empire of Germany, to which he has pleaded not guilty; and his extradition is sought for the trial thereof under the treaties of 1852 between the United States and Prussia and other states of the Germanic confederation, and in pursuance of the laws of the United States for extradition.

The first question presented for my decision is as to whether a person may be extradited upon a *prima facie* showing; and it is claimed that the presumption of law as to a man's innocence is a stand-off as against a *prima facie* showing of guilt. This might be so, and would probably be so acted on, where the *prima facie* showing was light; but when the evidence not only creates the presumption of guilt, but creates such a volume of strength, from the evidence, of the guilt of the party charged that it would seem unreasonable to suppose such party innocent, then, in such case, it would seem the plain duty of the magistrate to make the order for holding for extradition. The treaty provides for extradition "upon such evidence of criminality, as, according to the laws of the place where the fugitive is found, would justify his apprehension and commitment for trial, if the crime had there been committed." And, further, that "if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority." I take it that this latter clause requires the judge to be satisfied that the evidence before him is sufficient to sustain the charge were the same on trial before him. If a verdict of guilty were rendered upon the evidence, would he feel it his duty to set it aside? That seems to me to be the reasonable rule. In other words, the evidence should be such as to fairly prove the charge, and call upon the defendant to explain the facts adduced, and without which explanation the charge would stand proven. I think that is the rule by which I should be governed in the decision of this case.

In 1883 there were three mills on the Griesel river, in the kingdom of Prussia, known as the "upper mill," the "middle mill," and the "lower" or "back mill." The defendant was the proprietor of the middle mill, and afterwards his son, Louis Risch; while the deceased was the proprietor of the lower or back mill. These mills were in a thickly-settled country, and near which were several villages and good-sized towns, and near there was a forest on the Bentnitz road, known as a "fir preserve." It

was for the growth and preservation of these trees. Franz Schmalinsky, the deceased, on and prior to April 22, 1883, was an industrious and enterprising miller, and at times thrifty, and enjoyed the confidence of those with whom he dealt to a considerable extent; but in the spring of that year he became embarrassed to a great extent, and availed himself of the confidence he enjoyed to obtain money, as alleged, by forgeries, and also by converting many of his available assets into money, and unquestionably had in hand from \$1,600 to \$3,000, probably in the neighborhood of \$2,500; but as his creditors would soon likely be upon him with writs, and as the supposed forgeries might soon come to light, he took one further step of transferring all his available means, household furniture, cattle, horses, buggies, and hay to the defendant, and, with the exception of a load or so of hay, the whole of those things were removed to the house and mill of the defendant, as early as April 22, 1883, in which both parties took part, and engaged in the transfer and removal with an energy that showed that time was an important element of the transaction in hand. The 22d was on Sunday. Among the things so removed was a large-sized fir wardrobe, capable of holding a man inclosed therein; and when it was moved over to defendant's, a distance of about three-quarters of a mile or less, one witness says it was full of clothes, and another that it contained all of the best clothes of the deceased. That the deceased contemplated a movement of some kind is evident, not only from these facts, but from the fact that he had frequently announced his intention of going to Poland to buy cattle. He had made such trips several times before in previous years.

In the afternoon of the 22d he sent his servant, with his money satchel, to defendant, informing his servant that it contained money, and to deliver it to defendant, which she did, but whether it contained any money or not was unknown to witness. Some time early in April the defendant recalled from service in a neighboring place one of his daughters, with the view of keeping house for his son Louis, at the mill, and in whose name the mill property stood. She reached home April 3, 1883, and some seven days prior to April 23, 1883, that being the day of the tragedy, defendant engaged tickets for himself, wife, and four children, one of them, his ward, being also a child by adoption, he paying say \$20 thereon by way of earnest money to secure the tickets, the vessel being to sail about the 29th or 30th of April, whereupon the ticket agent, as was his duty, gave notice of such transaction to the local police. The defendant left his home for the steamer on the 29th of April, 1883, and for America, with all of his family above stated, leaving only his son Louis and a daughter remaining at the mill, which stood in the name of Louis, who had recently returned from a three-years service in the army. The defendant and the five members of his family arrived in America in due course, reaching San Antonio, Tex., from New York, by rail, where he bought a lot shortly after his arrival, paying \$200 down and the balance of \$300 on time, and erected by himself a small shed-house, and afterwards, by arrangement with a building association, a larger and more comfortable dwelling, in all, however, not exceeding in

present value the sum of from \$1,500 to \$2,500 for lot and improvements. His life has been frugal, and he has maintained good habits, and is well esteemed by all who know him in San Antonio, Tex. His name in Germany was Ludwig Risch, and he was so known. On coming to America he claims an additional given name, "Martin." He also changed his name from "Risch" to "Rischki," and signs his name "M. Ludwig Rischki." Since here he has been overwhelmed by misfortune in the loss by death in 1883 of his son Otto, and afterwards by the death of his wife, and also of his daughter Anna. In October, 1883, his daughter left by him at the mill left for America, and joined him at San Antonio, and afterwards his son Louis did likewise, his daughter, however, coming first, and alone. His daughters went at once to service, and have contributed to his aid in living and acquiring the homestead; and such was the case up to the time of the arrest herein, on which day the one last arriving here was to have been married. The property of Schmalinsky, moved over to defendant's mill, was left there by defendant, in the hands of his son Louis, and was mostly taken back by Mrs. Schmalinsky or redelivered to her. There was one notable exception, however, and that was the clothes of Schmalinsky. When the wardrobe came back through the aid of her former guardian, it was empty of clothing.

It is time now to go back to the mill, and review the tragic occurrences of the 23d of April, and those connected therewith. The middle mill, defendant's residence, was a large stone building, with one roof covering the mill and the dwelling. It was two stories, with a hall in the center above, which was reached from below in front by means of steps. On the left side of the hall, in the upper story, was the residence of defendant, with a door entering from the hall into the sitting-room, behind which was the sleeping-room and a pantry. On the right-hand side of the hall was the mill used for grinding grains and all the business incident to the mill. Over all this was a garret, where persons engaged in the mill sometimes slept. The door on the right-hand side entered into the mill, while that on the left entered into the sitting-room. Below the mill, hall, and residence portion, or on the lower floor, was a kitchen, and what was called a "mill-room," used for grinding linseed, and making oil, wherein also was an oven, and it was also used for a sleeping-room for defendant's sons Louis and Otto, and claimed by the witness Brunzel to have been the place where he slept. On Sunday, April 22, 1883, everything was made lively at the lower mill and at the middle mill by the parties and their servants in moving Schmalinsky's things and chattels to the middle mill. The defendant and his servant, August Brunzel, as well as several members of defendant's family, were busy in hauling or receiving things. In the night of that day, say 10 P. M., the deceased was seen by his wife for the last time, in her bedroom, and in the presence of defendant, and no mention of any immediate departure was spoken of. Later on the last load was hauled that night, and there was attached to the load or wagon the buggy of the deceased, to be hauled to the defendant's mill; and while so proceeding, Brun-



zel driving, the deceased was seen by Brunzel walking behind and talking with defendant about the sale of his things to him, but was missed by Brunzel about the time they reached a point of the road near the fir preserve. Brunzel, Risch, and his son Louis or Otto—witness cannot state which—proceeded on to the house of defendant, where the horses were unhitched, Risch directing them to be fed, and informing Brunzel that they would have to start early again in the morning, at 3 A. M., in order to get another load of hay, so as to get in ahead of others, the creditors of deceased; after which the defendant, Risch, went into his sitting-room. There was a light burning. It was usual to burn a light all night in that room. Just after the horses were unhitched, Brunzel saw a man coming across the meadow from the direction of the Schmalinsky mill towards the rear of the house of defendant, and witness stopped and looked and soon saw the deceased come up, who accosted him, and went on up into the mill by the back stairs, towards the dwelling of Risch. Defendant and several members of his family had been in the sitting-room a few moments before. This was about 1 A. M., and was the last ever seen of deceased alive on this earth. Brunzel went into his sleeping place under the house to bed, and went to sleep for a half hour, or perhaps an hour, when he was awakened by noises overhead as if the moving of furniture, and the stepping of men with boots on, and the gargling or rattling sound as if of some one in the last gasps of death; but after a little he went to sleep again until he was awakened in the morning about 4 A. M. by defendant, who claimed to have overslept himself, when they went to the lower or back mill for another load of hay, and found others already there on the same mission, but the deceased was missing, and defendant informed witness that deceased had gone to Poland to buy cattle. But on the next day, and afterwards, defendant claimed, not only to Brunzel, but to others, that deceased had gone to America, and would never come back; and also stated to some one that he was a bad man to have left his wife in that way. It was generally supposed and believed that deceased had gone to America until January 31, 1884, when his body was found in a thicket of the "fir preserve" in the rear of his former residence and mill, dead, and his body in such a state of decay as was consistent with the time of his disappearance and finding,—his head off, four front teeth out of the upper jaw, also corner tooth, without watch or ring or other valuable, and in his ordinary miller's clothes, such as he wore in life. His skull had been fractured, and bore the impress of a heavy blow by some hard instrument, which left a blood-stain in the bone of the skull, showing that the blow had been struck while he was in life, and of a character that would have caused death. Now who did it? His life was gone, his money was gone, and his clothes were gone. Who took them away? He was last seen in the very early morning entering defendant's mill, in which defendant then was. The defendant was in possession of his money satchel; what became of it? The wardrobe contained all his clothing; what became of them? Can the mind lead up to any other conclusion than that he was killed at defendant's mill by his aid and as-

sistance, at least, on the morning of the 23d of April, 1883? My mind is led to that conclusion. And I might stop here and close, but there are many other facts in evidence that, while they have relevancy to the foregoing, yet they relate more to theories of how the body was removed than fully proving that it was done in any given way.

It is sufficient for the purposes of this investigation that the evidence shows that the body or person of the deceased was removed from defendant's house, and that defendant and his confederates, one or more, had ample means and opportunity for so removing it. The defendant had the team and buggy of the deceased, as well as his own, with which he could have removed him or it, between the time when Brunzel heard the noise and gargling sounds and when he was called at 4 in the morning. Again, it was possible that the deceased was stuffed in the wardrobe with his clothes, and taken off in that on the 24th or 25th. The testimony on that subject is that on the 24th or 25th defendant ordered Brunzel and his son Louis to help load the wardrobe upon a wagon, and that Brunzel remarked that it was very heavy, and that defendant replied that it was certainly heavy; that defendant said he was going to take it to Bentnitz, to some one to whom he had sold or was going to sell it, and that defendant and Louis drove off with it on that road, which would be the proper one to take to reach the place where the body was finally deposited, as well as the one which led to Bentnitz; and that, after a brief period, but long enough for them to have gone to Bentnitz and return, they returned with the wardrobe, and, by the aid of the witness, returned it to the place where it had formerly stood in the sitting-room; that Brunzel noticed that it was still heavy, but whether lighter than before he could not state. While this shows that the body might have been so moved, yet it does not prove that it was so moved. The wardrobe was locked when moved. Whether it was locked when brought to the defendant, is not shown. When returned to Mrs. Schmalinsky, it was empty. I might allude to the fact that defendant exhibited a large amount of money in the presence of Mrs. Ernestine Deckert, and of his son Louis, as she believes, before leaving for America, which, while it shows that he had money, yet its exhibition openly would perhaps indicate innocence, rather than guilt. As to the stench smelled in the house about the 8th of May, they indicate nothing as to the body; and if they relate to the burning of the clothes,—of which there is no evidence,—they are too remote and indefinite, and so also of the blood-stains found in the house.

The only solid facts with which I have to deal are that just prior to the killing defendant was acquainted with the financial condition and embarrassments of the deceased, and aided him therein; that deceased came to defendant's mill, after midnight, and in the early morning of April 23, 1883; that defendant was there, also some members of his family; that shortly thereafter unusual noises were heard in the residence portion of defendant's dwelling, as of moving of furniture, the stepping of men with boots on, and the gargling sounds as of some one in the gasps of death; that deceased disappeared, and was no more heard of

until his body was found January 31, 1884, in a "fir preserve" situated without, but to the rear of, the mill of the deceased, and in a state of decomposition consistent with the length of time of its disappearance and surroundings; that on the morning of the disappearance, and before the awakening of Brunzel by defendant, defendant had ample time and means to remove the body to the "fir preserve," where it was found; that defendant had possession of the money satchel of deceased, and also of all his clothing contained in the wardrobe; that deceased had considerable money on hand, whether in his satchel or elsewhere; that the clothing, satchel, and money have not been heard of since the disappearance of the deceased, and that deceased was found dead as the result of a heavy blow on the skull; that his body was identified; that defendant had taken steps to remove to America shortly previous to the murder; that on the occasion of the murder he was aided by one or more co-principals; that defendant left for America quietly, and that his leaving was not generally known; that it was in the nature of a sudden disappearance; that he had money to reach San Antonio, Tex., and pay \$200 on land; that defendant was seen with a considerable amount of money shortly before he left, exhibited by him to Mrs. Ernestine Decker, in presence of his wife, and against his wife's remonstrances, and in the presence also of his son Louis, as Mrs. Decker believes. I might state here that I have not disregarded the attempted contradiction of the witness Brunzel as to his sleeping-place; but whether he had a sleeping-place at the stable, or one which might have been used as such, yet I am satisfied that, as his evidence is supported in so many different instances by other witnesses upon different subjects, as well as by the certificate of the judge, together with the explanation of the witness as to the little importance attached by him at the time to the noises heard by him, and to his fear of being suspected himself, that I am inclined to, and have given entire credence to, his statements.

Without referring to the numerous other matters presented by the evidence, I am convinced that the evidence is sufficient to sustain the charge made against the defendant herein, Ludwig Rische, *alias* Rischkee, or Rischky, by Julius Runge, consul for the German empire, that said Risch, *alias* Rischkee, or Rischky, had committed the crime of murder of and upon one Franz Schmalinsky, on the 23d day of April, 1883, at Griesel, in the district of Crossen, in the kingdom of Prussia, in the empire of Germany, and within their jurisdiction and government, and deem the same amply adequate and sufficient to sustain the said charge under the provisions of the treaty between the United States of America and Prussia, and of other German states, parties thereto, of date June 16, 1852, and of that of November 16, 1852, and that Prussia is now a part of the German empire; and I therefore order and adjudge, and it is ordered and adjudged by me, that the said Ludwig Risch, *alias* Rischkee, or Rischky, be held in custody by the marshal of the United States of America for the Eastern district of Texas, and confined in the county jail of Galveston county, Tex., for extradition, in accordance with said treaties and the laws of the United States, as contained in the Revised Statutes of the

United States, tit. 66, "Extradition," pp. 1021-1023, and that a warrant issue to carry this order into effect; and that the evidence, or a copy thereof, be immediately, or as soon as may be, transmitted to the secretary of state of the United States, to the end that such action may be had by him in the premises as justice may require. And it is so ordered.

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*In re* WY SHING.

*In re* WONG GAN.

(*Circuit Court, N. D. California. November 8, 1888.*)

1. CHINESE—CHILDREN BORN IN UNITED STATES—CITIZENSHIP—FOURTEENTH AMENDMENT.

A person born in the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the government of China or other foreign power, is born subject to the jurisdiction of the United States, and he is a citizen thereof, under the fourteenth amendment to the national constitution.<sup>1</sup>

2. SAME—EXCLUSION ACTS—CONSTRUCTION.

The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage.<sup>1</sup>

3. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS.

No citizen can be excluded from the United States, except in punishment for crime.

(*Syllabus by the Court.*)

*Habeas Corpus.*

Wy Shing was born in San Francisco, Cal., of Chinese parents, who had intermarried at Marysville, in the state of California. After his birth petitioner's parents returned to Marysville, where his mother died when he was three years old. When petitioner was six years old his father sent him to China in charge of an elder brother of the father, where he remained till thirteen years old, when he returned to California. In 1885 he went to China again, and remained there till September, 1888, when he took passage a second time for California, before the passage of the late exclusion act. He arrived at San Francisco October 7, 1888, after the approval of said exclusion act, on October 1, 1888. The collector refused him permission to land, on the ground that he was a Chinese laborer, who had departed from the country, and that he was prohibited from returning by the provisions of said act. His father was, and he still is, a laborer, and he was in no way in the service of the emperor or government of China at the time of the birth of petitioner or at any other time. He still resides in California, and he has never been back to China or left the state of California since the birth of petitioner.

<sup>1</sup>See, to the same effect, *Ex parte Chin King*, 35 Fed. Rep. 354; *In re Yung Sing Hee*, ante, 437.

Wong Gan was born in San Francisco in 1868. He is now 20 years old. His father was a merchant while here, but he labors in the field in China, although he has an interest in a small trading establishment. The petitioner returned to China with his parents when he was 14 years old, where he remained till September, 1888, when he embarked on his return voyage to San Francisco, and arrived at his destination since the passage of the exclusion act. Neither his father nor his mother has ever returned to San Francisco, since their departure in 1881. They still remain in China. While here they had no connection with the diplomatic service of the Chinese empire.

*A. H. Ricketts*, for petitioners.

*John T. Carey*, U. S. Atty., for the United States.

Before SAWYER, Circuit Judge.

SAWYER, J., (*after stating the facts as above.*) In *Look Tin Sing's Case*, 10 Sawy. 353, 21 Fed. Rep. 905, after a full argument by able counsel, and careful consideration by the court, Mr. Justice FIELD, with the concurrence of the circuit and district judges, held that a person born in the United States, of Chinese parents not engaged in the diplomatic service of any foreign government, is born subject to the jurisdiction of the United States, and is a citizen thereof, under the provisions of the fourteenth amendment to the national constitution. As such citizen, it was further held that he was not subject to the Chinese restriction laws, and could not be excluded from this country. I am still satisfied with this ruling; but, if I were in doubt, I should not presume to overrule Mr. Justice FIELD upon a question which he has so maturely considered, and decided. If the point was erroneously decided, then children of Caucasian parentage, born under similar circumstances, are not citizens; and hundreds of thousands have, for years, been, unlawfully, enjoying and exercising all the rights of citizens, civil and political. The decision in that case controls these cases, which are similar to it. The petitioners are citizens, and are not, and they cannot be, excluded from the United States under the provisions of the late act in question. They are, therefore, illegally restrained of their liberty, and must be discharged, and it is so ordered.

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ECLIPSE MANUF'G CO. v. ADKINS *et al.*

(Circuit Court, N. D. Illinois. October 15, 1888.)

1. PATENTS FOR INVENTIONS—NOVELTY—DEMURRER.

The court not being able to say from common knowledge that there is no novelty in the design for a radiator described in letters patent No. 17,270, granted April 19, 1887, to Leon H. Prentice, consisting of a plan for ornamenting the surface of the radiator pipes by embossed or depressed figures on the upper parts, leaving the lower parts plain, thus forming two rectangular parallelograms, one above the other, a demurrer to a bill to enjoin the infringement of such a patent should be overruled.

## 2. SAME.

A demurrer to such a bill for want of novelty in the alleged invention will not be sustained unless the court, from his own knowledge, has no doubt that the device is well-known, and in common use.

In Equity. Bill to enjoin the infringement of letters patent. On demurrer.

Bill by the Eclipse Manufacturing Company against Erastus V. Adkins and others to enjoin the infringement of a patent.

*Dyrenforth & Dyrenforth*, for complainant.

*E. S. Bottum*, for defendants.

BLODGETT, J. This is a bill in equity asking for an injunction and accounting by reason of the alleged infringement of letters patent No 17,-270, granted April 19, 1887, to Leon H. Prentice, for a "design for a radiator." In his specification the patentee describes the subject-matter of his patent as follows:

"The leading feature of my design consists in the upright or vertical pipes of the radiator having a comparatively plain or even surface for a portion of their length from the bottom up, and with an ornamented surface consisting, preferably, of embossed or depressed ornamentation at the top or upper part, the plain portion constituting the lower or base portion of the radiator, and the figured or ornamented portion constituting the top or crown of the same; the plain and figured portions offsetting each other and presenting a contrasting appearance between the upper and lower parts of the radiator. These portions of the surface give the radiator a pleasing appearance. \* \* \* The invention consists in the radiator composed of a series of vertical pipes or loops of uniform height, having the crown or top portion of the pipes or loops ornamented or figured a uniform distance from the top downward, the portion below being comparatively plain. In this manner the ornamented and plain portions of the aggregate surface of the radiator constitute two rectangular parallelograms, one above the other. A similar effect would be produced by transposing the plain and figured portions."

And the claim is:

"The design for a radiator herein shown, consisting of a series of upright pipes or loops of uniform height, having the upper and lower portions of their aggregate surface distinguished from each other by ornamentation, so as to present rectangular figures, A, B, in contrast."

Defendant demurs to the bill on the ground that the design described and set forth in the patent was not new and patentable at the time of the alleged invention thereof by the patentee, but that, on the contrary, the same was, from the common and general knowledge of the public, old and well known at the time of the alleged invention thereof by the patentee; of all which the court will take judicial notice. That the design is not such as requires the exercise of inventive genius and effort. It was also urged *ore tenus* that the patent is void because the specifications do not describe the kind of figures that are to be used for the ornamentation of the radiator, but it is simply and baldly for the idea of ornamenting the upper or lower portion of a radiator with figures of any kind, whether embossed or painted thereon. The patent law of the United States (section 4929, Rev. St.) provides that—

"any person who by his own industry, genius, efforts, and expense has invented and produced any new and original design for a manufacture, bust, statue, *alto relievo*, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, \* \* \* may obtain a patent therefor."

In *West v. Rae*, 33 Fed. Rep. 45, this court sustained a demurrer to a bill charging infringement of a patent on a device for protecting woolen blankets from insects by incasing them in paper bags, on the ground that within the common knowledge it was old to wrap or incase woollens in paper to protect them from dust or insects. At the time I announced the decision in that case I stated that its effect might be to encourage counsel to demur to bills for infringement of patents in cases where they, from their special knowledge of the art, might be of opinion that the device covered by the patent was old. And my anticipations in that respect have been fully realized, as that decision has already produced in this court quite a bountiful crop of demurrers in this class of cases. But the court must meet each case as it arises, and, in sustaining demurrers like this, keep strictly within the field of common knowledge. The practical difficulty and danger is in defining where special knowledge leaves off and common knowledge begins. The judge must always be careful to distinguish between his own special knowledge, and what he considers to be the knowledge of others, in the field or sphere where the device in question is used. But when the judge before whom rights are claimed by virtue of a patent can say from his own observation and experience that the patented device is in principle and mode of operation only an old and well-known device in common use, he may act upon such knowledge. The case must, however, be so plain as to leave no room for doubt; otherwise injustice may be done, and the right granted by the patent defeated, without a hearing upon the proofs. The judge must on all such questions vigilantly guard against acting upon expert or special knowledge of his own, instead of keeping strictly within the field of general or popular knowledge. While I do not intend to lay down a rule, I am free to say that I should not feel justified in holding a patent void for want of novelty on common knowledge, unless I could cite instances of common use which would, at once, on the suggestion being made, strike persons of usual intelligence as a complete answer to the claim of such patent.

The patent now under consideration is for a design by which the surface of a radiator is to be divided by a horizontal line into two rectangular spaces, and one of them—that is, either the upper or lower of these spaces—ornamented with figures, which may be produced by embossing or depressing upon the surface, or perhaps by painting. This certainly strikes me at first impression as a very close, if not doubtful, patent. I cannot, however, say from my own knowledge, or from any familiarity with radiators in common use, that it is not new. I may say that, so far

as my own observation goes, I have never seen radiators ornamented in the manner shown in this patent, or by figures of any kind, either embossed, depressed, or painted thereon. Hence I am unable to say that this design is not wholly new and original with this patentee. As to the point that this patent is void because it does not describe the kind of figures, I can only say that I, at present, am of opinion that if this patentee was the first to invent or produce an ornamented radiator, that is, the first to design a radiator with an upper or lower rectangular space ornamented by figures of any kind upon it, then he may be entitled to a patent for such design. It may not have required a very high order of genius or inventive talent to have conceived and produced such a design, but if it was new, if it originated with him, then I cannot on demurrer say his patent is invalid. I have nothing at present before me from which I can say that it did not require study, thought, and inventive talent to produce this design. The case can be far more satisfactorily and safely, for the rights of all parties, disposed of upon proof as to the state of the art. The demurrer is therefore overruled.

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PRESTON v. MANARD *et al.*<sup>1</sup>

(Circuit Court, N. D. Illinois. January 6, 1882.)

1. PATENTS FOR INVENTIONS—NOVELTY—LAWN SPRINKLERS—HOSE-CARRIAGE.

The first claim of letters patent No. 183,188, issued to J. W. McGaffey, for an "improvement in fountain hose-carriages," which is for the combination of a hose-reel mounted on a truck provided with a foot or brace, by means of which the truck may be set or sustained in a vertical position, so that the single truck-shaft may, when thus set in an upright position, act as a fountain standard, is void for want of novelty.

2. SAME—CONSTRUCTION OF CLAIM—NOZZLE HOLDER.

The clasp or nozzle holder, in combination with the truck and the reel, which is the subject of the second claim of the patent, must be limited to such a clasp as is there shown, the proof showing that the idea of the device to fasten the nozzle to the standard of a lawn sprinkler was not new to the inventor.

3. SAME—LOCKING DEVICE.

The fourth claim of the patent, which is for the combination of a set-screw, by which the hose-reel is locked or made rigid on the spindle or axle, and the nozzle clasp, is not infringed by a similar machine whose locking device is a pawl and ratchet, and not a set-screw.

In Equity. Bill for an injunction and damages for an alleged infringement of patent. The bill was filed by Everett B. Preston against Alpheus B. and James W. Manard.

*Munday & Evarts*, for complainant.

*C. M. Brazee*, for defendants.

BLODGETT, J. This is a bill for an injunction and damages for an alleged infringement by defendants of patent No. 183,188, issued to J. W.

<sup>1</sup>The delay in publishing this opinion was occasioned by failure to receive it at the time of its rendition.



McGaffey, for an "improvement in fountain hose-carriages," and duly assigned to the complainant. It is charged in the bill that the defendant infringes the first, second, and fourth claims of the patent. These claims are as follows:

"(1) A hose-reel mounted on a wheeled carriage, which is provided with a foot or brace, by means of which it may be sustained in an upright vertical position, whereby the device becomes capable of use both as a hose-carriage and as a fountain standard, substantially as specified. (2) The combination with a hose-reel, mounted upon a suitable standard or frame-work, of a clasp or clasps upon the reel, or standard, or both, for holding the hose or nozzle so that the apparatus may be used as a lawn sprinkler, substantially as described. (3) The hose-reel, provided with a set-screw for locking it from turning, and with a clasp or clasps for holding the nozzle, substantially as set forth."

The defendants make and use a hose-reel constructed by making a truck with two shafts or standards, with a hose-reel working between the two standards, or truck-shafts, as they may perhaps be more properly called. The defense is (1) want of novelty; and (2) that defendants do not infringe.

The first claim of this patent, it will be seen, is for the combination of a hose-reel mounted on a truck provided with a foot or brace, by means of which the truck may be set or sustained in a vertical position, so that the single truck-shaft may, when thus set in an upright position, act as a fountain standard.

This combination seems to me to have been fully anticipated in the reference from Knight's Mechanical Dictionary, vol. 2, p. 1132, under the title of "Hose-Reel," where a truck or carriage is shown which seems to me the same in principle and mode of operation as that shown in the patent. It is true the application or use of the combined truck and reel of a fountain standard is not suggested in this reference, but it is clear that no change in the mechanical structure is needed to adapt it to this use, unless it be some mode of fastening the hose-nozzle to the standard, and devices for this purpose are shown in the older art; as, for instance, in the hose-holder of Smith, described in his patent No. 137,802, dated April 15, 1873; the patent of Ryder of November 11, 1873, No. 144,415; and other devices of an analogous character to this, for keeping the hose or nozzle in position, and which might have been adopted in this case.

The clasp or nozzle holder, in combination with the truck and the reel, is the subject of the second claim, and must be limited to such a clasp as is there shown, because the proof shows that the idea of a device to fasten the nozzle to the standard of a lawn sprinkler was not new to this inventor. Smith, Ryder, and Copping had shown such devices before he entered the field, and therefore he must be limited to his specific device or clasp; and an inspection of the nozzle holder of the defendant is sufficient to show that, while it performs the same function as that of the complainant's nozzle holder, it is a different mechanical contrivance.

The fourth claim is for the combination of a set-screw, by which the hose-reel is locked or made rigid on the spindle or axle, and the nozzle clasp. It is sufficient to say, while the defendant's machine has a lock-

ing device, it is a pawl and ratchet, and not a set-screw, and does not, therefore, infringe the complainant's combination. The only peculiar feature in the complainant's machine, which is not expressly shown in the exhibit from Knight's Mechanical Dictionary, is in regard to the construction of the reel. The complainant says in his specification: "The reel being supported at a considerable height from the ground, renders it possible to employ a reel of sufficient diameter so that the water will freely flow through the portion of the hose wound thereon, by means of which only so much of the hose need be unwound from the reel as is needed to place the sprinkler where it is wanted for operation;" but the exact size required for a reel in order to secure a flowing of the water through the hose, when wound thereon, is not given; nor does the inventor pretend that he was the first to discover the principle or fact that water would flow through a hose when wound on a reel of a certain diameter. It is obvious, I think, that the flowing of water through a hose while wound upon a reel depends, not only upon the size of the reel, but to some extent on the care and rigidity or tightness with which it is wound, and the number of coils laid upon each other. And it seems, from the way in which McGaffey refers to this feature in his description, that he considered it a mere form of construction which could be adopted in the arrangement of the parts of his machine, if the constructor saw fit to do so; that is, his shaft and trucks were so arranged that he could use a large reel if it was desirable to do so. It is not an essential element of his patent, and does not form the subject of any claim. I therefore come to the conclusion that the first claim is void for want of novelty, and that the defendants do not infringe the second and fourth claims. The defendants' machine, in fact, more nearly resembles, in mechanical structure and combination of parts, the hose-reel described in Knight's Dictionary; but it is obvious that the differences between the complainant's and defendants' machines are more apparent than real. The complainant's machine has only a single truck-shaft, with the reel attached to it by a spindle, while defendants' machine has two truck-shafts, and the reel revolves between them on an axle attached to each shaft. The complainant's foot or brace makes with the wheels of his truck a tripod, which supports the shaft as a standard for a lawn sprinkler; the defendants' shafts, being set on brackets attached to the axle of the truck, make, when set on end, a four-footed pedestal and two standards for a lawn sprinkler, either of which may of course be used as desired. The bill is therefore dismissed for want of equity.

SOUTHARD *et al.* v. BRADY.*Circuit Court, S. D. New York. October 15, 1888.)*

## ADMIRALTY—PRACTICE—LACHES.

A claim in admiralty, which would be barred at law by the statute of limitations, is barred, by analogy, on the ground of laches.

In Admiralty. On appeal from district court.

Libel by Thomas J. Southard and others against William Brady on the charter of the bark T. Jeffrey Southard. Decree for respondent, and libelants appeal.

*Findings of Fact.* (1) On or about the 15th day of November, 1875, a charter was made of the bark T. Jeffrey Southard by the owners, the libelants and appellants herein, to the respondent and appellee. It was negotiated by J. H. Beattie, the owners' agent, and for a voyage from Galveston, Tex., to Liverpool, or other specified port on the Continent. (2) That the firm of M. Quin & Co., of Galveston, Tex., were the agents of the respondent at Galveston, and that said firm attended to all business of the respondent in connection with said charter and said loading, and were duly authorized by the respondent for that purpose; and that during said time the respondent was not in Galveston, and had no personal knowledge of what was done. (3) That on March 29, 1876, the bark sailed from Galveston. (4) That the claim of the libelants accrued, if at all, on or prior to said day of sailing. (5) That this action was begun by service of the citation on October 23, 1883. (6) That Mr. Thomas, one of the said firm of M. Quin & Co., died in 1879 or 1880. (7) The respondent has been a resident of New York since 1874, and at all times had an office in New York city, where he could be found except during occasional absences, none of which exceeded two and a half months. He also had a residence in New York city or Brooklyn all the time, where he could also have been found except during said absences. (8) The libelants have been guilty of laches.

Y. Henry Dewey, for appellants.

Geo. B. Adams, for appellee.

LACOMBE, J., (*after stating the findings as above.*) The transactions out of which the libelants contend that their cause of action arose were completed more than six years before the action was begun. Statutes of limitations are no longer received in an unfavorable light, as an unjust and discreditable defense, but should receive such support from courts of justice as would make them what they were intended emphatically to be—statutes of repose. *Bell v. Morrison*, 1 Pet. 360. They are now generally regarded with favor, as being in the interest of justice, by compelling parties to bring their actions promptly, so that debtors shall not be obliged to take care forever of their acquittances, or alleged debtors of the evidence which may enable them to defeat the claims advanced against them. It is true that there is no statute of limitations in admi-

rality; but courts of admiralty, like those of equity, will not lend their aid to enforce stale demands. Exceptional circumstances will sometimes lead a court of admiralty to pronounce a claim stale after a lapse of time less than the local statutory period of limitation. Where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations. *The Sarah Ann*, 2 Sum. 206, per STORY, J. The evidence taken in this court shows that one of the persons, who as agents of the respondent attended to all business of the respondent in connection with the charter and loading, died before the commencement of the action. Were that fact not in proof, however, (and there is some question as to the regularity of the taking of this testimony,) the lapse of the period within which only under the local statutes the respondents are required to preserve their acquittances and evidence should be sufficient to bar the claim.

The elaborate brief submitted by the counsel for the libelants and appellants contains an exhaustive enumeration of authorities bearing on the question of limitation in admiralty. None of them seem to be in conflict with the views above expressed. In those cases, where it is held that the respondent must show that some special interest has been prejudiced by the delay in order to avail of the defense of staleness, it will be found that the delay was for less than the period prescribed by the local statute in common-law actions. In *The Galloway C. Morris*, 2 Abb. (U. S.) 166, which was an action for seaman's wages, the period of service began not more than 21 months before the filing of the libel, and continued down to one week before filing; in *The Mary*, 1 Paine, 180, the delay was for one year only; in *The Bolivar*, Olcott, 477, it was less than two years; in *The Favorite*, 1 Biss. 525, two years and ten months, in *The H. B. Foster*, 3 Ware, 167, seven months, in *The Platina*, 3 Ware, 182, four years had elapsed. *The Key City*, 14 Wall. 653, was an action *in rem* begun three years and a half after the cause of action accrued. In *Brown v. Jones*, 2 Gall. 477, decided by Judge STORY in 1845, and much relied upon by counsel for the libelants, it was held that the Massachusetts statute of limitations did not apply,—a defense which was not pleaded,—and the question of laches or staleness, irrespective of the Massachusetts statute, was not considered. In *Willard v. Dorr*, 3 Mason, 91, there was a capture and condemnation, and subsequent reversal. Leaving out the period subsequent to the capture, and prior to the return of the proceeds to the owner, six years had not elapsed. In *The Sarah Ann*, 2 Sum. 206, nearly six years had elapsed. In *Smith v. Sturgis*, 3 Ben. 330, six and a quarter years had elapsed; the action was not sustained. In *Joy v. Allen*, 2 Woodb. & M. 303, the part of the claim which was sustained had been acknowledged as a debt within six years. "The long delay," says the court, "to prosecute for the oil which arrived home is not shown to have led to any losses, acts, or divisions of profits injurious to the owners, or to have been accompanied by any other evidence than the length of time raising a presumption of the payment to the libellant." But it adds on the next page (325:) "My own impression is that the claim for what actually reached the owners ought not to be barred by the delay

to enforce it, unless it has been such as at law would make the statute of limitations available." In *Jay v. Allen*, 1 Spr. 130, an acknowledgment within six years took the case out of the statute. The court says: "It is generally true that courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogy of common-law limitations." In *The Eastern Star*, 1 Ware, 185, one voyage only had intervened; in *Saunders v. Buckup*, Blatchf. & H. 264, three years and five months. In *The Rebecca*, 5 C. Rob. 102, and *The Mentor*, 1 C. Rob. 181, the delay was, respectively, for 12 and 17 years, and relief was refused. In *The Huldah*, 3 C. Rob. 235, there was a delay of a year and nine months; and in *The Susanna*, 6 C. Rob. 48, of almost six years. In *The Jonge Jan*, 1 Dod. 453, an action brought in 1814, the court (Sir W. Scott) said:

"This is an objection taken to an account of the commissioners of the navy dated as long back as the year 1806. At this great distance of time the court would be inclined to hold the account to be entirely settled, and not liable to be ripped up unless it could be shown by the claimants that they had it not in their power to obtain a revision at an earlier period. If the parties really had no earlier opportunity to look into the transaction, I should not feel disposed to exclude them now, and to hold them to be barred by mere lapse of time. But is it a fact that the parties have had no such opportunity? Would not this court, upon application made to it, have compelled the production of the account long ago? Undoubtedly it would have done so. If parties choose to let matters sleep for so great a length of time, even beyond the period fixed by the statute of limitations, they must take the consequences of their own laches, for the court will not suffer itself to be called upon to open accounts so stale and antiquated as these are. If inquiries of this kind are to be now entered into, I do not see where the matter is to end. It is impossible to say what limitation is to be put, or what number of cases may be affected. If I am to go back seven years, why not seventeen? \* \* \* I think I am fully at liberty to decline going into the question, and to consider it as long ago concluded between the parties."

The precise point raised in the case at bar was decided in this district. *Scull v. Raymond*, 18 Fed. Rep. 547. The decision of the learned district judge in that case was never appealed from. It seems to be in harmony with the authorities, and may be accepted as controlling in this case. The decree of the district court is affirmed, with costs.

## THE CALIFORNIA.

COMPAGNIE BORDELAISE DE NAVIGATION À VAPEUR v. THE CALIFORNIA.

*(District Court, E. D. New York. October 3, 1888.)*

## SALVAGE—DISABLED STEAM-SHIP—TOWAGE—AWARD.

The German steam-ship *California*, from Hamburg for New York, when about 800 miles east of Sandy Hook, broke her high-pressure piston. She drifted for two days, the weather being very stormy, until she was within 56 miles of Nantucket shoals, and 67 miles from St. George's banks, and 54 miles from the Bavis bank. Here the steam-ship *Chateau Margaux*, from New York to Bordeaux, hove in sight, and, at the request of the master of the *California*, turned back in her course, and brought the latter vessel into the harbor of New York. In doing so she lost a week's time, and incurred an expense of about \$2,000. The *California* was worth, with her cargo, freight, and passage money, \$260,650. The value of the *Chateau Margaux*, her cargo, freight, and passage money, was \$568,000. *Held*, that the *Chateau Margaux* was entitled to \$15,000 as salvage, and \$2,000 for her expenditures.

In Admiralty. Libel for salvage.

*Wing, Shoudy & Putnam*, for libellant.

*Ullo, Ruebsamen & Hubbe*, for claimant.

BENEDICT, J. This is an action to recover salvage compensation for services rendered to the steam-ship *California* by the steam-ship *Chateau Margaux*, in April, 1888. The *California* was a German steam-ship, bound on a voyage from Hamburg to New York. The *Chateau Margaux* was a French steamer bound from New York to Bordeaux. It appears by the statement of the master of the *California* that on the morning of the 5th of April the engine of the *California* stopped by reason of the breaking of her high-pressure piston, and could be no longer used. The steamer was then about 300 miles to the eastward of Sandy Hook. She was brigantine rigged. In the afternoon of the 5th the wind began to freshen. During the night of the 5th the weather was very stormy, and the ship drifted very hard to the north-west, so that the soundings shoaled from 55 fathoms to 31 fathoms between noon of the 5th and 5 o'clock in the morning of the 6th. It was reckoned that the steamer by mid-day of the 5th had made three miles under sail. Between 4 P. M. and 8 P. M. of the 5th it was reckoned that ten miles were made. Between 8 P. M. and 12 P. M. of the 5th eight miles were made, the wind then blowing hard from the southerly. From midnight of the 5th to 4 A. M. of the 6th, wind still blowing hard from the southerly, the steamer was estimated to have run eight miles. At 4 P. M. of the 6th the wind was shifting to westward, and the soundings showed 31 fathoms, with fine sand. Between that and 8 P. M. of the 6th the steamer drifted into deeper water. She could do little in the way of steering. At 12 P. M. of the 5th the log says: "Had no steerage-way on the ship." The entry of the

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

log at 4 p. m. is: "No steerage-way on the ship." The same entry was made on the next watch, and also from 8 o'clock a. m. till noon. At 4 o'clock of the 6th the ship wore around on the southern tack. She could not tack. In the afternoon of the 6th the log says: "Tried to wear, but the ship refused to obey the helm, and we were obliged to continue on the same course as before." This was because she was in a cross sea. The log on the morning of the 7th contains the same entry. The ship at this time refused to obey because there was no wind. On the morning of the 7th the steamer was about 56 miles from Nantucket shoals and 67 miles from St. George's banks, and 54 miles from the Bavis bank. She had taken aboard a pilot at 8 p. m. of the 6th, and the weather was fine. Between 5 and 6 a. m. of the 7th the Chateau Margaux hove in sight. The California displayed a flag of distress, and a signal that she wished to be taken in tow. The Chateau Margaux bore to her, and a request was sent by the master of the California that the Chateau Margaux would tow the California to New York. To this the master of the Chateau Margaux assented, at the same time in writing calling the attention of the master of the California to the fact that instead of taking her to Halifax he retraced his steps at the request of the master of the California, and for her convenience. The Chateau Margaux having taken the California's hawser, towed her into the port of New York in safety, and there left her at anchor at 6:25 p. m. on the 8th of April. The Chateau Margaux was able to make with the California in tow some eight miles an hour. In the performance of the service no damage was sustained by the Chateau Margaux, save only her thrust shaft became heated and burned, requiring a day's extra labor by the engineers to repair it. The weather was for the most part fine. In the afternoon of the 5th the wind increased, and hauled to the west-north-west, and became fresher, and the vessels strained so much that it was deemed wise to put out a second towing hawser. Whereupon the steamers were stopped, and the Chateau Margaux lowered her small boat with the first officer, who went to the California, and took a steel wire hawser shackled from the starboard anchor chain of the California, and made it fast to the starboard quarter of the Chateau Margaux. The sea was high, but not breaking. The service was attended with some danger. At the same time a series of night signals were arranged between the masters, providing for a display of rockets in case of anything wrong. The vessels crossed Sandy Hook bar without accident on the morning of the 8th of April, and at 6:25 of that day the towing line of the California was cast off at quarantine, and both vessels came to anchor. The following day the Chateau Margaux was engaged in endeavoring to procure coal and other necessary supplies. The bearings of the thrust shaft were replaced. On Wednesday it was too foggy to go to sea. On Thursday she sailed again upon her voyage, having lost about a week by reason of this service. The cabin passengers were naturally restive during the delay, but limited their action to complaints. When the Chateau Margaux arrived at Santander and Bordeaux, although she was under extra expense, she was unable to depart from Bordeaux on her sailing day. A detention of two

days beyond her return sailing day occurred, during which time she had to maintain 160 passengers at additional expense. The disbursements of the Chateau Margaux caused by this service, for pilotage, coal, oil, engine-room supplies, provisions, etc., amount to \$2,000. The value of the Chateau Margaux is about \$400,000. Her cargo was worth \$150,000. The freight and passage money amounted to about \$18,000. The value of the California, as shown by her subsequent sale in her home port, was \$173,000; cargo and freight, \$75,000; passage money, \$12,650; amounting in all to \$260,650.

It is not doubted that on this occasion a salvage service was rendered by the Chateau Margaux. The only dispute is as to the amount. The libellant claims that the amount should be the sum of \$25,000, and refers to the case of *The Daniel Steinman*, 19 Fed. Rep. 918, where this court awarded \$25,000, as supporting a similar award in this case. In many respects this case is as favorable for the libellant as was the case of the Daniel Steinman; but the case of the Daniel Steinman differs from the present case in this: that the California, when spoken, was about 300 miles from New York, whereas the Daniel Steinman was over 600 miles to the eastward of the port of New York, consequently not so likely to be spoken by vessels going out from New York as was the California. Here there was the highest probability that the California would be spoken by some vessel able to tow her. She was in fact spoken by another vessel shortly after the Chateau Margaux had spoken her. The peril of the California was, therefore, in my opinion, less than the peril from which the Daniel Steinman was relieved. The service in the case of the Daniel Steinman was towage of over 600 miles. The service here was a towage of 300 miles. The White Star steamer that towed the Daniel Steinman had 697 passengers on board. The salving steamer in this case had but 24 passengers. The risk of a far greater trouble was assumed by the Daniel Steinman than by the Chateau Margaux. I do not think, therefore, that the case of the Daniel Steinman is sufficient to justify an award of \$25,000 in this case. Reference is also made by the libellant to the case of *The Suevia*, disabled by a broken shaft, and towed four days by the Istrian, where Sir JAMES HANNEN awarded £4,650 on a value of £68,000. *The Suevia*, March 26, 1888, reported London Shipping Gazette, March 29, 1888. Also to the awards made by English courts, where vessels have been taken to Halifax, and it is suggested, not without force, that it would be unfortunate if the impression should gain ground that better salvage awards are obtained when vessels are taken out of their course to Halifax, rather than on their direct track to New York. In the case of *The City of Richmond*, 2 Pritch. Dig. 1925, where a steamer was towed 240 miles to Halifax, an English court awarded £7,000. In the case of *The City of Chester*, Id. 1926, where a salvage award of £6,600 was given, where the vessel was towed 225 miles to Halifax. In the case of *The France*, towed 187 miles to Halifax, the award was £4,500 for services involving no danger and little difficulty. These and other cases I have examined, and in the light of these decisions have found in this case that \$15,000 is in my opinion a proper sum



to award the Chateau Margaux for her services, to which I add \$2,000 for her expenditures caused by the rendition of the salvage service in question.

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SACQUELAND *et al.* v. THE METEOR.

(District Court, E. D. New York. October 4, 1888.)

1. SEAMEN—WAGES—CHARACTER OF SERVICE—EVIDENCE.

The testimony of libelant was that he was hired by the master as mate, at \$50 per month. That of the master was that he was only hired as a deckhand, at \$30. There was no other mate than libelant, and he had been promoted during the previous season from a deckhand at \$30 to a mate at \$50, and as such served until the end of the season. Until about 3 weeks before his discharge he wore a mate's uniform, bought for him by the master, who explained it by saying that it was necessary to have some one to act as mate to receive guests. Letters from the master, written when sick, to the libelant, authorizing him to employ men, and giving him directions to keep the work going, were introduced. *Heid*, that libelant was employed as mate, and should be paid \$50 per month.

2. SAME—BOARD OF SEAMEN.

The evidence of the seamen of a yacht, and the master, as to whether they were to pay their own board for a period of 10 days, when the vessel was without a cook, being conflicting, the facts that a short time previously, when they boarded themselves, they were paid the amount it cost them in addition to their wages, and that, if they paid their own board, they would receive only 25 cents per day during the 10 days, instead of \$1, throw the preponderance to the side of the seamen.

In Admiralty. Libels for wages.

Libels by Sacqueland and others against the yacht Meteor for wages as mate and seamen.

*Noah Tebbets*, for libelants.

*Wilcox, Adams & Macklin*, for claimant.

BENEDICT, J. This is an action against the steam-yacht Meteor to recover wages for services rendered on board the yacht in the season of 1887. The claim of the libelant Sacqueland is that he was employed to be the mate of the yacht, at the rate of \$50 a month; that he served as mate, but was paid only \$30 a month, and is entitled to recover a balance of \$60 for the time he served as mate. In his case the only issue is whether he was hired to be mate at \$50 a month, or to be deckhand at \$30 a month. The testimony of the master and the testimony of the libelant is in absolute conflict on this point. The surrounding circumstances lead me to believe that Sacqueland is entitled to be paid mate's wages. If Sacqueland was not mate, then the yacht had no mate, which seems improbable. It appears that on the previous season Sacqueland was employed first as deckhand on this yacht, at \$30 a month, was afterwards promoted to be mate of the yacht, and his wages raised to \$50 a month. He served as her mate to the end of that season. This warrants

the presumption that if Sacqueland remained as mate of the yacht for the season of 1887, he would be entitled to \$50 a month, the wages paid on the previous season. That in 1887 he acted as the mate, and not as a deckhand, on the yacht, seems to be shown by the fact proved that until about three weeks before his discharge he wore a mate's uniform, which uniform he took off on being informed that the owner would not pay him at the rate of \$50 a month. The mate's uniform so worn by Sacqueland was bought for him by the master, and made by a tailor who measured him by direction of the master of the yacht. The master's explanation of this circumstance is that it would be contrary to etiquette on pleasure yachts that guests, when coming on board, should be received by a deckhand, and, as the master could not always be present to receive the guests, the mate's uniform was bought for Sacqueland in order that Sacqueland, when receiving the guests, might not be known to such guests to be a deckhand. The explanation is hardly sufficient to deprive Sacqueland of a mate's wages. Furthermore, two letters of the master to Sacqueland, at a time when the master was sick and out of town, are put in evidence, which are not such letters as would be written to a deckhand, but are such as would be written to a mate in command. They authorize Sacqueland to employ men; they give him directions to keep the work going ahead; and are inconsistent with the idea that Sacqueland had not control of the crew on board the yacht in the master's absence. The discarding of the mate's uniform at the end of the season by Sacqueland, when informed that the owner would not pay him mate's wages, indicates that, up to that time at least, he had supposed himself to be a mate, and of course earning a mate's wages. Upon the evidence I am of the opinion that Sacqueland is entitled to recover mate's wages up to the time that he took off the mate's uniform. As to the claim of the other libelants, being seamen who served on board the yacht during the season of 1887, the only question is whether they are entitled to recover 75 cents a day for the expenses of their board from the 1st to the 10th of May, during which time there was no cook on board the yacht, and they paid their own board. In regard to the libelant Brown there can be no doubt. He was employed by Sacqueland, and both he and Sacqueland testify that the bargain was that he should be paid a dollar a day for his labor, and 75 cents a day for his board during this time. The other men were hired by the master, and the conflict of evidence in regard to their hiring is complete. The master asserts that the agreement was that they should pay their own board during these 10 days. Each of the men assert that the vessel was to pay them 75 cents a day for their board during this period. I incline here to believe the statement of the seamen. It seems hardly possible that these seamen would have agreed to work in May for 25 cents a day, as would be the case if they paid their own board out of the dollar; and, moreover, it is proved that \$1.75 per day was paid them in April, when they paid their own board. My conclusion is that the agreement was that the board of the men was to be paid them in addition to the dollar per day. They are therefore entitled each to receive \$6.50, except Charles Colson, who, as the testi-

mony seems to show, has abandoned his claim. Let a decree in favor of the libelants, in accordance with this opinion, be entered. The libelants must also recover the costs.

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### THE SAMMIE.

#### THE CITY OF SPRINGFIELD.

#### HARTFORD & N. Y. TRANSP. CO. v. THE SAMMIE *et al.*

#### LUTHER *et al.* v. THE CITY OF SPRINGFIELD *et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

#### 1. COLLISION—KEEPING OUT OF THE WAY—SAFE MARGIN—TIDE CURRENTS.

A steamer bound to keep out of the way must, at her own peril, shape her course for a safe margin against the contingencies of navigation, and the effects of tide currents. *Held*, in this case, that the conflict in the evidence was probably in part to be explained by the westward set of the flood-tide off Twenty-Third street, which changed to the westward the course of the S., a steamer 300 feet long, as she struck the current, and that the collision was by her fault only.

#### 2. SAME—TUG AND TOW—SUDDEN BACKING—PARTING LINES—ERROR OF JUDGMENT IN EXTREMIS.

The collision being with a heavy car-float in tow along-side a tug, and the S. contending that the float had broken loose from the tug just before the collision, through the tug's too sudden backing, which the tug denied, *held* that, even if the lines were parted, as alleged, before the collision, the tug's backing was made necessary by the fault of the S. when the danger was imminent, and that the error, if there was any error, was one of judgment, under the excitement of the moment, and not a legal fault.

In Admiralty. On appeal from district court. See 29 Fed. Rep. 923.

Cross-libels for collision by Thomas B. Luther and others, claimants of the steam-tug Sammie, against the Hartford & New York Transportation Company, claimant of the steamer City of Springfield. A decree was rendered dismissing the libel against the Sammie, and sustaining that against the City of Springfield.

*Franklin A. Wilcox* and *Geo. B. Adams*, for Hartford & New York Transportation Company.

*E. D. McCarthy*, for Luther *et al.*

LACOMBE, J. It is conceded that if each vessel had kept her course after sighting they would have passed safely. The district judge has found, amid much conflicting testimony given by witnesses whom he saw and heard, that the Springfield changed her course so as to get from the Brooklyn side of mid-river into the Sammie's water, and that the Sammie did not change her course, or, at least, did not change it sufficiently to bring her to the eastward of the track which, by the first exchange of signals, she was justified in following. The new testimony

only goes to show: *First*. That one supposed contributing cause of the Springfield's change of position (to-wit, the tide) was not as efficient as the district judge supposed. *Second*. That when a tug with a car-float lashed to its side has to carry a starboard helm, in order to keep her course, the effect of suddenly letting her helm run amidships will be to give her a swing to starboard. This fact in navigation was no doubt well enough known to the district judge without any testimony. *Third*. Persons who, two years before testifying, had seen the hole in the bow of the City of Springfield, gave evidence as to the appearance of the wreckage, and to their opinions as to the relative positions of the steamer and the car-float at the moment of collision. There is nothing in this to call for any modification of the decree of the district court, which is therefore affirmed.

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MORRISON v. I. & V. FLORIO S. S. Co.

(District Court, D. New Jersey. November 5, 1888.)

1. SHIPPING—CARRIAGE OF GOODS—DELAY IN DELIVERY—RISE IN MARKET.

A cargo of prunes, which should have been delivered not later than April 28th, was, by the negligence of respondent, not delivered until June 11th, and then in a damaged condition. They were sold July 8th, on which day the market price for sound prunes was 6 cents per pound, but on account of their damaged condition a portion of the prunes brought only 5½ cents. The market price on April 28th, when they should have been delivered, was 5 cents. *Held*, that libelant was entitled to recover the difference between the market price on the day of delayed delivery and the price for which the damaged prunes sold. Respondent cannot be allowed to escape liability by reason of the advance in price in the interval between the dates of required and actual delivery.

2. SAME—SALE FOR ACCOUNT OF VESSEL—DELAY.

Respondent has no cause to complain of the delay in making sale of the damaged prunes. It was the libelant's duty to prevent a sacrifice, and to obtain the best market price, and it does not appear that an unreasonable length of time was taken to do this.

3. SAME—REBATE IN CUSTOMS DUTIES.

The amount of rebate of duties allowed to the libelant at the custom-house was the customary one allowed on all fruit cargoes, and had no reference to the damages caused by respondent's negligence; hence respondent was not entitled to the benefit of it.

In Admiralty. On exceptions to commissioner's report.

Libel filed by Richard J. Morrison, as administrator, against the I. & V. Florio Steam-Ship Company. There was a decree for libelant, and a reference to ascertain the damages; reported *sub nom. Mina v. Steam-Ship Co.*, 23 Fed. Rep. 915.

Wing, Shoudy & Putnam, for libelant.

Ullo, Ruebsamen & Hubbe, for respondents.

WALES, J. This case was referred to Linsly Rowe, Esq., commissioner, to ascertain and report the amount of damages, if any, suffered

by the libelant by reason of the delay of the respondents in trans-shipping, at Palermo, 600 casks of prunes, which had been shipped at Trieste, to be delivered in New York. The prunes should have been delivered in New York not later than the 28th of April, but did not arrive until the 11th of the following June; having been detained at Palermo for 55 days. The question whether there had been neglect and unreasonable delay on the part of the respondents in forwarding the cargo from Palermo was decided by Judge NIXON, who held that "if any injury resulted to the cargo from this long detention, the loss must be charged to the respondent corporation, which caused it." *Mina v. Steam-Ship Co.*, 23 Fed. Rep. 915. There was some conflict in the testimony submitted to the commissioner as to the condition of the fruit when it arrived in New York, and whether its damaged condition was the effect of inherent deterioration, or of exposure for an unreasonable time to the hot climate of Sicily. On both of these points the preponderating proof sustains the allegations of the libel. The fruit had been selected with unusual care, having been twice inspected before it was shipped at Trieste. While at Palermo, it was stored in an old hulk, or floating magazine, for nearly two months of the hottest period of the year in that region. The result of such exposure could not be other than injurious. On the extent of the injury directly traceable to that cause the testimony is contradictory, but it certainly does not require very much evidence to prove that perishable articles, like prunes, cannot stand long exposure to a tropical climate without risk of serious injury, if not of a total loss. As a matter of fact, about two-thirds of the prunes were found damaged, when examined in New York, immediately after their delivery. The libelant notified the respondents' agents that in consequence of the wrongful detention he would hold the respondents liable for damages, and requested them to appoint some person to represent them at an inspection of the fruit, with the view to an amicable adjustment. This request was declined, or at least not complied with, and the libelant's experts inspected the casks in the absence of the respondents, and made written reports, which are among the exhibits in the case. One of these inspectors states that 409 casks were damaged from 12 to 30 per cent. in value, and the other says that he never saw prunes, arriving between January and June, as badly injured. The respondents' witnesses contradict these statements, but their examination of the fruit was superficial; their report was not reduced to writing; and, as they gave their testimony from recollection long afterwards, it cannot be deemed of equal weight with the libelant's proofs. The prunes were sold on the 8th of July, within less than one month after their delivery. One hundred and ninety-one casks of sound fruit brought six cents per pound, and 409 casks of damaged fruit sold for five and one-quarter cents per pound. On the day of the sale the market price of sound prunes was six cents; and the libelant claims as the measure of his loss the difference between that price and the one for which the damaged casks sold, which would be three-fourths of a cent. On the other hand, the respondents contend that the libelant is not entitled to recover anything, on the broad ground that the delay in deliv-

ering the prunes, instead of being a loss, resulted in an actual profit to the libelant; in other words, that the prunes sold for much more on the 8th of July than they would have sold for on the 28th of the preceding April, the day when they should have been delivered. Reduced to figures, the libelant made a total profit, on the whole lot of 600 casks, in consequence of the advance in the market price between April 28th and July 8th, of \$4,818.08.

The commissioner, after a careful review of the evidence, and an elaborate discussion of the law relating to the rule of damages in such cases, has found for the libelant; estimating his loss on the sale of the unsound prunes at one-half cent on the pound, that being the difference between the market price of sound prunes on June 11th, the day of delayed delivery, (5½ cents) and the price for which the damaged prunes sold on the 8th of July, (5¼ cents.) The items of damage are reported as follows:

|  |            |
|--|------------|
| Damage to 409 casks prunes weighing net 556,712 lbs, at ½ c. | \$2,783 56 |
| Cooperage - - - - -  | 120 00     |
|  | <hr/>      |
|  | \$2,903 56 |
| Interest on above from June 18, 1881, - - - - -              | 1,161 50   |
| Interest on invoice, \$33,000, for 40 days, - - - - -        | 220 00     |
|  | <hr/>      |
|  | \$4,285 06 |

In fixing this measure of damages, the commissioner says:

"The testimony shows that the prices for the season were as follows: March, 5½ cents; April and May, 5 cents; June, at the time of arrival, 5¼ cents; and July, 6 cents. This gives as the average price for the season 5½ cents. \* \* \* Upon a careful consideration of the whole matter, I am of opinion that, under the circumstances of this case, the damages must be measured by the price at the date of delivery, which is proved to be 5¼ cents."

The libelant claimed the difference between 5¼ cents and 6 cents, but the commissioner justly concluded that he had no right to store the goods and wait for a rising market; the libelant was obliged to use reasonable diligence in disposing of the goods, but not to delay the sale at the risk of further deterioration of a perishable article. The exception to the principal item of damage would have some validity if the delayed delivery had not been caused by the fault of the respondents; but, it having been decided that the long detention at Palermo was directly attributable to their neglect to provide means for prompt trans-shipment, they cannot now be allowed to take advantage of their own wrong, and claim a participation of profits growing out of a rise in the market price. The profit accruing from the accidental rise in the market belonged to the libelant, and it would be an extraordinary misapplication of the principles of justice to allow the respondents to escape all liability for their negligence and dereliction of duty by depriving the libelant of any recompense for their wrong because of the advance in price. To do this would be to bestow a premium on the misconduct of the respondents. The illustration presented on the argument by libelant's proctor exhibits the danger of adopting the rule contended for by respondents. Here were

600 casks of prunes, consigned to the libelant. Suppose that the price had doubled between April 28th, the day when they should have been delivered, and June 11th, the day of actual delivery; suppose also that 300 casks were delivered sound, and the other 300 were totally destroyed by the fault of the carrier,—can the ship-owner claim that the doubling of the market price had relieved him from payment for the half destroyed? It is admitted that, had the delay occurred without fault on the part of the carrier, the libelant would not be entitled to recover; it having been well settled by competent authority that, in long and uncertain voyages by sea, the damages by the fall of the market are too remote to be recoverable against the carrier. *The Parana*, 2 Prob. Div. 118; *The Notting Hill*, 9 Prob. Div. 105. In the latter case, it was said by Sir JAMES HANNEN that the loss of market is an accidental loss, and the allowance of such a claim would also be contrary to the long-established practice of the admiralty court. But here there was no proof that the long delay was caused by any stress of weather, but it is proved to have arisen from the respondents' neglect to provide for the more direct transportation of the merchandise to New York after its arrival at Palermo. In the case of *The Sabioncello*, 8 Ben. 90, rags damaged by contact with petroleum were sold at auction, and bought by the consignee, and by him manufactured into paper, which brought the same price as paper manufactured from sound goods. It was held that the price as determined by the sale fixed the damages; and that the subsequent manufacture into paper could not reduce the damages resulting from the saturation. Even where the measure of damages has been fixed by the parties, the carrier cannot be exempted from the consequences of his own wrong by the sale of the goods at an advanced price. In *Pearse v. Steam-Ship Co.*, 24 Fed. Rep. 285, the bill of lading was for 14 bales, 3 of which were damaged. It contained the clause that "in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods." The invoice value of the goods was \$2,692.16; the price obtained for the whole in the foreign market was \$2,901.85. The invoice value of the damaged goods alone was \$571.05; the actual price received for them was \$184.85. The respondents there contended that the stipulation of the bill of lading should be construed as limiting their responsibility to the invoice value of the shipment as a whole; and that the carriers were not to be liable for any loss or damage, provided the shipper ultimately realized at the port of destination the whole invoice value. But the court held that, if the construction contended for by the claimants were the proper meaning of the limiting clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to the theft or non-delivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might without accountability appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole; a result destructive of all commerce, because enabling the carrier to appropriate all its profits. The decree in that case was that the libelant was awarded the difference between the

invoice value of the goods damaged and freight, and the net proceeds of the sale of them. See, also, Sedg. Dam. (Ed. 1880) 56, note "Damages not reduced by benefit [to plaintiff] accruing through defendant's wrong." Nor have the respondents any just cause to complain of the postponement of the sale of the damaged prunes. The interval of time that elapsed between the day of delivery and the day of sale was not long. It was the duty of the libelant to prevent a sacrifice of his property, and to obtain the best market price; and this course was equally advantageous to the respondents; for if the damaged prunes had been sold immediately on their arrival, it is quite probable that they would have sold for less than they did. There is no evidence that they might have brought more. Moreover, it is questionable whether the libelant would have been justified in making an immediate sale, and without any endeavor to secure the highest attainable price. In *The Marinin S.*, 28 Fed. Rep. 668, it was said to be unreasonable to throw a large quantity of goods on the market for sale at auction as damaged goods, upon a slight examination, at the assumed risk and loss of the vessel; and that a court of admiralty would not support any such precipitate action. It was held that the master was entitled to the same protection against unreasonable and indiscriminate sales by the consignee, in the port of discharge on the vessel's account and risk, that is imposed on the master in favor of the owner on a sale by the master in a foreign port.

The respondents further claim that the amount of rebate of duties allowed to the libelant at the custom-house should be deducted from the damages ascertained by the commissioner. This question has been already adjudicated. *The Eroë*, 9 Ben. 191, 17 Blatch. 16; *The Lizzie W. Virden*, 8 Fed. Rep. 624. The rebate was the customary one allowed on all fruit cargoes, the benefit of which belonged to the owner, and had no reference to the damages caused by the respondents' neglect; and differing in this respect from *The Mangalore*, 23 Fed. Rep. 463, cited by the respondents' proctor. The exceptions are overruled, and the report confirmed, and it is ordered that a decree be entered for the libelant for the amount found to be due by the commissioner, with interest on the sum of \$2,903.56 from the 15th day of February, 1888, (the date of filing the report,) to the day of entering the decree, with costs.

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CARD v. HINES.

(District Court, D. South Carolina. November 10, 1888.

ADMIRALTY—PRACTICE—AMENDMENT—SERVICE OF NOTICE—GENERAL APPEARANCE—EFFECT.

A libel for an alleged breach of a charter-party, made by the owners of a certain steam-ship, was brought against respondent under the allegation that he was the sole owner. Respondent not being within the jurisdiction of the court, the ship was attached, upon which respondent's proctors put in a general appearance for him, filed security, and obtained release of the vessel. A



plea in abatement for defect of parties was sustained, and libelant was allowed to amend his libel by inserting the fact that other persons besides respondent were owners with him, and that they were without the reach of process. *Held*, that the order to amend was an interlocutory order in the attachment suit, to abide which respondent bound himself by his general appearance, and it was not necessary to serve him in person with a copy of the order.

In Admiralty. On motion to dismiss libel for want of proper service and jurisdiction.

*J. N. Nathans*, for libelant.

*J. P. K. Bryan*, for respondent.

SIMONTON, J. This case comes up again. The libel was filed 23d December, 1887. It counts upon a supposed claim for violation of charter-party against Wilfred Hines, alleged to be the sole owner of the British steam-ship West Cumberland. The charter-party was set out in terms, not in full. The monition could not be served personally on the defendant, he not being within the jurisdiction. The ship was therefore attached. A general appearance in writing was put in for Hines by Messrs. Bryan & Bryan on 23d December, 1887. On the same day, by his lawfully constituted agent, he entered into stipulation with security, first submitting himself to the jurisdiction of this court, and thereby obtained the release of the vessel. He thus bound himself to abide all orders, interlocutory or final, of this court, and its final decree herein. On 28th December, 1887, on an exception by the defendant to the libel, the libelant was ordered to attach a copy of the charter-party as an exhibit thereto. 33 Fed. Rep. 189. By the charter-party it appeared that it had been executed by Simpson, Spruce & Young, agents for the owners of the steam-ship West Cumberland. On 30th December, 1887, the defendant applied for and obtained further time to plead to the libel. On 4th January, 1888, he filed a demurrer to the libel for the variance between its allegations and those of the charter-party as to the ownership of the ship. The demurrer was overruled after argument. Thereupon the cause was heard on a plea in abatement to the libel, because there were other owners of the steam-ship besides respondent, who was sued as sole owner. This plea was sustained. 35 Fed. Rep. 598. A motion was made for leave to amend the libel on 11th July, 1888, against which the defendant was heard. The motion was granted to this extent: that the allegation of the libel should be stricken out wherein respondent was alleged to be sole owner, and in lieu thereof should be inserted the allegation that he, with certain other persons unknown to the libelant, and without reach of process of this court, were owners at the filing of the libel, with corresponding amendments of allegations in other parts of the libel, but no change of prayer. The order allowing the amendment "decided nothing not on the face of the order, and allowed the respondent to file any such defense as he may be advised, within fourteen days after he has been served with the copy of the order." On 28th July, 1888, the defendant Wilfred Hines filed a paper, stating that he appearing specially, solely, and only to object to the jurisdiction and power of the court to compel him to appear and answer in this action,

pleads formally to the jurisdiction, for that he has not been served with process, citation, or summons, and that he does not waive personal service of process, citation, or summons. A copy of the order granting leave to amend was served on Mr. J. P. K. Bryan, of the firm of Bryan & Bryan. He refused to receive it, and it was left at his office then and there by the deputy-marshal.

The question is, was it necessary to serve the respondent in person with a copy of the order granting leave to libelant to amend his libel? That order contained in itself a summons. The cause began by attachment, the respondent being a non-resident alien. From the earliest period of the admiralty the process by attachment has been in use for the purpose of compelling an appearance of a defendant in a cause. *Manro v. Almeida*, 10 Wheat. 490, quoting Clerke, Praxis, Adm. (by Hall,) pt. 2, tit. 28. It is in constant use in this court, having, among others, for its authority the habitual practice "of a very able admiralty judge," (Bee.) *Manro v. Almeida*, *supra*; *Bouysson v. Miller*, Bee, 186. "In the practice of our courts of admiralty the attachment of the goods or credits gave jurisdiction, and the cause proceeded to decree whether the defendant appeared or not." *Atkins v. Disintegrating Co.*, 18 Wall. 304. So by the attachment the defendant was in court subject to its jurisdiction in this cause. After that he entered a general appearance by his proctors, stipulated for, and was placed in charge of the ship attached, and asked the indulgence of the court in the time to plead. He then took proper measures for perfecting the libel, both as to formal parts and its allegations, and tested by argument the result of his measures. He bound himself by his stipulation "to abide all orders, interlocutory or final," of this court in this cause. There can be no doubt, therefore, that he is in this court; that it has over him complete jurisdiction; and that he must obey all orders, interlocutory or final, provided always that his presence in court, its jurisdiction over him, and such orders, interlocutory or final, are confined to this cause. He is not here for the purposes of any other suit.

Does the amendment allowed operate as a termination of the suit brought by attachment and the inauguration of a new suit? Let us see the full scope of the amendment. The libel was for a supposed breach of a charter-party, made by the agents of the owners of the steam-ship West Cumberland, and was brought against the respondent under the allegation that he was the sole owner. Respondent denied that he was the sole owner, and sustained his denial by proof. The court held that, this being proved, he could not be held liable upon the allegations of the libel as they then stood; distinguishing this case from the practice stated in Ben. Adm. § 387, because in Benedict's rule the statement must be made in the libel that the other co-contractors were out of the reach of process. Thereupon, on motion and after argument, libelant was allowed to amend the statements of his libel by inserting the fact that other persons besides respondent were the owners with him, and that they were without the reach of process. He made no prayer for judgment against them. This amendment could not operate as a surprise on the respond-

ent, nor did it bring new matter to his attention. It simply admitted his own facts. Nor did it change the issue. The libel, as filed, when the exhibit was attached at the request of the respondent, set forth a breach of the charter-party, made by the agents of those owning the steam-ship, and seeks to hold respondent liable thereon, alleging that he is sole owner. He was held liable because of the breach of the charter-party as owner, not because he was sole owner. In its amended form it seeks to hold the respondent liable for the breach of the charter-party, because he is an owner with others not within the reach of the process of this court. In its original form it sought relief against him only as sole owner. In its amended form it asks relief against him only, his co-owners being alleged to be without the reach of process. No new issue of fact is presented. If there be any new issue it is one of law. It being now admitted, as defendant has alleged, that the charter-party was made for others besides himself, can he be held thereon without making his co-owners parties by service of process or by attachment? The cause of action, the parties to the action, the substantial facts on which the action turns, the relief asked, are not changed in any degree. The amendment does not terminate the first action, nor make a new action. "It is the same debt which is sought to be recovered by the same plaintiff against the same defendant, and the only difference is in the ground upon which the liability is based." *Sibley v. Young*, 26 S. C. 423, 2 S. E. Rep. 314. The amendment was allowed because of the practice stated in Ben. Adm. § 387. It does not commit the court to any expression of opinion upon the question. Can the defendant under the allegation be held personally and singly responsible in this court? It simply gives the libelant the opportunity of making the question. In *The Monte A.*, 12 Fed. Rep. 331, an action *in rem* was changed to one *in personam*. An entire change of parties (Dunl. Adm. Pr. 213) applies to a mutation of the libel by propounding a new cause of action,—alleging a different contract. In this case the cause of action is a breach of contract,—a charter-party made by the agents of the owners of the ship West Cumberland. The consequences of the breach were charged to respondent, he being an owner, not because he was sole owner. In the libel as amended the cause of action is the same breach of contract, the same charter-party, made by the same agents for the owners of the same steam-ship. The consequences of the breach are charged on respondent, he being an owner, and so liable *in solido* therefor. His liability in this action is based on the fact that he is the only owner in court, the other owners being beyond reach of its process. This being the case, the order of amendment is one of the interlocutory orders of this court, and service of the same upon the proctors who have entered a general appearance for respondent is in strict conformity with the rules and practice of this court. The motion is dismissed, with costs of the motion. Respondent has leave to file such defense as he might be advised, within 14 days from the date of this order.

BARLOW v. DELANY *et al.*

(Circuit Court, E. D. Missouri, E. D. November 8, 1888.)

## 1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—PARTITION—COVENANTS—LIABILITY OF HEIRS.

B., a married woman, having a separate estate in certain lands, in which complainant by suit in ejectment had recovered an undivided interest, entered into a voluntary partition of the same with complainant. By her partition deed she agreed to warrant and defend the title to the lots set apart to complainant against her own acts and the acts of those under whom she claimed. Her husband did not join in said deed. The covenant having been broken after the death of B., *held*, on a bill filed by complainant against her heirs to recover damages, (a) that the covenant became a charge on the separate estate of B. owned at the time the covenant was made, which a court of equity will enforce against her heirs, to whom the estate has descended.<sup>1</sup>

## 2. SAME—COVENANTS—EQUITY—JURISDICTION.

(b) That the remedy in such case against the heirs is in equity, and not at law, and that all the heirs may be proceeded against jointly, although the separate estate acquired of B. has been partitioned among them since her death.

## 3. SAME—WIFE'S SEPARATE ESTATE—CONVEYANCE—SOLE DEED.

(c) That under the laws of Missouri, as construed by its highest court, a married woman holding a separate estate may convey the same by her sole deed, unless particularly restrained from so doing by the instrument creating the estate.<sup>1</sup>

## 4. SAME—STATUTES—CONSTRUCTION.

(d) That section 669, Rev. St. Mo., is an enabling act passed to authorize husband and wife to convey by their joint deed the general estate of the wife, in which the husband has a marital interest, and that it does not operate as a limitation of the wife's power to dispose of her separate estate.

## 4. SAME.

(e) That section 669 only limits the operation of such covenants of married women as are contained in deeds executed by them jointly with their husbands, and does not affect a covenant of a wife contained in a deed executed by herself and trustee conveying her separate estate.

## 6. PARTITION—BY CONSENT OF PARTIES—IMPLIED COVENANTS.

(f) It seems that at common law no covenants were implied in case of a voluntary partition of lands among tenants in common or joint tenants, the rule being that each party must protect himself by express covenants.

## 7. VENDOR AND VENDEE—VENDOR'S LIEN—COLLATERAL COVENANTS.

(g) In order to create a vendor's lien there must be a fixed amount of unpaid purchase money due to the vendor. A vendee's obligation to a vendor on a collateral covenant made at the time of a purchase will not give rise to a vendor's lien unless the vendor expressly reserves such lien in his deed.

## 8. SAME—CHARACTER OF TRANSACTION—SALE OR EXCHANGE.

(h) The transaction between B. and complainant, as described in the bill, was not a sale of lands out of which a vendor's lien could arise, nor was it an exchange of lands such as would give rise to an implied warranty in behalf of either party.

(Syllabus by the Court.)

In Equity. On demurrer to bill.

Bill against the heirs of Mrs. Octavia Boyce to establish a lien on certain lands held by her in her life-time as a separate estate. The lands in

<sup>1</sup>As to the power of a married woman to contract so as to bind herself, and her separate estate, under the various statutes, see *Jones v. Holt*, (N. H.) 15 Atl. Rep. 214, and note; *Greig v. Smith*, (S. C.) 7 S. E. Rep. 610, and note.

question had been partitioned among the defendants (the heirs of Mrs. Boyce) subsequent to her death. Administration upon her estate had been closed before the covenant of warranty referred to in the opinion was broken, and before the bill was filed.

*W. H. Clopton*, for complainant.

*Thomas K. Skinker* and *George M. Stewart*, for defendants.

THAYER, J. Two general questions arise in this case, to which all others are subsidiary. The first is whether complainant has an equitable lien in the nature of a vendor's lien on the several parcels of real estate described in the bill, and now owned by defendants, because the deed of Mrs. Octavia Boyce, the mother of the defendants, made on April 15, 1867, failed to convey to complainant a fee-simple title to some of the lots described in that deed. The second is whether the defendants are bound by the express covenant of Mrs. Boyce contained in her deed of April 15, 1867, or by any covenant implied in the deed, or that is to be implied from the transaction out of which it arose.

In the case of *Barlow v. Delaney*, 86 Mo. 584, it was remarked at the close of the opinion that complainant "might have an equitable right to have the lots conveyed by him" to Mrs. Boyce on April 15, 1867, (contemporaneously with her deed to him,) "charged with a lien for the unpaid purchase price, which would be the value of the lots conveyed by Mrs. Boyce to the complainant at the time of that conveyance." What was thus said must be regarded merely as a suggestion that such equitable right might exist, rather than a decision that it did exist, inasmuch as the question as to the existence of such a right was not before the court for determination in that case. The learned judge who delivered the opinion evidently had in mind a vendor's lien, and in making the suggestion very likely acted on the assumption that the transaction between Mrs. Boyce and Mr. Barlow, as set forth in the record then under consideration, had some of the aspects of a sale of real estate. However that may be, the bill in the present case very clearly shows that it was not a sale, and that the doctrine of vendor's lien for that reason is not applicable to the case. The bill shows that in 1867 Mrs. Boyce was in possession of certain real property in the city of St. Louis, which she had derived title under John Mullanphy, Ann Biddle, and Bryan Mullanphy; and that the complainant, Barlow, had at that time obtained a judgment in ejectment against Mrs. Boyce for an undivided portion thereof. Thereupon, to avoid further litigation, Mrs. Boyce and Mr. Barlow agreed to an amicable partition of the property in the proportion of twelve-thirtieths to the complainant, and eighteen-thirtieths to Mrs. Boyce; the partition to be effected through the aid of commissioners by them chosen, and by an exchange of deeds, as soon as the commissioners had made the requisite allotment. It was agreed between them that each was legally and equitably entitled to an undivided interest in the property in the proportions above stated, and that after their respective shares had been ascertained and set apart by the commissioners, that deeds should be exchanged to effectuate the partition. Mrs. Boyce agreed to execute a deed containing

a "special warranty against any person or persons claiming or to claim the property embraced in her deed under her, or those under whom she had derived title," and Mr. Barlow was to execute a deed "with covenants of warranty against all persons lawfully claiming or to claim the property embraced in his deed, under him in any way, save on account of taxes." After the commissioners had made the allotment, deeds were duly executed on April 15, 1867. The deed from Mrs. Boyce, which was executed by herself and her trustee, (inasmuch as she held the property through trustees as her sole and separate estate,) contained a covenant to the effect that herself and heirs would "warrant and defend the title to the real estate to Barlow, and his heirs and assigns, against herself, and against all acts done or suffered by her, or John Mullanphy, or Bryan Mullanphy, or Ann Biddle, from whom she derived title." In point of fact Mrs. Boyce only had a life-estate in that part of the property derived from Ann Biddle; and it so happened that a portion of the property so derived was allotted to complainant in the partition, and after the death of Mrs. Boyce, the complainant's grantee was compelled to purchase the outstanding remainder then vested in the defendants by virtue of the will of Ann Biddle.

It is impossible to regard the transaction between Mrs. Boyce and Barlow as anything more than a voluntary partition of certain lands in which Mrs. Boyce and Barlow owned at the time undivided interests. The agreement recited that each was seized of an undivided interest in the lands, and the manifest purpose was to set apart to each their just proportion, so that they might thereafter hold their respective shares in severalty. It would clearly be a misnomer to call the transaction in question a sale. But even if it could be regarded as a sale, the bill shows that complainant received precisely what he agreed to accept as the consideration for his conveyance to Mrs. Boyce; that is to say, he received a deed conveying all of her interest in the twelve-thirtieths of the land allotted to him, together with such covenants as he had agreed to accept. Even upon the assumption, then, that the transaction in question was a sale, no portion of the purchase money agreed to be paid to the complainant remains unpaid, and there is no foundation for a vendor's lien upon the lots which he conveyed to Mrs. Boyce, unless it can be maintained that he is entitled to such lien to secure the faithful performance of the covenant made by Mrs. Boyce in the deed by her executed, which is said to have been broken. The question is to be hereafter considered, how far the covenants of that deed, either express or implied, are binding on Mrs. Boyce and her heirs, in view of her having been a married woman; but, waiving that question for the present, I remark that complainant cannot be allowed a vendor's lien on the lots by him conveyed, to secure the damages resulting from Mrs. Boyce's breach of covenant, even if the covenants expressed or implied in her deed are valid. The general rule is that, in order to create a vendor's lien, there must be a debt for unpaid purchase money to a fixed amount, due directly to the vendor. A vendee's obligation to the vendor on a collateral covenant will not give rise to a lien in favor of the vendor on lands by him con-

veyed, unless such a lien to secure the performance of the covenant is expressly reserved. *Patterson v. Edwards*, 29 Miss. 71; *Clarke v. Royle*, 3 Sim. 499; *Parrott v. Sweetland*, 3 Mylne & K. 655; *Buckland v. Pocknell*, 13 Sim. 406; *Brawley v. Catron*, 8 Leigh, 522; Herm. Mortg. §§ 176, 185. I have not overlooked the decisions in this state of *Pratt v. Clark*, 57 Mo. 189, 65 Mo. 157, and *Bennett v. Shipley*, 82 Mo. 448; but, as it appears to me, they can be reconciled with the rule last stated, which undoubtedly declares the true doctrine, and is best supported by reason and authority. In each of the cases last mentioned defendants had bought certain land of plaintiffs, agreeing to give therefor certain other land then incumbered with mortgages, and to pay off the mortgages. It was held that the plaintiffs had a lien on the property by them conveyed to the amount of the respective mortgages, which the defendant had agreed to discharge, but had failed to do. The amount of the mortgages in each case was treated as an unpaid portion of the purchase money which the vendors were to receive for their respective conveyances. In those cases, no doubt, the court allowed a vendor's lien under very exceptional circumstances; but the decisions therein fall very far short of establishing the proposition contended for in this case, that complainant has a lien on the lots which he conveyed to Mrs. Boyce, to make good the special covenant which she executed. I conclude, therefore, that the transaction between Mrs. Boyce and the complainant was not a sale of lands out of which a vendor's lien could arise, and that, even if it could be regarded as a sale, complainant received all of the consideration promised in the partition agreement, (that is to say, a deed with certain covenants;) and that, inasmuch as complainant did not in and by his conveyance to Mrs. Boyce expressly reserve a lien to secure the faithful performance of the covenants, no lien exists or can be implied for that purpose. The first general question above proposed is accordingly answered in the negative.

Passing to the second branch of the case, the most important question for consideration is whether the covenant of special warranty made by Mrs. Boyce in her deed of April 15, 1867, operated as a charge on the separate estate that she then owned? As she was a married woman at that time, she had no power to make a contract that could be enforced in a legal proceeding. The covenant that she made, therefore, if it is valid, can only be enforced in equity as a charge upon her separate estate. Rawle, Cov. (5th Ed.) §§ 305-307, and cases cited. From some allegations of the bill it would appear that the bill was framed partially upon the theory that the transaction between Mrs. Boyce and Mr. Barlow in 1867 was an exchange of property, and that Mrs. Boyce became bound by a covenant such as was once implied in case of an exchange of property. This theory of the case, however, is wholly untenable, as the transaction in question was not an "exchange of property," but a voluntary partition. Furthermore, Mrs. Boyce's deed did not contain the necessary words to create an implied covenant such as was formerly implied when an exchange of lands took place. *Id.* § 270; *Gamble v. McClure*, 69 Pa. St. 282; 3 Hil. Real Prop. (4th Ed.) 555.

I am also of the opinion that no implied covenant arose out of the transaction, treating it as a partition, for the reason that the partition was voluntary, and not enforced. In such cases the rule seems to be that the parties to a partition must protect themselves by express covenants, and that none will be implied. Rawle, Cov. (5th Ed.) §§ 277, 278, and cases cited. The fact that Mrs. Boyce was a married woman, and could not bind herself at law, is a further objection to all attempts to hold Mrs. Boyce liable at law upon any covenant that might possibly be implied as against a person not under disability. The only question to be considered, therefore, on this branch of the case, is whether the express covenant made by Mrs. Boyce ought to be enforced as a charge against her equitable estate in lands that have now descended to her heirs. It is claimed by counsel for the defendants that by virtue of section 669, Rev. St. Mo., which was in force on April 15, 1867, that her deed, notwithstanding the covenant of special warranty, only operated as a quitclaim, and that the damages resulting from a breach of that covenant are not chargeable upon the separate estate which she then owned. Section 669, last referred to, is as follows:

"A husband and wife may convey the real estate of the wife \* \* \* by their joint deed, acknowledged and certified as herein provided; but no covenant expressed or implied in such deed shall bind the wife or the heirs, except so far as may be necessary, effectually to convey from her and her heirs, all her right, title, and interest expressed to be conveyed therein."

The case of *Bank v. Robidoux*, 57 Mo. 446, and the case of *Pratt v. Eaton*, 65 Mo. 165, unquestionably lend some aid to defendant's contention, as in each of those cases section 669 was held applicable to a married woman's covenant contained in a joint deed by husband and wife, conveying her separate estate. It is to be observed, however, that in the case under consideration Mr. Boyce did not join in the deed executed by his wife, and for that reason the covenant contained therein does not fall within the language of the statute. The first paragraph of section 669 refers exclusively to deeds executed jointly by husband and wife, and the last paragraph refers to covenants contained in such deeds as are mentioned in the first paragraph, and to no other covenants, unless it be by implication. It may be further remarked that the decisions in *Bank v. Robidoux* and *Pratt v. Eaton*, may have been influenced by an opinion which then prevailed to some extent in this state, that a married woman could not convey her separate estate by her sole deed, and that section 669 related to conveyances of a married woman's separate estate, as well as to conveyances of her general property, in which the husband had a marital interest. That view of the law has lately been expressly overruled in the very recent case of *Turner v. Shaw*, 96 Mo. —, 8 S. W. Rep. 897, in which it is held that a married woman may convey her separate estate by deed, without joining her husband. It would in all probability now be held by the court of last resort (in conformity with the dissenting opinion in *Martin v. Colburn*, 88 Mo. 235) that section 669 is an enabling act passed to authorize a husband and wife to convey the wife's general property, and that it has no reference to conveyances of



her separate property, as to which she is to be regarded as a *feme sole*. The decision in *Turner v. Shaw*, leads logically to that conclusion. But whether it would or would not be so held, section 669 is not in terms applicable to this case, because the covenant under consideration was not contained in a joint deed executed by Mrs. Boyce and her husband. The result is that the effect of her covenant in the deed of April 15, 1867, (that deed having been valid,) must be determined by the same rules that determine when other contracts of a married woman become a charge on her separate estate; and, as it has long been the rule in this state that contracts of a married woman, whether oral or written, when made with reference to her separate estate or upon the credit thereof, become a charge against the same which a court of equity will enforce, no reason is perceived why the covenant made by Mrs. Boyce in the deed of 1867 may not be enforced against the separate estate which she owned at the date of the covenant, and eventually transmitted to her heirs. The covenant was contained in a deed conveying a part of her separate estate, and no reason can be assigned, consistent with the laws of this state, why it should not operate as a charge on the residue of her separate estate. *Whitesides v. Cannon*, 23 Mo. 457; *Kimm v. Weippert*, 46 Mo. 536; *King v. Mittelberger*, 50 Mo. 185; *Martin v. Colburn*, 88 Mo. 236, 237. The present bill, it is true, is not framed with a view of enforcing such a charge, and does not contain some of the allegations, at least, that are necessary to authorize such relief. For this reason the demurrers will be sustained, with leave to the complainant to amend if he so elects.

With reference to the contention that the defendants cannot be proceeded against jointly, and that the action is barred by limitation, and that the defendants, if liable, must be sued at law, rather than in equity, I will say that, after a careful consideration of all those points, my conclusion is that none of them are tenable. If complainant proceeds to charge the defendants with a liability which Mrs. Boyce imposed in equity upon her separate estate by executing the covenant of special warranty, which has been broken since her death, the proceeding is properly brought in equity, and against all of the heirs jointly, and the breach of the covenant occurred so recently that the proceeding is not barred. *Davis v. Smith*, 75 Mo. 219.

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SCHNEIDER v. MISSOURI GLASS Co. et al.

(Circuit Court, E. D. Missouri, E. D. October 31, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—SUSTAINED PATENT.

A restraining order, pending suit for infringement of a patent, will be granted where the patent has been fortified by one final decision in its favor, and by numerous interlocutory orders of injunction granted by other courts, and there has been public acquiescence for several years in the validity of the patent.

## 2. SAME—PLEADING—CERTAINTY—PROOFS.

A bill in equity, praying for an injunction to restrain an alleged infringement of a patent for an improved lamp-shade holder, contained the averment that defendant "has imported lamp-shade holders adapted and intended by defendant to be used as a substantial part of the combination invented and patented by complainant." Affidavits on file showed that defendant had imported certain shade-holders; that the shade-holders so imported were the same as that exhibited to the court as an infringement of that manufactured by complainant, and which, by comparison, appeared substantially alike. *Held*, that the allegation as to infringement, and proof tendered in support thereof, were sufficient to warrant an injunction.

## 8. SAME—INFRINGEMENT—PARTS OF COMBINATION.

It is no defense that defendant has not imported all of the parts of complainant's combination, and that the part actually imported was adapted to other uses than as a part of complainant's combination; defendant not having explained the uses to which it intended to put the shade-holders.

In Equity. On motion for an injunction *pendente lite*, restraining the alleged infringement of reissued patent No. 10,087, for an improvement in shade-holders, granted April 11, 1882, to Bennett B. Schneider, as assignee of Carl Votti, the original inventor.

*Gifford & Brown*, for complainant.

*Ed. Cunningham, Jr.*, and *Fowler & Fowler*, for defendants.

THAYER, J. Since the first reissued patent of Carl Votti was held void by Judges BENEDICT and BLATCHFORD for want of a sufficient description of the invention, in *Schneider v. Thill*, 5 Ban. & A. 565, and *Schneider v. Lovell*, 10 Fed. Rep. 666, a second reissue has been obtained, which was sustained on final hearing in the case of *Schneider v. Pountney*, 21 Fed. Rep. 399, (U. S. Circuit Court, District of New Jersey, decided August 30, 1884.) In the last-mentioned case the second reissue was assailed on the following grounds: (1) That the specifications were still defective in the respect pointed out by Judges BENEDICT and BLATCHFORD; (2) that the invention had been anticipated; (3) that there was lack of patentable novelty; and (4) that the claims had been altered in the reissue so as to cover a different invention than that claimed and covered by the original patent. As a fifth defense defendants also asserted that they had not infringed, for that they had only sold one element of the combination covered by the patent. It is true that the court in its decision only mentions the first and last of the above-mentioned defenses, but, considering the elaborate arguments made in support of and against the other defenses, it must be presumed that they were also considered, and that they were not referred to in the decision because, in the opinion of the court, they involved questions of less doubt and difficulty. It also appears from the moving papers that interlocutory injunctions have been granted on this reissue by several other circuit courts of the United States, after the service of orders to show cause why such injunctions should not issue; and that a large number of dealers throughout the country have acquiesced for several years in the validity of the reissued letters. The utility of the invention is inferentially established by the large sales that have been made, and by the large demand that appears to have arisen for the patented article. The defendant is shown to be engaged

in the jobbing trade, and, as it is said, has recently imported lamp "shade-holders" which infringe complainant's patent. The sale of the same to retail dealers in various places may entail much expensive litigation, besides interfering with the trade and prices which complainant and purchasers from him of the patented article have already established. These are considerations which usually control the grant of an interlocutory restraining order, and they predispose me to issue such an order. It is not expected of course, nor would it be fair to either party, to enter upon a full investigation of the question of "anticipation" or "patentable novelty" or "expansion of the original claims" at this stage of the case. Those are questions which should be reserved for final hearing, inasmuch as the patent appears to be fortified by one final decision in its favor on these points, and by numerous interlocutory orders of injunction granted by other courts, as well as by public acquiescence.

It is suggested by defendant that both the allegation as to infringement, and the proof tendered in support thereof, is too vague to warrant an injunction. This objection must be overruled. It is averred in the bill, on information and belief, that defendant has imported lamp "shade-holders adapted and intended by defendant to be used \* \* \* as a substantial part of the combination invented and patented" by complainant's assignor. The affidavits on file show that defendant has imported certain shade-holders, and the fact of such importation is not denied by defendant. The affidavits further show that the shade-holders so imported are the same as the "Leopold shade-holder" exhibited to the court on the hearing of the motion, and by comparison of the one so exhibited with those manufactured by the complainant, and also produced as exhibits, it is evident that they are substantially alike. With respect to the suggestion that defendant has not imported all of the parts of complainant's combination, and that the part actually imported is adapted to other uses than as a part of complainant's combination, it is sufficient to say that, if they are intended for such other uses, it was an easy matter for defendant to have explained the uses to which it intends to put the imported shade-holders; and it has failed to do so. *Wallace v. Holmes*, 5 Fish. Pat. Cas. 37. Upon the whole, I conclude that it is a proper case in which to grant a restraining order pending suit, and such an order is accordingly granted, to take effect on filing a bond for \$5,000, and after service of the order on the defendant.

SCHLICHT & FIELD CO. v. CHICAGO SEWING-MACHINE CO. *et al.*

(Circuit Court, N. D. Illinois. November 5, 1888.)

## 1. PATENTS FOR INVENTIONS—NOVELTY—LETTER-FILES.

Letters patent No. 217,909, issued July 29, 1879, to Frederick W. Smith and James S. Shannon, for an improvement in paper-holders, cover a novel and patentable device, and are valid. Following *Shannon v. Printing Co.*, 9 Fed. Rep. 205.

## 2. SAME—INFRINGEMENT—COLORABLE CHANGES.

Said patent is infringed by defendants' device, which is in all respects similar, except that the function of movement is transferred from the vibrating wires to the receiving wires, a merely colorable change, which any mechanic might easily make.

## 3. SAME—WHO ENTITLED TO—ESTOPPEL.

The testimony of one of two joint patentees, and alleged joint inventors, that he was in fact the sole inventor, is neutralized by his former oath, taken for the purpose of obtaining the patent.

In Equity. Bill for infringement of patent.

This bill was brought by the Schlicht & Field Company against the Chicago Sewing-Machine Company, Luke L. Miller, and Daniel H. Isenminger.

*Banning & Banning & Payson*, for complainant.

*M. W. Robinson* and *C. M. Hardy*, for defendants.

BLODGETT, J. The bill in this case asks for an injunction and an accounting by reason of the alleged infringement of patent No. 217,909, granted July 29, 1879, to Frederick W. Smith and James S. Shannon, for an "improvement in paper-holders." The invention covered by this patent is described by the patentees in their specifications as follows:

"Our invention relates to that class of paper-files or temporary binders adapted, by having separable uniting wires, to allow of the withdrawal of any one of many papers thereon held, or the insertion of papers between those already on the file, without disturbing the order in which the others are placed. The object of our invention is to provide a file more prompt and positive in its action, less calculated to tear the papers filed thereon, more convenient of manipulation, and adapted, in its double form, especially, to serve as a writing table for the lap or desk. It consists—*First*, in a paper-holder, with duplex parallel hinged transfer wires made from one piece; *second*, in a paper-holder having the fixed wires and movable wires secured to the same connecting plate, whereby those parts may be separately packed and attached to any desired base-board; *third*, in the structure of the puncturing wire; *fourth*, in the felt or plush covering for the bottom of the base-board; *fifth*, in the stop to limit the movement of the hinged wires."

This patent was before this court in the case of *Shannon v. Printing Co.*, reported in 9 Fed. Rep. 205, in which the validity of the patent was sustained, and nothing shown in the record in the present case induces me to, in any degree, modify or change the conclusions there arrived at.

Infringement is charged in this case of the first, second, third, fourth, fifth, and seventh claims of the patent, which are:

"(1) The combination, in a paper-holder, of a base-board, two parallel fixed puncturing wires, and two parallel hinged transfer wires, made in a single piece, arranged thereon as shown, to form two parallel rings, adapted to be opened and closed at pleasure, substantially as and for the purposes set forth. (2) In combination with the duplex file or paper-holder, substantially as shown, a rigid connecting part, joining the hinged wires, so that both may be rotated or held by applying force for the purpose to either, substantially as set forth. (3) In combination with the fixed wires, T, and the moveable wires, H, the plate, P, constructed to give hinged support to H at *h*, *h*, and to have the central spring, S, all arranged and adapted to operate substantially as described. (4) The combination, with the fixed wires, T, and hinged wires, H, of the plate, P, having the hinge-arms, R, and the spring-tongue, S, and supporting said wires, T and H, in working position, whereby the working parts of the file or paper-holder are adapted to be applied to any tablet by screws, *a*, *a*, substantially as and for the purposes specified. (5) In a paper-holder having a tubular puncturing wire, sharpened by having its end beveled from one side to the other, and a second wire entering the tube to serve as a transfer wire, the inwardly bent or curved form of the beveled point of the tube, whereby the said point may lie close to the transfer wire, substantially as described, and for the purpose set forth." "(7) In combination with the hinged wires, H, and a spring operating them, as described, a stop, *s*, or stops, *s* and *s'*, arranged to arrest the throw of the wires, H, substantially as and for the purpose set forth."

Defendants deny infringement of the patent, and also attack the validity of the patent upon the ground that Smith, one of the patentees, has testified in this case, that he was the only inventor of the devices covered by the patent, and that Shannon, the other patentee and alleged inventor, had nothing to do with the invention.

In regard to the second matter of defense, which was not considered in the former case, I will merely say that Smith, having applied for a patent as the joint invention of himself and Shannon, should be estopped, as against any *bona fide* owner of the patent, from now defeating it by proof tending to show that he took a false oath, or imposed upon the patent-office for the purpose of obtaining the patent. Proof that Smith was the sole inventor is undoubtedly admissible to defeat the patent, but it must come from some one else than himself; because he has given the patent life by one oath, and cannot now be heard to destroy it by another oath. Certainly, as much faith must be placed in the affidavit which the law required him to make at the time he applied for the patent, showing that the device covered by the application was the joint invention of himself and Shannon, as should now be given to his deposition in this case wherein he claims to be the sole inventor. So that it may be said, for the purposes of this question of fact, that the testimony of Smith is neutralized by his conduct in applying for and obtaining a patent; and this leaves the question, as to whether or not Smith was the sole inventor, to the testimony of Blades, the other witness called by the defense upon this point, and Blades' testimony goes to show that Shannon and Smith were consulting together and acting together in perfecting and completing the invention. Smith was a mechanic, and it would seem, both from his own testimony and that of Blades, that he was attempting to invent a letter-file, and that what

he was doing was done under the constant supervision and criticism of Shannon, and from the testimony it would seem that suggestions were made from time to time by Shannon; and the court at this time, and in the light of the testimony before it, cannot see but what the ideas embodied in the machine were as essentially those of Shannon as of Smith. Hence the defense that the patent is void, because of Smith's being the sole inventor, is not sustained.

The defendants manufacture and sell a letter-file consisting of receiving wires, upon which the papers to be filed are strung, and arched wires adapted to come in contact with the receiving wires, so as to form, with the receiving wires, a continuous ring or arch, upon which the papers may be turned for the purpose of inspection or examination, the same as is provided for in the complainant's patent, but in the defendant's device the receiving wires are so arranged that they rock forward from out of contact with the arched wires. This seems to me to be merely a colorable change in the construction of the device; the transfer of the function of movement from the vibrating wires to the receiving wires is merely such a change as, with the complainant's patent before him, any mechanic might readily make, and is but an attempt at an evasion of the idea covered by the complainant's patent. The case seems to me to come closely within the principle announced in *Adams v. Manufacturing Co.*, 3 Ban. & A. 1, where it was said: "Changing the position of a part of a machine does not avert infringement, where the part transposed performs the same function as before." I therefore find that the complainant's patent is valid, and that the defendant's infringe, and a decree may be prepared accordingly.

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SCHLICHT & FIELD CO. v. SHERWOOD LETTER-FILE CO.

(Circuit Court, N. D. Illinois. November 5, 1888.)

**PATENTS FOR INVENTIONS—NOVELTY—LETTER-FILES.**

Claim 1 of letters patent No. 254,847, granted March 14, 1882, to James S. Shannon for a paper-file, in which the invention claimed is an ordinary punch attached to the base of the file, "adapted to simultaneously punch two holes in the paper, in position and of size to admit the receiving wires," is void for want of patentability in the device.

In Equity. On bill for infringement of patent.

*Banning & Banning & Payson*, for complainant.

*Dyrenforth & Dyrenforth*, for defendant.

BLODGETT, J. The bill in this case charges the defendant with the infringement of letters patent No. 254,847, granted March 14, 1882, to James S. Shannon, for a paper-file; and asks for an injunction and accounting for damages. In his specifications the patentee says:

"This invention relates to paper-files having receiving wires; and it consists in providing a punch attached to the file base or tablet, adapted to simultaneously punch as many holes in the papers to be filed as there are receiving wires on the file, and to punch them somewhat larger than, and in proper position to admit, said receiving wires. By this means the papers may lie closer and smoother on the file. They may be shifted more freely on the wires, and the apertures therein are not torn out or enlarged in filing or shifting them. It is more particularly intended as an improvement on the files described in letters patent of the United States Nos. 217,907 and 217,909, dated July 29, 1879, wherein the receiving wires are sharpened to puncture the papers, and wherein transferring wires are employed in connection with the receiving wires. In the use of said files the papers are often shifted from one pair of wires to the other, and it is found that in such frequent transfers the apertures made by the puncturing wires are apt to be torn out or enlarged. Moreover, in the act of filing, by thrusting the papers down upon the wires, the edges of the apertures so made are ragged; a burr, so to speak, is formed about the holes in the paper; and in pressing the papers down, and in shifting them, the burrs of one sheet enter the holes in the adjacent sheet above it, so that the sheets are not readily separable without inconvenience or tearing. By providing on the file a punch adapted by a single motion to cut clean-edged holes in the papers corresponding with the number and position of the receiving wires, and a little larger than the wires, the papers so punched may be more expeditiously filed; they will be flat and compact upon the tablet; they may be freely transferred from the receiving to the transfer wires, and back again; and in no ordinarily careful handling are they liable to be torn."

No claim is made in this case upon the form of construction embodied in the punch, but the patent covers simply and only the idea of affixing to a letter-file tablet a punch for the purpose of perforating the papers to be filed, so that they may be more readily manipulated upon the receiving wires of the letter-file.

Infringement in this case is charged only as to the first claim of the patent, which is:

"(1) The paper-file described, consisting of a base, A, and two parallel receiving wires, B, B, provided with a double punch mounted upon the same base, and adapted to simultaneously punch two holes in the paper in position, and of size to admit the receiving wires, substantially as set forth."

The defenses set up are (1) non-patentability of the device; and (2) that defendants do not infringe.

The defendant manufactures and sells a letter-file containing receiving and vibrating wires, operating substantially like those shown in the complainant's patent, with a punch located under the arch of the vibrating wires, so that the papers to be filed are passed through the space between the ends of the receiving and vibrating wires to the punch, where they are perforated; when they may be retracted or drawn back, and passed over the receiving wires, upon the file. The defendant's punch is attached to the tablet, and in that respect is like the complainant's, although, in the exhibits of the complainant's and defendant's tablets offered in evidence, the defendant's punch is located at a different place from the location of the punch on the complainant's tablet; but, as there is no specific place designated in the complainant's patent as to where the punch shall be located, I do not know that this difference is in any

special degree material in the consideration of this case; so that the case simply presents this question: Is it patentable to locate any kind of a punch upon a paper-file so that the papers to be filed thereon may be punctured by the punch, to enable them to be more readily passed upon the receiving-wires of the file? It is obvious that the punch performs no new function, by reason of its being attached to a tablet, from what it would if it were attached to a table, window-sill, or any other location, where it could be used readily in connection with the tablet; and a patent, therefore, merely for this attachment, seems to me to come entirely within the principle laid down by the supreme court in *Hailes v. Van Wormer*, 20 Wall. 353, and *Reckendorfer v. Faber*, 92 U. S. 347. In the latter case the patent was for the idea of attaching a piece of rubber to the end of a lead-pencil, so that the rubber could be used readily to erase pencil-marks. In that case the rubber performed no new function by being attached to the pencil. It was undoubtedly a convenient arrangement, whereby the rubber was readily at hand to erase or correct any mistakes made in the use of the pencil, but it was still nothing but an eraser attached to the pencil. And the court in its opinion says:

"This combination consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead-pencil. It is as if a patent should be granted for an article, or a manufacture, as the patentee prefers to term it, consisting of a stick twelve inches long, on one end of which is an ordinary hammer, and on the other end is a screw-driver or a tack-drawer, or, what you will see in use in every retail shop, a lead-pencil, on one end of which is a steel pen. It is the case of a garden rake, on the handle end of which should be placed a hoe, or on the other side of the same end of of which should be placed a hoe. In all these cases there might be the advantage of carrying about one instrument instead of two, or of avoiding the liability to loss or misplacing of separate tools. The instruments placed upon the same rod might be more convenient for use then when used separately. Each, however, continues to perform its own duty, and nothing else. No effect is produced, no result follows, from the joint use of the two. A handle in common,—a joint handle,—does not create a new or combined operation. The handle for the pencil does not create or aid the handle for the eraser. The handle for the eraser does not create or aid the handle for the pencil. Each has and each requires a handle the same as it had and required, without reference to what is at the other end of the instrument; and the operation of the handle of and for each is precisely the same, whether the new article is or is not at the other end of it. In this and the cases supposed you have but a rake, a hoe, a hammer, a pencil, or an eraser, when you are done. The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability."

So here the punch performs no new or increased function by being attached to the tablet. It is still nothing but a punch, and, as the proof shows, is often attached to a table, or some other permanent fixture, so as to be convenient for use in connection with several tablets. I therefore think that this is but an aggregation of parts, and, as such, does not come within the field of invention. In *Pickering v. McCullough*, 104 U. S. 310, the supreme court, speaking by Mr. Justice MATTHEWS, said:



"In the patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. \* \* \* It must form either a new machine of a distinct character and function, or produce a result due to the joint co-operating action of all the elements; it is not the mere adding together of separate contributions."

For these reasons I consider the defense of non-patentability is fully made out, and the bill is dismissed for want of equity.

### SCHLICHT & FIELD Co. v. SHERWOOD LETTER-FILE Co.

(Circuit Court, N. D. Illinois. November 5, 1888.)

#### PATENTS FOR INVENTIONS—NOVELTY—LETTER-FILES.

Claim 1 of letters patent No. 217,907, granted July 29, 1879, to James S. Shannon for an "improvement in temporary binders," the invention claimed consisting of the use of vertical and vibrating wires in pairs for filing papers, is void for want of novelty. The Bussey patent, issued January 8, 1878, anticipates the combination of a single vibrating wire with a fixed vertical wire, and there is no invention in merely duplicating the wires.

In Equity. On bill for infringement of patent.

*Banning & Banning & Payson*, for complainant.

*Dyrenforth & Dyrenforth*, for defendant.

BLODGETT, J. By the bill in this case the defendant is charged with the infringement of letters patent No. 217,907, granted July 29, 1879, to James S. Shannon, for an "improvement in temporary binders," and an injunction and accounting for damages are asked for. The patentee in his specifications says:

"My invention relates to a novel construction in temporary binders of the class having fixed receiving wires, and hinged or vibrating transfer wires; and consists—*First*, in giving movement to the latter on a vertical axis, for the purpose of swinging their free ends towards or from the free ends of the fixed wires; *secondly*, in means, provided and arranged substantially as herein shown and described, whereby the vertically vibrating wires are held stationary, either in contact with or removed from the fixed wires; and, *thirdly*, in connecting the two swinging wires of a double file, so that in rotating one the other is also operated."

The patent contains four claims, but infringement is here charged only as to the first, which is in the following words:

"(1) In combination with the fixed wire, B, and the base, A, the arched vibrating wire, C, having a positive rotary movement in the axis of its vertical portion, whereby its free end may be swung into contact with or away from the free end of the fixed wire, substantially as described."

The complainant has filed a disclaimer, which is in the following words:

"Your petitioner is aware that in the patent to William C. Bussey, No. 198,968, issued January 8, 1878, for an improvement in bill-files, an arrange-

ment of a base-plate, one fixed wire, and one arched vibrating wire are shown, but in that and similar arrangements, where only one wire is used, there is nothing to steady the papers, and prevent them from turning to one side or the other. Your petitioner, therefore, limits the first claim of said patent to a combination with the fixed wire, B, and the base, A, of the arched vibrating wire, C, having a positive rotary movement in the axis of its vertical portion, when the fixed and vibrating wires are used in pairs, whether operating simultaneously, or each separately, as shown and described in said patent."

So that by this disclaimer the complainant limits this first claim to the use of the vertical and vibrating wires in pairs. The patent shows devices whereby the vertically vibrating wires are held stationary, either in contact with or removed from the fixed wires; and also a device whereby the two vibrating wires are rotated simultaneously by pressure upon either one. But these two devices for holding the wires stationary, either in contact with or away from the fixed wires, and for operating both wires simultaneously, are not involved in this suit. The defenses interposed are (1) that the patent, as shown by this first claim, is void for want of novelty; (2) that defendant does not infringe.

The disclaimer filed by the complainant admits that the Bussey patent of January 8, 1878, anticipates the combination of a single vibrating or arched wire with a fixed vertical wire, as shown by the first claim of complainant's patent; but complainant has attempted, by the disclaimer filed herein, to obviate the effect of the Bussey patent, by limiting the complainant's device to a tablet or letter-file containing at least a pair of wires; so that we now have to deal with complainant's patent, as amended or limited by the disclaimer, as consisting of two vertical wires and two vibrating wires, each vibrating wire co-acting with one of the vertical wires to form a continuous arch or ring, so that the papers upon the file may be passed over from the spindle onto the transfer or vibrating wire for the purpose of removing the letter or paper from the file, without disturbing the relations of the other papers upon the file, and the vibrating wires having a free movement on their vertical axis, so as to admit the swinging of the free ends into contact with or away from the ends of the fixed wires; and the question now is, it being conceded that the Bussey patent showed a single vertical or vibrating wire co-acting with a fixed vertical wire, precisely like the single vertical and vibrating and fixed wires described in the first claim of the complainant's patent, is there any invention in duplicating these wires so as to hang the papers to be filed upon two spindles instead of one? That there may be some advantage in holding the papers by two points of suspension or attachment to the letter-file or temporary binder, as it is called in this patent, is probable; but, when Bussey had shown the method of making a file with one set of wires, could there be any invention in simply making a letter-file with two such sets, so as to have two points of attachment of the papers to the letter-file, thereby, in the language of the disclaimer, "steading the papers, and preventing them from turning to one side or the other?" It does not seem to me that this mere duplication of parts calls for the exercise of inventive talent. There is no more invention in fastening papers to a letter-file by two points of at-

tachment, instead of one, than there would be in fastening a board to a piece of studding or beam by two nails instead of one. In *Dunbar v. Myers*, 94 U. S. 187, the patent was for putting deflecting plates on both sides of a circular saw for cutting veneers. It was conceded that the use of a deflecting plate on one side of the saw was old, and the court said, at page 195:

"Grant that two such plates are in certain cases better than one used alone; still the question arises whether it involves any invention to add the second plate to a machine already constructed with one plate. Beyond doubt, every operator, who had used a machine having one deflecting plate, knew full well what the function was that the deflecting plate was designed to accomplish, and the reasons for placing it at the side of the saw are obvious to the understanding of every one who ever witnessed the operation of a circular saw. Ordinary mechanics know how to use bolts, rivets, and screws, and it is obvious that any one knowing how to use such devices would know how to arrange a deflecting plate at one side of a circular saw which had such a device properly arranged on the other side—it being conceded that both deflecting plates are constructed and arranged precisely alike, except that one is placed on one side of the saw, and the other on the opposite side. Both are attached to the frame in the same manner; nor is it shown, either in the specification or drawings, that there is anything peculiar in the means employed for arranging the deflecting plates at the sides of the saw, or in attaching the same to the frame."

And the same rule was followed in *Millner v. Voss*, 4 Hughes, 262.

I am therefore of opinion that, in the light of the Bussey patent, the complainant has gained nothing by the attempt to limit this patent to the use of the wires in pairs; and I must therefore find that this patent is void for want of novelty.

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JOEL v. GESSWEIN.

(Circuit Court, S. D. New York. November 10, 1888.)

**PATENTS FOR INVENTIONS—NOVELTY—STONE SETTINGS.**

Letters patent No. 319,095 granted to Samuel Joel, June 2, 1885, for an improvement in holders for the settings of stones, the object being to provide a convenient tool to hold the metallic setting firmly while it is being manipulated by the workman prior to the reception of the stone, are void for want of novelty.

In Equity. Bill for infringement of letters patent No. 319,095, filed by Samuel Joel against Frederick W. Gesswein.

*Julius J. Frank*, for complainant.

*Henry C. Atwater*, for defendant.

COXE, J. On the 2d of June, 1885, letters patent No. 319,095 were granted to the complainant for an improvement in holders for the settings of stones. The object of the patentee was to provide a convenient tool to hold the metallic setting firmly while it is being manipulated by

the workman prior to the reception of the stone. The size of the tool varies according to the size of the setting. The complainant's record contains the letters patent and proof of infringement. No evidence in rebuttal was offered. The defense is want of novelty. The defendant introduced an engraver's large wooden chuck, known as "Exhibit No. 6." The complainant concedes that if this chuck, or others similarly constructed, were made prior to the alleged invention, the patent must be declared invalid; the difference in size being unimportant. This concession simplifies the issue. The proof is clear that these anticipating devices were known and in use long prior to the complainant's patent. The defendant saw them as early as 1877. One of the witnesses recollects seeing them in 1879; two others, in the spring of 1884. This evidence is criticised, and some circumstances which tend to cast doubt upon its correctness are pointed out; but, as it is not contradicted, and comes from the lips of respectable and unimpeached witnesses, there is no justification for arbitrarily disregarding it. Upon the record as presented, the patent is unquestionably void for want of novelty.

It is unnecessary to consider letters patent No. 289,106, granted to the complainant, November 27, 1883, for the reason that it was admitted on the argument that the defendant had not infringed. The bill must be dismissed, with costs.

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AM ENDE v. SEABURY *et al.*

(Circuit Court, S. D. New York. November 15, 1888.)

1. PATENTS FOR INVENTIONS—SPECIFICATIONS—CERTAINTY.

Letters patent No. 181,024, issued August 15, 1876, to Charles G. Am Ende, for an improvement in borated cotton, describe the process as follows: "I first prepare a solution of boracic acid, in the usual manner, and add thereto a small proportion of glycerine. \* \* \* The cotton, either in bulk or wadding, is next immersed in the solution until well impregnated therewith, and then pressed, to discharge all surplus solution, or so much thereof as may be required. The cotton is then dried, and ready for use." *Held*, that while the directions contained in this specification might seem vague and indefinite to a person not skilled in chemistry, they were sufficiently clear to be comprehended by persons skilled in the art to which the patent relates, which is sufficient.

2. SAME—ANTICIPATION.

*Held*, also, that none of the journal articles in evidence anticipate said patent, as none of them indicate the use of cotton saturated with a solution of boracic acid and glycerine in the manner described in the specification.

In Equity. Bill for infringement of patent, brought by Charles G. Am Ende against Seabury & Johnson.

Arthur V. Briesen, for complainant.

Norman T. M. Melliss, for defendants.

COXE, J. The complainant is the owner of letters patent No. 181,024, granted to him August 15, 1876, for an improvement in borated cotton.

The object of the inventor was to produce a simple and inexpensive antiseptic dressing by combining the various advantages of cotton fiber with those possessed by boracic acid and glycerine. The specification asserts that prior to the invention boracic acid had been used as a preservative agent only in a fluid state or as a powder, and that it was necessary to immerse the matter to be preserved in the fluid, or cover it completely with the powder, requiring, in either case, large quantities of the acid. The inventor accomplishes a better and more permanent result in a much simpler and more convenient way by saturating the cotton with the acid and glycerine in small proportions; thus adding to their preservative properties the germ-filtering quality and elasticity of the cotton. The manner of producing the borated cotton is described in the specification as follows:

"I first prepare a solution of boracic acid in the usual manner, and add thereto a small proportion of glycerine. For the preservation of tender substances, such as veal, I may also add from 10 to 40 per cent. of soda or potash, never sufficient, however, to reach neutrality. The cotton, either in bulk or wadding, is next immersed in the solution until well impregnated therewith, and then pressed, to discharge all surplus solution, or so much thereof as may be required. The cotton is then dried, and ready for use."

The claim is for "the borated cotton, being cotton fiber which is saturated with boracic acid and glycerine, substantially as herein shown and described." The defenses are that the specification is not so clear and explicit as to enable a person skilled in the art to practice the invention, and that the patent is void for lack of novelty. Infringement is clearly established, and is not denied in the brief submitted for the defendants. In considering the question presented by the first defense it should be remembered that the language criticised by the defendants is addressed to persons skilled in the particular art to which it relates. To a lawyer or a banker the specification might seem vague, and, perhaps, meaningless; but a pharmacist, a chemist, or even an educated physician would have little difficulty in understanding it. When the patentee says he prepares a "solution of boracic acid in the usual manner," he means as it has formerly been prepared. He speaks of it as he would speak of a solution of camphor or alum. Every druggist knows what he means. He certainly might have been more definite when he says that he adds to this solution "a *small* proportion of glycerine," but it is thought that the intelligent chemist, setting out properly to combine the enumerated ingredients into which the cotton is to be immersed, and with which it is to be impregnated, could hardly go astray. Indeed, in examining the extracts introduced by the defendants to establish lack of novelty, copied from pharmaceutical journals of conceded reputation and authority, we find similar language used. Thus, in the Druggists' Circular and Chemical Gazette it is stated that Dr. Edmunds had used "a solution of boracic acid," and in the Journal de Pharmacie it appears that Prof. Gubler saturated his wadding with "a *certain* quantity of glycerine." The formula for preparing this dressing is then given. "It is only necessary," says the writer, "to pour a *small* quantity of glycerine

over the square sheet," etc. Such expressions would seem to belong to the nomenclature of the art. The expression "well impregnated" means thoroughly, completely impregnated; the word "well" being used in the sense that a housewife might use it when telling her domestic to keep the bread or the joint in the oven until *well* done. Tested by the rule of *Loom Co. v. Higgins*, 105 U. S. 580, the specification would seem to be sufficient.

The article translated from the *Journal de Pharmacie et de Chimie* is not an anticipation. It is entitled "Glycerized cotton, for dressing wounds." There is no reference to boracic acid. Two of the elements of Am Ende's combination, boracic acid and water,—the acid in solution,—are wanting. True, it is stated that Prof. Gubler found this wadding permeable to all medicinal liquids, but there is no hint that he knew that with it could be combined the preservative properties of boracic acid in an uncrystallized condition as a convenient, effective, and permanent antiseptic composition. The article in the *American Journal of Pharmacy* of March, 1867, shows great familiarity with the characteristics and uses of glycerine on the part of the writer. He knew its excipient, hygroscopic, and penetrating properties. He knew that it was a solvent for boracic acid, but he certainly did not know—at least he did not divulge the knowledge—that it could be combined with dissolved boracic acid, and thus held in cotton fiber for antiseptic purposes. The quotation from the *Druggists' Circular* of June, 1875, is entitled "Boracic Acid," and describes a case of amputation in which the surgeon employed a "dressing of lint steeped in a hot saturated solution of boracic acid." This dressing was probably applied in a moist condition to the wound. No glycerine was used. It cannot be demonstrated from the proofs that any one, prior to Am Ende, accomplished what he has described and claimed. Even though there be a doubt, it should be resolved in favor of the patent. The fact that others had done something quite similar, that they had used separately, or in different combinations, the ingredients of his claim, should not affect his patent. All that is described in the prior publications the defendants may use with perfect impunity. They may use "lint steeped in a hot saturated solution of boracic acid," or "wadding saturated with a certain quantity of glycerine," or boracic acid dissolved in glycerine; but they should not be permitted to use cotton saturated with a solution of boracic acid and glycerine in the manner described in the specification, for that belongs to Am Ende. The complainant is entitled to the usual decree.

## DURHAM HOUSE DRAINAGE Co. v. ARMSTRONG.

*(Circuit Court, S. D. New York. November 19, 1888.*

## PATENTS FOR INVENTIONS—INFRINGEMENT—DRAINAGE SYSTEM.

Letters patent No. 235,754, issued December 21, 1880, to Caleb W. Durham, were for an invention of a drainage system, which supports itself independently of the building, upon pillars of masonry on which is laid the main waste-pipe, connected at the lower end of a vertical soil-pipe, to which are rigidly fastened the branches running to various parts of the building. The invention also claims a combination of a cast water-closet fitting provided with a flange for the reception of the water-closet, with the rigid branch-pipes. The defendant's apparatus consists of a main drain laid under ground, and resting upon the earth, with the soil-pipe extending perpendicularly to the second story, thence at an angle of 60 degrees to the third story, thence perpendicularly to the roof. The soil-pipe above the angle found support from the flanges at the ends of the branch-pipes resting on the floor in each story, but was not otherwise self-supporting. *Held* no infringement.

In Equity. Bill for infringement of a patent.

Action by the Durham House Drainage Company, of New York, against James Armstrong for the infringement of letters patent No. 235,754, granted to Caleb W. Durham for an improvement in drainage apparatus.

*Tuttle, Goodell & Brooks and John H. Kitchen*, for complainant.

*George V. Brower*, for defendant.

COXE, J. The complainant's patent, No. 235,754, was granted to Caleb W. Durham, December 21, 1880, for an improvement in drainage apparatus for houses and other buildings. The central idea of the invention is a drainage system which supports itself independently of the building in which it is located. The object of the inventor was to prevent the escape of sewer gas, caused by the loosening of the joints and the breaking or disarrangement of the parts of the apparatus, occasioned by the settling, rocking, or rolling of the building, and the different parts thereof. This result is accomplished by laying the main waste-pipe in an inclined position upon pillars of masonry. To this is attached a vertical soil-pipe, which extends up through the various stories of the building, its lower end being screwed into an elbow, which supports it directly upon the masonry. From this soil-pipe rigid branches extend connecting it with the water-closets, the whole being supported by the vertical pipe, as a tree supports its branches. The three claims alleged to be infringed are as follows:

"(2) The combination with the drain, of the vertical soil-pipe, and a support therefor, independent of the building, substantially as specified. (3) The combination with the rigid soil-pipe, and an independent support therefor, of the rigid branch-pipe, upon which the water-closet fitting is supported and secured, substantially as and for the purpose specified." "(5) The combination of the cast water-closet fitting provided with a flange for the reception of the water-closet, with a rigid branch-pipe, substantially as specified."

Defendant has placed a drainage apparatus in a building known as "Trinity Factory." It is charged that in so doing he has infringed. The

main drain-pipe of the defendant's structure is laid in a trench beneath the surface of the ground. There are no pillars of masonry. The pipe rests on the natural earth, in a manner well known long before the date of the patent. The vertical soil-pipe is connected to the drain by an elbow joint which also rests upon the earth. This pipe is perpendicular until it reaches the second story above the basement when it runs at an angle of about 60 degrees to the third floor. Above the third floor the pipe is again perpendicular to the roof. At the angle the pipe is 10 feet, 9 inches in length, the deflection is 8 feet, 3 inches. Above the angle the weight of the pipe and branches is 2,547 pounds. This portion of the apparatus was constructed separately from the lower portion, being held temporarily in position by timbers and ropes. When completed it found ample support from the flanges at the ends of the branch-pipes resting upon the floor in each story. Had it been independent of the building, it would have fallen when the temporary supports were removed. That the slanting pipe which connects the upper with the lower sections is incapable alone of upholding the weight above it was demonstrated by a practical experiment. A similar pipe was placed at the same angle, and it was found that it broke at the joint with less than one-half the weight in question. It is true this experiment was *ex parte*,—such experiments usually are,—but this presents no excuse for arbitrarily rejecting the evidence, especially as it is not traversed or impeached. It was also proved that the branches from the soil-pipe were tightly packed around with brick, slate, and asphalt, and that their flanges rested on the floor, and served to hold the main structure in position. In fact it seems to be clearly established that the drainage system of the "Trinity Factory" is not independent of the building, but a part of it, and dependent upon it for support. If the building settles or rocks, the drainage system must settle and rock with it. One of the witnesses, testifying upon this branch of the controversy, aptly says:

"In the event of the building settling, the whole structure would go with the building, because the apparatus receiving its support from each of the floors, and there being no solid foundation under the drain-pipe of masonry, the earth would naturally give way with the pipe at the bottom, or cause sufficient spring in the pipe to let the whole structure down together. It has to go down, or something breaks."

The complainant's patent is intended to protect various combinations constituting his system of house drainage. This system the defendant has not used. A construction of the claims sufficiently broad to cover the structure of the "Trinity Factory" would also cover any system of drainage where a vertical iron soil-pipe is used connecting with the drain beneath the surface of the earth. There is no infringement of the fifth claim unless it is given a construction so broad that it must fall for lack of invention. The bill must be dismissed.



## THE MARY POWELL

## THE PHILIP SINNOTT.

MOORE *et al.* v. THE MARY POWELL.MARY POWELL STEAM-BOAT CO. v. THE PHILIP SINNOTT *et al.**(Circuit Court, S. D. New York. October 15, 1888.)*

## 1. COLLISION—BETWEEN STEAMER AND VESSEL AT PIER—INEVITABLE ACCIDENT.

On the south side of a pier, projecting from the shore-line 512 feet into North river, lay the barge S., her bow towards the shore, and her stern projecting from 10 to 20 feet beyond the end of the pier, when she was struck by an up-steamer, which had swung out from a 400-foot pier, 600 feet below. *Held*, that though wind and tide were setting in towards the upper pier, and the pilot, on discovering that his swing-off was not sufficient to avoid collision, used due diligence to stop the steamer, it was not an inevitable accident; the pilot being familiar with the set of the tides there, and there being abundant space for passage behind the stern of the barge.

## 2. SAME—CONTRIBUTORY NEGLIGENCE.

The mere fact that a barge lies with her stern projecting from 10 to 20 feet beyond the end of a 512-foot pier, at which she is berthed in North river, does not constitute contributory negligence, in case of a collision by a steamer in attempting to pass up the river, after swinging off from a 400-foot pier 600 feet below; there being no other obstruction to free passage.

In Admiralty. Cross-libels for damages. On appeal from district court, 31 Fed. Rep. 622.

Cross-libels for damages by collision by Harrison B. Moore and others, owners of the barge Philip Sinnott, and by the Mary Powell Steam-Boat Company, owners of the steam-boat Mary Powell. From decrees against the Mary Powell her owners appeal.

*James Parker*, for the Mary Powell *et al.*

*John A. Deady*, for Moore *et al.*

LACOMBE, J. On July 7, 1886, the barge Philip Sinnott lay along the south side of pier foot of Twenty-Fourth street, North river, her bow towards shore, and her stern projecting into the river beyond the end of the pier. The extent of this projection is in dispute; the appellants claiming that it was about 16 feet, and the appellees insisting that it did not exceed 9 or 10 feet. In either case it was less than the width of another barge or lighter which at the same time lay across the end of the pier, with her bows pointing down the river. The width of this other barge—the Anderson—was 23 feet, and it seems probable, from the evidence, that the Sinnott's stern did not project more than half that distance beyond the end of the pier. This Twenty-Fourth street pier projects 512 feet from the line of the bulk-head or shore-line. Two hundred feet or more below it lies the northerly rack of the Pavonia ferry. Still further down is the pier, foot of Twenty-Second street, distant nearly 600 feet from the Twenty-Fourth street pier. It projects from the bulk-head or shore-line only 400 feet. About 3:30 P. M. the steam-boat Mary

Powell, after making her usual daily landing at the lower pier, swung her head off preparatory to starting on her course up river. The wind was blowing a good breeze from the W. S. W., and the tide was flood. Her pilot saw the two barges lying as above described. Almost immediately after starting he discovered that his swing-off was not sufficient to prevent the Powell from being so set in by wind and tide towards the Twenty-Fourth street pier that collision was imminent. Thereupon he rang bells to stop the engines, and back them strong, which bells were obeyed; but, before the Powell's headway could be entirely stopped, her stem came into contact with the starboard side of the Sinnott, causing damage to both vessels. Decrees upon the cross-libels were given in the district court against the Mary Powell, and her owners have appealed.

That the Powell was in fault seems entirely clear. She was in motion, the barge fast to the pier. Her pilot had been engaged for four years in piloting her at that dock, and was familiar with the set of the tides there. He saw the lighters before he started, and undertook to swing out far enough to just clear them. As he himself expresses it, "If I went clear of it, I was well satisfied." He had, for all that appears in the case, the whole of the North river to swing in; and when, after the collision, he allowed himself more room, he passed, as he admits, without any trouble, clearing the lighter at the end of the dock with a margin of 16 feet. There is nothing in this to make out a case of inevitable accident, under the authorities. *Steam-Ship Co. v. Steam-Ship Co.*, 24 How. 307; *The Morning Light*, 2 Wall. 550; *The Baltic*, 2 Ben. 452. It was, as the learned district judge held, an error of judgment by the Powell's officers, occurring naturally enough, and not necessarily impeaching their general skill and judgment, but none the less it was an avoidable mistake. They undertook to shave too close, when they had abundant room to spare, and the boat must respond for their error. *The John Brotherick*, 8 Jur. 276.

It is further contended on behalf of the Mary Powell that the Sinnott was herself in fault, because her position at the pier, with her stern projecting, was an improper one, and rendered her an additional obstruction to navigation. The mere fact that a vessel lying at a pier is so berthed as to project beyond the corner of the pier is not by this court deemed sufficient cause for condemning her to contribute for the damages resulting from a collision occurring while so berthed. *The Canima*, 32 Fed. Rep. 302. The situation of the projecting vessel must be such as improperly to obstruct the colliding vessel's access to or egress from her pier, or in some way to complicate her proper movements. In the case at bar such interference with the Powell is not made out. It is true that she had to swing out from her own pier in order to take her course; but the designers of the pier plan of this city, when they thrust the upper pier 112 feet further out than the lower one, made it necessary for every boat bound up the river from the lower pier to make such swing. It is also true that she had to swing further out than would be necessary merely to clear the pier itself; but the pier was built for use, and its width was thus liable to be increased by the beam of vessels lying at each

side, and its length by the beam of vessels lying at its end. No local regulation restricting the use of the end of the pier has been called to the attention of the court. The provision in the ordinances (Revision 1866, p. 299) forbidding vessels to lie "at the end of or within any pier with the jib-boom rigged out" was omitted in the Revision of 1881; being perhaps considered to have been superseded by regulations of the dock department, to which jurisdiction over such matters had been theretofore confided. Even if still in force, it does not forbid vessels from lying at the end of a pier when their jib-booms are not rigged out. In the absence of local regulation, the ordinary use of a pier contemplates the occupation from time to time of sufficient water area off its end and at its sides to allow for berthing vessels. With the whole width of the river to swing in, and a starting point more than 500 feet down stream, it was quite easy and practicable for the steam-boat to clear the upper pier, and a space beyond it, sufficient to subserve its ordinary use as a pier. Beyond that space the Sinnott did not protrude, nor did she violate the rule as to obstructing ferry slips. *The Baltic*, 2 Ben. 452. She was not an additional obstruction at that point, for she did not occupy any part of the river not already appropriated to obstruction by the erection of the pier, and the use which its presence invited. She lay wholly within the area which the Powell was bound to clear whenever called upon. The decrees of the district court should be affirmed, with costs.

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### OCEAN S. S. Co. v. THE TALISMAN.

(District Court, S. D. New York. October 20, 1888.)

#### **COLLISION—STEAMER AND TUG—RULE OF THE STARBOARD HAND.**

The steamer City of S. was coming into the North river from sea, and moving with the flood tide. The steam-tug T., going down the river with a car-float in tow, was nearer the New York shore, and on the starboard hand of the steamer, their courses not then crossing. The latter, to approach her slip, ported, and attempted to cross the bow of the float, but was struck on her port bow, receiving damage, for which this suit was brought against the tug. *Held*, that the fault of the collision was with the steamer, which, from her position, was bound to avoid the tow, yet attempted to cross her bow, that the T. did nothing to thwart any proper maneuver on the part of the steamer, but backed as soon as the intent of the S. was clear; and the libel against her should be dismissed.

In Admiralty. Libel for damages.

Libel by the Ocean Steam-Ship Company against the steam-tug *Talisman*, for injuries to the steamer City of Savannah by collision.

*Rice & Bijur*, for libellant.

*Goodrich, Deady & Goodrich*, for claimants.

**BROWN, J.** On the 11th of February, 1888, the libellant's steamer City of Savannah, in coming in from sea, collided with a car-float in tow

of the steam-tug *Talisman*, a little past 8 o'clock in the morning, and from 100 to 200 yards off Chambers-Street slip in the North river. All the witnesses agree that the *City of Savannah*, when off the Battery, and when off Courtlandt street, was not far from the middle of the river; that she afterwards ported, and at the time of the collision had swung around from three to six points towards the New York shore. The car-float, which was coming down, struck the *City of Savannah* on her port side, about 25 feet from her stern, doing considerable damage. The libelants claim that when the *City of Savannah* was nearly in mid-river, and heading directly up stream, the *Talisman* and her tow were seen nearly directly ahead from one-quarter to a half a mile distant, and about a quarter of a point on her starboard bow; that the *Talisman* was at that time heading somewhat across the river towards the Jersey shore; and that the swing of the *City of Savannah* to starboard was made in order to give the *Talisman* more room to the westward, but that her maneuver was thwarted by the *Talisman's* starboarding, and thereby swinging towards the New York shore. Upon careful consideration of the testimony, I cannot find this theory borne out by the weight of evidence, or the probabilities of the case. The tide was strong flood. The tug, heavily incumbered, could not have been making by land more than three knots, while the speed of the *City of Savannah* by land was from two to three times as great. Had the *Talisman* been near mid-river, and headed towards the Jersey shore, as claimed by the libelant, she could not possibly have turned so as to reach the place of collision so near the shore at the time that the *Savannah* reached that place, without turning about at once and heading almost straight for the New York shore, which it is not pretended she did, and which is incompatible with the libelant's other testimony. The *Talisman*, in coming from Weehawken, had followed the usual course, crossing the river to within 200 or 300 yards of the New York shore, and then following the line of the shore. There was no reason, after passing Tenth street, which must have been long before she was seen by the *City of Savannah*, for heading towards the Jersey shore, or for her being nearly in mid-river. The contrary is proved, not only by her own witnesses, but by disinterested witnesses from the Hoboken ferry-boats. The weight of proof agrees with the probabilities of the case, that when the *Talisman* was first sighted she must have been much nearer the New York shore than the *City of Savannah*, then nearly in mid-river. The *City of Savannah* was bound for her dock at Spring street. Having the *Talisman* on her own starboard hand, it was her legal duty to keep out of the way, and she took all risks of attempting to cross the *Talisman's* bow, instead of keeping to the westward of her, on her original course. She is in fault for this maneuver. From the place of collision, so near the shore, it is further clear that the *City of Savannah* must have persisted in her attempt to cross the *Talisman's* bows for a considerable time after it was safe to make such an attempt, instead of stopping and backing earlier, as she might easily have done, and thereby avoided the collision. The pilots of the Hoboken ferry-boats the *Lackawanna* and the *Montclair* strongly corroborate the general testimony of

the witnesses from the *Talisman*, as to the position and course of the latter.

As respects the *Talisman*, I think it clear that nothing on her part thwarted any proper maneuver of the City of Savannah. There was at first no danger; their courses were not crossing until the City of Savannah ported, to approach the New York shore. The *Talisman* was on the City of Savannah's starboard hand, and it was then the duty of the *Talisman* to hold her course. At the slow speed she was making against the strong tide, whether she starboarded her helm or not, (and I do not think that charge established,) she could not, in the short time after the alleged starboarding, have changed her position so much as to have made any difference in the result. The City of Savannah, after her first porting, had abundant means to keep out of the way of the *Talisman* by going to the westward. The pilot of the *Talisman* had no reason to suppose that the City of Savannah would persist in attempting to cross his bows, instead of passing to the westward, until shortly before the collision; and I am satisfied that he stopped and backed as soon as he had reason to believe that the City of Savannah intended to cross ahead of him, contrary to her duty. This was all that by the rules of navigation was required of the *Talisman*, under such circumstances, (*The Greenpoint*, 31 Fed. Rep. 231,) and the libel must therefore be dismissed, with costs.

I have not thought it necessary to discuss the evidence concerning the fog or thick weather, alleged by the witnesses for the City of Savannah, although upon this point it seems to me that the weight of evidence is clearly against her. From this point of view it would seem probable that no sufficient lookout or attention was directed towards the *Talisman* by the City of Savannah while she was approaching her pier, and that that may have been the real cause of the accident.

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#### THE MERCEDES.<sup>1</sup>

#### THE ROSA.

#### NEW YORK HARBOR TOW-BOAT CO. v. THE MERCEDES.

#### MOORE *et al.* v. THE ROSA.

(District Court, E. D. New York. October 23, 1888.)

#### **COLLISION—BETWEEN STEAMERS—MEETING STEAMERS—MUTUAL FAULT.**

The steam-boat M. was coming down the North river, near the piers on the New York shore, and intending to round the Battery into the East river. The steam-boat R. had come from the East river into the North river, and was about to round to her berth near Castle Garden. She was outside the M., and displayed to the latter her green light. The R. whistled once to the M., and,

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

without waiting for a reply, ported her helm to round in to her berth. The *M.*, seeing the green light of the *R.* shutting in, and not knowing the latter's intention of going in-shore, blew two whistles, and starboarded her wheel, supposing that the *R.* would straighten up river again. The vessels came together at nearly right angles. *Held*, that both were in fault for the collision,—the *R.* for not awaiting a reply from the *M.* before she ported her wheel; the *M.* for starboarded her wheel as soon as she saw that the *R.* was sheering to port,—and that the damages should be divided.

In Admiralty. Cross-libels for damages.

Cross-libels for damages by collision by the New York Harbor & Tow-Boat Company, owner of the steam-boat *Rosa*, and by Harrison B. Moore and the Eastern & Amboy Railroad Company, owners of the steam-tug *Mercedes*.

*Wilcox, Adams & Macklin*, for the *Rosa*.

*Goodrich, Deady & Goodrich*, for the *Mercedes*.

BENEDICT, J. These are cross-actions, arising out of a collision which took place off Castle Garden on the 5th day of August, 1887, between the steam-tug *Mercedes* and the steam-boat *Rosa*, about half past 8 in the evening. The tide was flood. The *Mercedes* was proceeding from the Stonington pier down the North river, intending to pass around the Battery into the East river. The steam-boat *Rosa* had come from the East river, and was proceeding to her berth at the bulk-head off Castle Garden, intending to round-to so as to head down the river. As the two vessels approached each other; the evidence shows that the *Rosa* was on the outside of the *Mercedes*, displaying to the *Mercedes* her green light. According to the statement of the *Mercedes*, the green light of the *Rosa* was observed to be shutting in. Two whistles were at once blown from the *Mercedes*, and the helm of the *Mercedes* starboarded. According to the statement of the *Rosa*, she gave one whistle to the *Mercedes*, and, without waiting for any reply, ported her helm, intending, as before stated, to round-to and come ahead to the southward at the bulk-head off Castle Garden. When about 300 feet from Castle Garden the vessels came together, nearly at right angles; the *Mercedes* under a starboard helm, and the *Rosa* under a port helm. The speed of the respective vessels was about two miles an hour for the *Rosa*, and about eight miles an hour for the *Mercedes*. The cause of the collision was this: The *Mercedes* supposed that the *Rosa* was bound up the river, and had no thought that it was her intention to round-to at Castle Garden. The *Mercedes* accordingly presumed that the *Rosa*, on receiving two whistles from the *Mercedes*, would at once resume her course, and pass up the river outside of the *Mercedes*. On the other hand, the *Rosa* assumed that the *Mercedes*, on receiving her signal of one whistle, would port, and so pass outside of the *Rosa*.

I find both vessels in fault for acting upon presumptions unwarranted by the facts disclosed. It was the duty of the *Rosa*, when she blew her signal of one whistle, to await a reply from the *Mercedes* before porting her helm. Instead of so doing, assuming that the *Mercedes* would know that the *Rosa* intended to round-to at Castle Garden, and of course would

port, she ported. There was nothing to justify the Rosa in this presumption, and in acting upon it without waiting for a reply to her whistle she committed a fault which conduced to the collision. On the part of the Mercedes, a fault was committed in starboarding her wheel as soon as she saw that the Rosa was sheering to port; doing this on the presumption that the Rosa was bound up the river, and would therefore, of course, go outside on receiving a signal of two whistles. There was nothing to justify the Mercedes in this presumption. Her pilot says that he saw the green light of the Rosa beginning to shut in, and immediately starboarded his wheel without waiting for a reply to his signal. It was a fault in him to starboard under those circumstances. If he had ported, I have no doubt he would have avoided the collision. Both vessels being found in fault, damages must be apportioned.

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### THE J. W. HUSTED.

#### THE SUCCESS.

#### HAVENS *v.* THE J. W. HUSTED.

#### ROGERS *et al.* *v.* THE SUCCESS.

(District Court, S. D. New York. October 23, 1888.)

#### SALVAGE—TUG AND TOW—INTERFERENCE BY ANOTHER TUG—COLLUSION.

The lighter S., loaded with oil barrels, and in charge of the tug C., in the North river, got into difficulty by shipping considerable water in heavy swells from a passing steamer. The C. was competent to take care of her, and was bound to do so. The tug H. came up, and against the protest of the master of the lighter, but through the evident collusion of the C., succeeded in getting the lighter in her own charge, and towed her to the dock, and pumped her out, and thereupon refused for three days to deliver her to the owners, claiming salvage compensation on the false ground that the lighter had been abandoned and rescued by the H. In towing her she was negligently run against the wharf, causing some damage. *Held*, that the case was one of officious intermeddling with the duties of the C.; that the case was not one of salvage, and that no compensation for pumping should be allowed, as it was more than offset by the injury for a groundless claim of abandonment and salvage, and detention of the lighter from her owners; and that the H. should pay for the damage her negligence had caused the lighter.

#### In Admiralty.

Libel by Silas F. Havens, owner of the lighter Success, against the steam-tug J. W. Husted, for damages sustained by the Success while under the unauthorized control of the Husted. Also libel by Robert Rogers and others, claimants of the J. W. Husted, against the Success on a claim for salvage.

*Wing, Shoudy & Putnam*, for libelant Havens and The Success.

*Peter C. Carter*, for Rogers *et al.* and The Husted.

BROWN, J. The proof does not establish that the libellant's lighter *Success* was overloaded, or improperly loaded, or loaded more than usual. In going up the North river, in tow of the tug *Chapman*, on a hawser, she shipped considerable water through the effect of the swells from passing steamers; and, the hatches not being tight, so much was taken in her hold as to make her cranky, and render it inexpedient to continue her trip. The best thing to do was to take her ashore to be pumped out. Nothing more was needed. While the *Chapman* was backing down along-side of her, the *Husted* came up and offered to pump her out, for which she had means, while the *Chapman* had not. The *Husted's* captain, in answer to inquiries, not stating the charge for pumping out, the captain of the lighter declined his services. It is clear that the captain of the *Husted* was determined to get or take a job; and the *Chapman* evidently was willing to facilitate this, and to get rid of further trouble with the lighter; and the captain of the *Husted*, with the evident concurrence of the *Chapman*, thereupon took the lighter in charge, got out a hawser, and proceeded to tow her into pier 41, North river, where he pumped her out. About the time of making fast his hawser, or soon afterwards, the lighter received two heavy lurches from swells, and a part of the oil barrels with which she was loaded went overboard. The captain of the lighter had been put by the *Chapman* on board the *Husted*, whose captain refused to allow him to go on the lighter, claiming it to be then in his charge. The captain of the lighter testifies that he demanded to be put on board the lighter in order to steer it, and states that the loss of the barrels was through want of steering, and from the sheer while in tow of the *Husted*. This is denied by the witnesses for the latter. The whole proceeding on the part of the *Husted*, I must hold to be a gross abuse. It is now claimed that the *Success* was abandoned, a claim wholly without foundation. The *Chapman* was as well able as the *Husted* to take her to either shore. The lighter was in charge of the *Chapman*, and, whatever the immediate maneuvers were, there was evidently no thought of abandoning her by either her master or the master of the *Chapman*. There was not the slightest cause for abandonment, and it was the *Chapman's* duty to take the lighter to a place of safety. It would seem, however, that upon the advice of the latter, the captain of the lighter finally assented that the *Husted* should take her ashore to be pumped out, and nothing more. The *Husted* thereby became merely a substitute for the *Chapman* in towing the lighter to the pier, and in performing the duty that belonged to the *Chapman*. As the *Chapman* was perfectly able to perform it, and would have done so but for the *Husted's* proffer, there is no foundation for any claim of salvage as claimed in the second above entitled case. The element of danger, practically, was wholly wanting. This claim was set up, however, as soon as the *Husted* had secured possession of the lighter, and the captain of the lighter, and the owners, for several days afterwards were debarred from any possession or control of the lighter. I am satisfied from the evidence that in approaching the wharf the jib-boom of the lighter was run up over the pier, and damages were thereby caused



to the lighter, for which the owners of the Husted must answer. Considering the unstable condition of the lighter amid the swells, although at least 20 minutes had elapsed after she had taken the water aboard, and no further trouble had arisen while she was in the Chapman's charge, in the conflict of evidence, I am not so clear that the dumping of the barrels was caused by the imprudence of the Husted, or by want of steering, as to feel authorized to charge her with the cost of picking up the barrels, or the loss of those that were not recovered. The suit for salvage must be dismissed, with costs. Any claim that the Husted might have been entitled to for pumping out, and for the time spent in towing her into the slip in place of the Chapman, I regard as fully offset by the injury and the loss to the owner of the lighter through the Husted's officious and unjustifiable interference with the duties of the Chapman; by the practical collusion by which the lighter was turned over to the Husted to make a job against the master's will; the Husted's subsequent groundless claims for salvage; and by the subsequent detention of the lighter from her owners. In the first action the libellant is entitled to a decree for the damages to the lighter by running her bowsprit upon the wharf, with costs; and a reference to compute the damages, if not agreed on.

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*ARRECO v. POPE et al.*

(District Court, S. D. New York. October 23, 1888.)

**DEMURRAGE—DELAY IN LOADING—"WITHIN REACH OF THE SHIP'S TACKLES"—  
WAIVER.**

A charter-party allowed 18 days for loading. The cargo was tendered five days after notice of the ship's readiness. Thirty days were occupied by the master in loading. The charter required delivery of the cargo "within reach of the ship's tackles." It was delivered a few yards beyond, without objection from the master, and the cargo was delivered to the ship as fast as the ship could load. One day after the tender of the cargo was occupied by the ship in unloading her ballast. *Held*, that only five days' demurrage should be allowed to the ship, no evidence appearing that the cargo could not have been loaded by the ship within 18 days, and delivery "within reach of the ship's tackles" having been waived.

**In Admiralty.** Libel for demurrage.

*Butler, Stillman & Hubbard*, for libellant.

*Wilcox, Adams & Macklin*, for respondents.

**BROWN, J.** Although the charter required the cargo to be landed "within reach of the ship's tackles," the evidence shows that the captain accepted the delivery a few yards beyond, without objection; and after the 21st of February there was no delay in supplying the cargo, which was loaded by the master from the place where its delivery was accepted. Had it appeared that the cargo might with reasonable diligence have been loaded after that date within the 18 lay days allowed by the charter after

the ship was ready, to-wit, February 15th, I think the libelants would not have been entitled to any demurrage; for the master accepted the delivery without objection, and he was bound to load with reasonable diligence. All that was obligatory on the charterer in this regard was to furnish and deliver the cargo in time to admit of its being loaded with reasonable diligence within the 18 lay days. But it is not shown that the cargo could with reasonable diligence have been loaded in 12 days after it was delivered to the ship. On the other hand, I am not at all satisfied upon the master's testimony that the cargo could not have been easily loaded within 18 days after the 21st; nor that the delivery of the cargo a few yards distant from the reach of the ship's tackles was in any degree the cause of his use of 30 subsequent days in loading, instead of 18. It is not reasonable to suppose any such additional time beyond the 18 days contemplated by the charter could have been required on account of so slight a difference in the spot of delivery. If the master was dissatisfied as to the point of delivery, he should have objected at the time. Not only did he not object, but he did not even present any bill for what expense was incurred, though it was small, for bringing the cargo within reach of the tackles. I allow the ship, therefore, the use of the 18 lay days from the time the cargo was delivered and accepted by the master, viz., on the 21st. The ship was ready, however, to receive the cargo on the 15th. Sufficient prior notice of her arrival and expected readiness was given, but the cargo was not furnished till the 21st. During one of the intervening days the loading was interrupted by the necessity of unloading the residue of her own cargo. I allow her, therefore, five days' demurrage at the charter rate of £11 sterling per day, amounting to \$275.35, with interest and costs.

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DISBROW *et al.* v. THE WALSH BROTHERS.

(*District Court, S. D. New York.* October 22, 1883.)

1. MARITIME LIENS—SERVICES—SEAMEN—BRICK BARGE.

A barge without sails or rudder, used for transporting brick, on which men are employed in loading, carrying, and delivering brick, is subject to a lien for wages of the men employed in such transportation as seamen.

2. SEAMEN—WAGES—HIRING BY MONTH—DESERTION BEFORE TRIP ENDED.

Though the practice in this harbor upon hiring a seaman "by the month" in harbor navigation permits an employer to discharge, or the employed to leave, at the termination of any trip during the month on *pro rata* wages, neither can terminate the employment in the midst of a trip without legal cause. The employed having quit without leave, while the barge was discharging, the wages of that trip *held* forfeited.

In Admiralty. Libel for wages.

Alexander & Ash, for libelants.

R. D. Benedict, for claimant.

BROWN, J. The libelants sue for wages, and claim a lien as seamen on board the barge Walsh Brothers. The barge had no sails, masts, or rudder. She was used only for the transportation of brick. The libelants were hired for service on the barge, including loading and unloading, in transporting brick from Hackensack to New York and Brooklyn, at the rate of \$35 per month; no further engagement for any definite period being agreed on. They made several trips between May 15 and June 19, 1888, and on the day last named, while the barge was discharging brick at Ninety-First street, New York city, they quit work on account of some dissatisfaction with the alleged language and behavior of the master.

The services of the men constitute a lien upon the barge, because she was a vessel engaged in the transportation of cargo. The men lived on board, and though their duties as respects navigation were slight, they did attend to all such duties as were incident to such trips when the barge was taken in tow by the tug; and they were not employed in any duties upon land excepting such as belonged to the loading and unloading of cargo. Such services are all maritime, and are attended by a lien upon the vessel. See *The Minna*, 11 Fed. Rep. 759, and note. The men were not discharged by the master; nor can I find that they left with his assent. He wished them to remain until the cargo was unloaded. Though their engagement was by the month, they did not thereby forfeit their pay for the fractional part of the second month, so far as they finished trips of the barge. In *Moore v. Neafie*, 3 Fed. Rep. 650, it was held by Judge CHOATE, upon proof of the local usage, that upon engagement of seamen at so much a month for service about the harbor of New York, the contract might be terminated at the end of any trip, and a *pro rata* recovery had. The right of the employer to discharge, or of the employed to quit, extends no further. It would be contrary to the manifest meaning and intention of such an employment that either party should be at liberty to terminate the agreement at any moment in the course of an uncompleted trip. *The City of New Orleans*, 33 Fed. Rep. 683. The causes assigned by the libelants for leaving in the midst of unloading do not amount to a justification. They were legally required to remain and finish the unloading. The chief part of their work was loading and unloading the cargo. To quit work as they did was to subject the barge to the liability of special expenses, whether she undertook to get other persons to supply the libelants' places, or undertook to discharge without their aid, and thereby lose two days' time. The libelants must, therefore, either suffer a deduction for the special damage, or forfeit any claim to wages for that trip. The former is all the deduction claimed by the respondent. The amount claimed is no more than his probable actual loss, and is less than the forfeiture of the wages for the trip would be. I deduct the lesser sum of \$4.78 from each man. Judgment is allowed for the rest.

SHEDD v. FULLER *et al.*

(Circuit Court, N. D. Illinois. November 5, 1888.)

## REMOVAL OF CAUSES—PROCEDURE—FILING PETITION AND BOND WITH CLERK.

Under the act of congress for the removal of causes, (March 3, 1887,) providing that a party desiring to remove a suit from a state court to a circuit court of the United States shall file his petition and bond in the state court, a filing of the petition and bond with the clerk of the state court is not sufficient, as the court itself has a right to pass upon them, and the cause will be remanded.

## On Motion to Remand.

Action by Charles B. Shedd against J. Ensign Fuller and others, commenced in the state court, and removed by defendants to the circuit court of the United States, by filing a petition and bond with the clerk of the state court. Motion by plaintiff to remand.

*Capt. Prescott*, for plaintiff.

*G. Driggs*, for defendant.

GRESHAM, J., (*orally*.) The counsel for one of the defendants in this suit presented to the clerk of the state court, in which the suit was pending, a petition and bond in the usual form, for its removal to this court, and upon the request of the counsel he was furnished by the clerk with an authenticated copy of the record, which was filed in this court. It is admitted that the petition and bond were not presented to the state court for its action. The removal act of March 3, 1887, as well as the prior acts upon the same subject, provides that a party desiring to remove a suit from a state court to a circuit court of the United States shall file his petition and bond in such suit in the state court, when it shall be the duty of that court, if the petition and bond be sufficient to satisfy the statute, to accept both, and proceed no further in the case. The right of removal is purely statutory, and the jurisdiction of the state court remains undisturbed until a proper petition and bond are presented to that court for its judicial action. It is not sufficient to present the petition and bond to the clerk, who is the court's mere ministerial officer. While it is clear that the right of removal does not depend upon the action or non-action of the state court, it is equally clear that the state court cannot be deprived of its right to decide for itself upon the sufficiency of the petition and bond. The presentation of a proper petition and bond to the state court for its action is a jurisdictional prerequisite. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799. Motion to remand sustained.

## SIOUX CITY &amp; ST. P. R. CO. v. UNITED STATES.

*(Circuit Court, N. D. Iowa, November 23, 1888.)*

## COURTS—FEDERAL COURTS—SUITS AGAINST UNITED STATES—PUBLIC LANDS—OFFICERS—INJUNCTION ACT OF MARCH 8, 1887.

Act Cong. March 8, 1887, which confers upon the court of claims jurisdiction to hear and determine all claims founded on the constitution of the United States, or any law of congress, or on any regulation of an executive department, or on any contract, express or implied, with the government of the United States, and gives the United States circuit courts concurrent jurisdiction with the court of claims, simply removes the exemption of the United States from suit in those cases, and does not confer upon the circuit court jurisdiction to restrain the public land department officials from allowing land to be entered as a portion of the public domain, which is claimed by a railroad company to have been earned under its grant.

In Equity. On demurrer to bill.

Bill by the Sioux City & St. Paul Railroad Company against the United States to have complainant declared the owner of certain lands, and to have the officers of the United States enjoined from disposing of the same, or allowing entries to be made of the same under the homestead, timber culture, or pre-emption laws.

*J. H. & C. M. Swan*, for complainant.

*S. P. Murphy*, U. S. Dist. Atty., for the United States.

**SHIRAS, J.** Complainant in its bill herein filed avers that by the terms of the act of congress of May 12, 1864, there was granted to the state of Iowa, for the purpose of aiding in the construction of a line of railway from Sioux City to the Minnesota state line, every alternate section of land designated by odd numbers for 10 sections in width on each side of the proposed line of railway; that the state of Iowa in 1866 accepted said grant, and by an act of the legislature conveyed the lands to the complainant company, and that the complainant, by the construction of a line of railway from the Minnesota line to Le Mars, Iowa, and by the building of a short line in Sioux City, earned and became entitled to 320,000 acres of land; that a large part thereof was duly selected and patented to the state of Iowa by the secretary of the interior, but that the state of Iowa refused to convey the legal title of said lands to complainant, and on or about March 24, 1884, wrongfully relinquished and conveyed said lands to the United States; that the officers of the United States, to-wit, the secretary of the interior, commissioner of the general land-office, and the officers of the local land-office at Des Moines have wrongfully declared the said lands to be a part and parcel of the public domain, and as such to be open and subject to settlement and entry under the homestead, timber culture, and pre-emption laws of the United States. The bill further avers that certain named individuals have been permitted to make application for the purchase of certain named parts of sections, amounting in all to 720 acres, which it is averred in fact belong to the complainant as part of the lands by it earned under the grant

of 1864; and that, unless restrained from so doing, the officers of the land department will issue patents therefor to the named parties, thereby casting a cloud upon complainant's title. The prayer is that "judgment and decree be rendered declaring your complainant to be the owner of the said lands, and forbidding and enjoining the officers of the United States from selling or disposing of the same, or allowing any entries to be made of the same under said homestead, timber culture, or pre-emption laws." It is averred in the bill that jurisdiction to entertain the bill is conferred upon the court by the provisions of the act of congress of March 3, 1887. The demurrer presents the question whether such jurisdiction exists. In support thereof it is urged that the act of congress of May 12, 1864, granted the lands for the express purpose of aiding in the construction of the named line of railway, and that the company, relying upon such grant, undertook the construction of the road, and that in effect thereby there was created a contract between the United States and the company entitling the company to said lands upon the building of the line of railway as contemplated in said granting act; that the company's claim is based, not only upon the law of congress of May 12, 1864, but also upon the contract which was created between the company and the United States when the former undertook the building of the line of railway pursuant to the terms of said act of May 12, 1864; and that therefore the cause of action is clearly within the provisions of the act of March 3, 1887. That act provides "that the court of claims shall have jurisdiction to hear and determine the following matters: *First*. All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable," etc. It is also provided that the circuit courts of the United States shall have concurrent jurisdiction with the court of claims in all cases where the amount of the claim exceeds one thousand and does not exceed ten thousand dollars.

There can be no doubt that, granting the several allegations in the bill to be true, the complainant has a claim to the lands described in the act of May 12, 1864, and that such claim may be said to be founded, not only upon the act of congress, but also upon the contract which the law would imply in favor of the company, if it be true that, relying upon the grant of lands therein made, the company has built the road in compliance with the terms of the act; but it does not follow that this court has jurisdiction of every possible claim that may arise upon an act of congress or a contract with the government. The act itself expressly restricts the meaning of the words "all claims" by the provision "in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." The effect of the act is to provide that if a party has a

claim of the classes named in the act which he would otherwise have a right to prosecute in a court of law, equity, or admiralty, he shall not be debarred from so doing by reason of the fact that the United States is the adversary party. If, however, aside from the fact that the adversary party is the United States, there exists any reason or rule of law why a court has not jurisdiction of the claim or of the relief sought, then the act of March 3, 1887, does not confer it. Two views may be taken of the true scope of the bill filed in the present cause, and of the claim sought to be established thereby. One is that the purport thereof is to settle, as against the United States, the right of the complainant to the land, which it is averred the state of Iowa wrongfully reconveyed to the United States, and which complainant avers had been earned by it under the terms of the original grant. Assuming this to be the real purpose of the bill, then the subject of the controversy includes many thousands of acres of land, the value of which largely exceeds the limit of \$10,000, which the act of congress itself imposes upon the jurisdiction of this court; and for that reason, if for none other, the court would be without jurisdiction. If it be held, however, that the real matter in controversy is only the 720 acres of land specifically described in the bill, and which it is averred the officers of the land-office have permitted to be entered by the individuals named, then the value thereof, being below \$10,000, would not defeat the jurisdiction, if it otherwise exists. What, then, are the facts touching this 720 acres of land, which complainant shows by the averments of the bill as the grounds for relief sought? In substance it is averred that complainant earned these lands by constructing the line of railway described in the act of May 12, 1864; that the title thereto should have been perfected in complainant by the issuing of patents therefor by the state of Iowa, to whom the same had been conveyed in trust by the United States; that, in disregard of complainant's rights, the state of Iowa had reconveyed the lands to the United States, that the officials of the land department had declared said lands to be open to entry as part of the public domain of the United States, and had permitted the entry thereof by the parties named, who were completing the evidences of entry and occupation; and that, unless restrained, the officers of the land department would issue to the occupants patents for said lands. If these lands form part of the public domain, and are therefore open to entry, then the individuals named in the bill have the right to perfect their proofs of title, and procure the proper evidences thereof. The determination of this question calls for the exercise of judicial judgment and discretion on part of the officers of the land department. It is a well and long settled principle that the courts cannot control the officers of the department in the exercise of duties which are judicial or discretionary in their nature. *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530; *Craig v. Leitensdorfer*, 123 U. S. 189, 8 Sup. Ct. Rep. 85.

In *Litchfield v. Register*, 9 Wall. 575, it was sought to restrain the officers of the land-office at Fort Dodge, Iowa, from acting upon applications

made to prove up pre-emption on certain lands which it was averred had become the property of complainant through certain acts of congress and of the legislature of Iowa. The supreme court held "that the judiciary cannot interfere, either by *mandamus* or injunction, with executive officers, such as respondents here, in the discharge of their official duties unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion." The decision is placed upon the ground that the duty of deciding primarily whether given lands are or are not open to entry as part of the public domain is conferred upon the land department; that the duty is not ministerial, but is judicial, in its nature, and that the courts cannot interfere with the exercise thereof by the department. Before the passage, therefore, of the act of March 3, 1887, it is clear that this court did not possess the right to interfere with the land department in the discharge of the duty imposed upon it, to-wit: of deciding whether any given sections of land were open to entry, or whether the same had been reserved from public sale or had been granted away, and had thereby ceased to be part of the public domain. The cases cited point out clearly the remedy to be pursued by one who claimed that his rights had been denied or ignored.

Does the act of March 3, 1887, change the relations of the judicial and departmental branches of the government in this particular, and confer upon the courts increased jurisdiction in matters of this character? So radical a change in the relations of these branches of the government cannot be supposed to have been intended by congress, unless it is declared in unmistakable language; and such declaration cannot be found in the act in question. Not only so, but the restriction found in the declaration that the claims meant by the act are such claims as the party would be entitled to redress either in a court of law, equity, or admiralty, if the United States were suable, shows that the only purpose of the act was to remove the bar of the non-suability of the United States, and not to confer jurisdiction upon the courts to interfere with the action of the department in matters confided to it by the then existing laws. So long, therefore, as the land department has control of the question whether these lands are or are not portions of the public domain open to entry, and is dealing with that question, its action is beyond the control of this court, and the court cannot, as is asked in the bill filed herein, enjoin the officers of that department from deciding that question primarily, nor from executing the usual evidences of title if the decision is in favor of those claiming the land under the homestead, pre-emption, or timber culture laws. As the averments of the bill show that the land department is in the exercise of its undoubted jurisdiction in entertaining, considering, and deciding upon the claims of the parties named to hold said lands under the homestead laws of the United States, it follows that this court has not the jurisdiction to control or interfere with the action of the department in the premises. The facts averred in the bill touching the 720 acres of land specifically described do not present the question whether the court has the jurisdiction to hear and determine whether the complainant or the United States is the owner in fact of a given sec-



tion or sections of land. If the bill averred that the complainant had, by building the line of railway in accordance with the terms of the act of congress, earned certain lands, and that the United States refused to convey the legal title thereof to complainant, then it might be that jurisdiction to hear and determine that question might exist, provided the value of the lands did not exceed the limit fixed by the act itself, and provided further that the land department had not the question before it for consideration and determination. In other words, if the sole parties in interest were the complainant and the United States, the court might have jurisdiction to hear and determine the question whether the complainant had earned certain lands, and was therefore equitably entitled to demand a conveyance of the legal title from the United States. However this may be, and not deciding it, it still remains clear that when third parties assert rights to the lands under the homestead laws, and are proceeding according to law to submit their claims to the determination of the land department, then the primary jurisdiction to hear and determine the questions involved is with the department, and the court cannot interfere therewith. If the department holds that the lands are open to settlement, and evidences of title are executed to the applicants, then by suit against the latter the legal questions involved may be brought for adjudication before the courts; but so long as the matter is pending before the department the jurisdiction of the court is, to say the least, in abeyance, and cannot be invoked. The demurrer to the bill is therefore sustained.

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BEIRNE *et al.* v. WADSWORTH.

(Circuit Court, D. Minnesota. November 14, 1888.)

**EQUITY—PRACTICE—DISMISSAL FOR WANT OF PROSECUTION.**

Under circuit court rule 69, giving a complainant three months after issue joined in which to take depositions, a cause will not be dismissed for want of prosecution for nine months' delay, where it appears from the affidavits of complainant's counsel that from a conversation with defendant's counsel they were led to believe that a compromise was mutually desired and would be effected, and that they in good faith submitted the matter to their clients, who lived in Ireland, and, not having been yet advised of their intentions as to the proposition, took no proof, understanding defendant to agree that none need be taken pending negotiations, though from the statement of the conversation in the affidavits of defendant and his counsel such impression and delay were not warranted thereby.

In Equity. On motion to dismiss for want of prosecution.

Bill by Sarah Beirne and James Beirne, her husband, to set aside a conveyance made by said Sarah Beirne to defendant, Harry H. Wadsworth. On the 26th day of September, 1888, the cause being at issue on bill, answer, and replication, defendant moved to dismiss the cause for want of prosecution, basing his motion on his affidavit, in which he stated that the cause had been at issue upon the pleadings since Decem-

ber 14, 1887, and that more than the three months provided for the taking of proof in causes pending in the circuit court under rule 69 had elapsed, and no attempt to take testimony in support of the bill had been made. Upon this a rule to show cause was moved and made, which, with copies of the motion and defendant's affidavit, was served on complainants on the same day. Complainants, to show cause against such dismissal, filed the affidavits of A. B. Choate and Thomas J. Walsh. The affidavit of Mr. Choate set forth that the complainants were subjects of the kingdom of Great Britain and Ireland, living in Ireland, and had never been in America; that all his consultations with them were by correspondence; that they first employed Richard W. Clifford, of Chicago, Ill., as their solicitor, in whom they reposed special confidence; and that all the correspondence was with him, which made communication slow and difficult. Affiant further stated that since the cause was at issue a proposition had been submitted to him by defendant for a settlement of the controversy, of which he thought favorably, and so informed defendant. Affiant wrote Mr. Clifford of the proposition for transmission to complainants, and informed Mr. Clifford that in his opinion there was a fair prospect of a satisfactory adjustment of the matter. For this reason no depositions were taken in support of the bill, as the most of the testimony would have to be taken in Ireland, at great expense, which they hoped to obviate by a settlement. Affiant further stated that he had not heard from complainants since the proposition was made, but believed an answer would soon be received, and the cause would either be settled and dismissed or proofs taken to support the bill. He further stated that it was one of the terms of the proposed settlement that the cause should stand without prosecution during the pendency of negotiations, and that the attorneys for both parties agreed to unite in a proceeding to determine the interest complainants had in the land mentioned in the bill, and that said cause should be dismissed upon the reconveyance by defendant of the interest conveyed to him by complainants and the conveyance to defendant of a certain interest in said land, the exact amount of which he was unable to state from memory. The proposition was made by M. B. Koon, solicitor for defendant, to affiant. The affidavit of Mr. Walsh stated that he was an attorney residing in Chicago; that since the election of Hon. Richard W. Clifford as judge of the circuit court of Cook county, Ill., affiant had been attending to this cause in his behalf; that the important witnesses and the complainants themselves resided in Ireland; and that the complainants, being poor and unable to advance means to carry on the suit, were therefore desirous to settle the same; that in December and January last, Mr. Choate communicated the terms of a proposed adjustment of the controversy to Judge Clifford; that communication had been had with complainants regarding it, but that they had not as yet advised affiant of their positive intention to accept it, but they were induced from the fact of proposition being made to believe that a settlement would be reached; that, had affiant not been so led to believe, the depositions would have been taken; that complainants were anxious to dispose of the cause, and had a mer-

itorious cause of action; that they were willing to settle the matter on account of their poverty, if a settlement could be made, and would prepare for a speedy trial as soon as it became apparent that a settlement could not be made.

In support of the motion the defendant filed his affidavit, repeating substantially the allegations of the former one, and adding that he knew personally that no true testimony in support of the allegations of the bill could be procured, which he believed to be the reason none was taken. He further stated that he did not believe complainants ever intended to prosecute the suit, but brought it by the influence of designing persons. He denied the statements that complainants were poor, upon information received from them; denied making any proposition himself, or through any other person, looking towards a compromise; averred that there never was any prospect for a settlement of the suit, and that neither complainants nor their counsel were ever led to believe anything of the kind by him or his counsel. He also denied that complainants had any meritorious cause of action, and alleged that communication with them, if desired, could be had within 12 hours. The affidavit of M. B. Koon, defendant's counsel, stated that the object of the suit was to set aside a conveyance made by complainant Sarah Beirne to defendant of a two-fifths interest in land in Minneapolis; that affiant never consented to any delay or extension of the time for taking depositions therein, and that he was never asked to do so; denied that the cause was delayed or postponed by reason of any proposition to compromise, and alleged that none had been talked of between him and complainants' counsel; and stated that the only conversation that could be so construed was one occurring about the time defendant's answer was filed, in which affiant told Mr. Choate that all his clients claimed to own was an undivided one-twentieth part of the land, and that he (affiant) thought if they had any interest at all it was greater than that, and that if they would dismiss their suit defendant would as speedily as possible ascertain complainant's interest; and that, if he succeeded in establishing their interest, he would give them what they claimed, and take whatever interest he established over and above the undivided one-twentieth, for his own share and for his trouble and expense; that Mr. Choate said he could not answer without consulting the Chicago counsel, and thereupon the matter was dropped, and affiant had no recollection of its being mentioned again. Affiant explained in detail his reasons for thinking complainants entitled to one-twentieth of the land, and for making the proposition; and also stated that he was quite well acquainted with the facts, and did not believe complainants had any cause of action.

*A. B. Choate*, for complainants.

*M. B. Koon*, for defendant.

SHIRAS, J. With some hesitancy, I overrule the motion for an order dismissing the cause for want of prosecution. From the affidavits filed, while it clearly appears that complainants are in fault in not preparing the cause for trial, yet the excuse offered may explain the reasons there-

for. It is certainly the duty of complainants' counsel to either reach a settlement or prepare the case for trial. Unless such action is had, defendant has leave to renew his motion at the next term.

*CLEWS et al. v. BARDON et al.*

(Circuit Court, E. D. Wisconsin. November 22, 1888.)

1. BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF DIRECTORS—EXCESSIVE LOANS.

A national bank was organized with a capital of \$60,000. The promoter of the bank took 880 shares of stock in his own name, and procured the defendants to be directors, as well as a person to be elected cashier by them. The directors were not acquainted with the banking business. The proposed cashier was known to the directors, at least by reputation, and was supposed by them to be competent and trustworthy, and of considerable experience in the business, and they had full confidence in his integrity and ability to take charge of the bank. The cashier acted as manager of the loan and discount business of the bank, and the directors merely as advisers, when applied to. The promoter of the bank knew, and the other stockholders were presumed to know, that the directors were wholly unused to the banking business. *Held*, that the directors were not liable for the acts of the cashier in violation of the banking law, done without their participation or knowledge.

2. SAME.

The cashier made loans, in excess of 10 per cent. of the capital, to a manufacturing corporation supposed by him and by the public to be entirely solvent. None of the directors knew of the loans when made, but after a loan of \$8,000 in excess of the lawful limit had been made, the cashier informed one of them of such loan, and was by him advised to call it in when due; and thereafter such director's advice was asked as to a further discount to the same corporation, and he disapproved of it, and it was not made. Afterwards further loans or discounts were made to the same corporation, without the knowledge or consent of any of the directors. About eight months after the bank commenced business, one or more of the debtors of the bank failed, and the directors thereupon took the active management into their own hands. *Held*, that none of the directors had knowingly violated, or knowingly permitted to be violated, any of the provisions of the banking law, and were not liable for such violation by the cashier.

3. SAME—OFFICERS MAY MANAGE BANK.

Under the banking law, the management of a national bank may be exercised either by the directors, or by the cashier or other officers; therefore the directors are not liable for the illegal or negligent acts of the cashier or other officers by whom the bank is managed, if they have no knowledge of such acts, and do not connive at them, or willfully shut their eyes and permit them.

4. SAME—COMMON-LAW LIABILITY.

It seems that the liability of directors of a national bank is substantially the same under the banking law as at the common law.

(Syllabus by the Court.)

In Equity. On final hearing.

*Wenzell & Tiffany*, (John M. Gilman, of counsel,) for complainants.

*Pinney & Sanborn*, for defendants.

BUNN, J. This suit is brought by the complainants as stockholders in the First National Bank of Superior, Wis., against the defendants as directors of said bank, to recover losses incurred by the bank in consequence of certain loans and discounts made by the bank, which turned

out to be bad, on the ground of the alleged negligence of the said directors in permitting such loans to be made in excess of the legal limit provided by the national banking act. The charge made by the complainants is that the directors negligently allowed the cashier of the bank, one T. K. Alexander, to make loans of money to the amount of \$24,000, to the Paige-Sexsmith Lumber Co. and G. W. Sexsmith & Sons, in excess of the legal limit. Complainants also allege that the defendants, as such directors, negligently settled and compromised the several claims against these firms at 20 cents on the dollar, whereby a loss was also sustained by the bank. This is the substance of the complainants' claim against the directors. The action is brought, and the jurisdiction of this court invoked, under and by virtue of the provisions of the act of congress known as the "Banking Act;" which provisions are as follows:

"Sec. 5147. Each director shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly manage the affairs of the association, and will not knowingly violate, or permit to be violated, any of the provisions of this act," etc.

"Sec. 5200. The total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth of the capital, etc. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of such association shall be forfeited. \* \* \* And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The question to be determined is whether or not the complainants make a case against the directors, under the provisions of law. There is not much dispute about the facts. The bank was organized in February, 1882, with a capital stock of \$60,000, and D. M. Sabin, of Stillwater, chosen as its president. The promoter of the bank was one C. Edgar Haupt, who subscribed 380 out of 600 shares of stock, and obtained subscriptions for most of the other shares. He solicited and induced the defendants, who resided at Superior, to become directors, and to subscribe small amounts of stock and brought from St. Paul Mr. T. K. Alexander, who had been acting as cashier of the Second National Bank of St. Paul, and recommended him as a proper person to choose as cashier of the new bank, who was chosen on the organization of the bank to act as such; the directors taking a bond from him in the sum of \$30,000. Alexander was known to the directors at Superior, by reputation at least, and was supposed by all to be entirely competent and trustworthy, and of considerable experience in banking business. It appears that the directors and stockholders had full confidence in the integrity and ability of Alexander to take charge of and run the bank, and some

of the officers connected with the Second National Bank of St. Paul, where Alexander had acted as cashier, took stock to the amount of \$14,000 in the new bank, which was put in operation in May, 1882; Alexander acting as cashier and principal manager of the loans and discounts of the bank. The defendants never had any experience in banking business, and undertook to act as directors without compensation. Haupt was the originator and promoter of the bank. He virtually chose the directors and cashier, and, for himself and others, whom he represented, subscribed for most of the stock. He knew, and the other stockholders presumably knew, that the local directors were wholly unused to banking methods and business, and no doubt it was the general understanding of all interested that Alexander, with such assistance and advice as he might from time to time seek and obtain from the directors, was to manage the affairs of the bank. He, in fact, for the first seven or eight months, did mainly run the bank, and make all the loans and discounts; the directors giving such advice and information from time to time, in regard to the standing of customers, as the cashier required. From August 5 to August 20, 1882, the cashier loaned to the Paige-Sexsmith Lumber Co. \$10,000, which was \$4,000 in excess of the legal limit. No part of this amount was loaned with the knowledge or consent of either of the defendant directors. Alexander says in his testimony that he cannot recall how it came about that he violated the law, but he thinks that it was through carelessness; that the company stood so high financially that he thinks he was careless in the matter. After one loan of \$3,000 and another of \$6,000 had been made, Alexander told defendant Bardon that he had loaned the Paige-Sexsmith Lumber Co. \$9,000 on the indorsement of the Sexsmiths and Paiges, and Bardon told him it was too much to loan to any one firm without security, inquired as to the time the notes ran, and advised him to call them in. Shortly after this, Alexander consulted with Bardon as to making a further loan to the same parties, and Bardon advised him not to make it, and it was not made. About August 20, 1882, Alexander made them a further loan of \$1,000, without consulting with any of the directors. Afterwards, in the fall of 1882 and succeeding winter, Alexander discounted the notes of G. W. Sexsmith & Sons indorsed by Paige-Sexsmith Lumber Co., to the amount of \$20,000 more, without consulting with the directors, and without their knowledge or consent. These parties were large lumber firms, doing business at Superior and at Fond du Lac, were well known to Alexander, and were of high standing financially. They were borrowing largely at several leading banks. Alexander says he got his information regarding their financial credit from one or two of the Oshkosh banks, from Bradstreet's, and from his knowledge of the firms at Superior. His answers to inquiries respecting their standing were all to the effect that they were of excellent standing, and good financial strength. Indeed, there is nothing in the evidence to show that the financial credit of these corporations and firms were at all suspected at the time the loans were made. Alexander says that he was familiar with the law, but that he did not think that the discount of the last \$20,000 of notes came within the pro-

hibition, but that it was a discount of commercial or business paper, already owned and in circulation; that he had the law in mind, but did not think he was violating it. About January 1, 1883, some eight months after the bank was organized, one or more of the debtors of the bank having failed, the defendants, the resident directors, took the active management of the bank into their hands, and have run it ever since. The Paige-Sexsmith Lumber Co. and George W. Sexsmith & Sons soon after failed, and the directors, after a full investigation of their affairs, sold the notes the bank held against them for 20 per cent. of their face value, which was, no doubt, all that could be obtained for them, though it afterwards turned out, on settlement of their estates, that about 24½ per cent. were paid on these notes. But I think the directors acted prudently in making sale of the notes as they did. The comptroller of the currency at Washington ordered an assessment of 40 per cent. on the capital stock, to make good the losses, which was paid by the stockholders in full.

Though the testimony is quite voluminous, these seem to be the leading facts on which the case must be decided, and the question is whether there is enough proven on behalf of the complainants to make the defendants liable, under the provisions of the banking act, for the loss to the stockholders. There is not, if by a proper construction of the statute it is necessary to show that the directors had actual knowledge, or in some way participated in, connived at, or assented to, the violation of the law on the part of the cashier; because there is no evidence even tending to show any such knowledge, participation, or complicity on the part of directors. The evidence shows, on the contrary, that they had no knowledge of any such violation of the law until after it took place; nor did they approve or consent to it. But, as I understand the position of complainants' counsel, it is that such actual knowledge or consent need not be shown; that it is enough to show that the directors, who, by virtue of their office, are vested with the authority and duty to look into and manage the affairs of the bank, if they conferred that authority, and imposed that duty, upon the cashier, and allowed him to manage the bank,—that the directors are legally chargeable with knowledge of all that the cashier did. But I cannot think that such a mere constructive knowledge of or assent to the illegal acts of the cashier, in the circumstances of this case, is what is contemplated by the statute as sufficient to charge the directors personally, with all the consequences of such illegal acts. This might and probably would be so, if the exclusive duty of managing the active affairs of the bank was devolved upon the directors. But it seems clear enough that, under the law as it stands, and as it stood in 1882, the management of the bank might be intrusted either to the directors or to the cashier or other officers. If this was the case, then it would be just as legal and proper to intrust the matter of making loans and discounts to the cashier, as was done in this case, as to intrust the same duty to the directors. And every business man knows as a matter of common observation, throughout this part of the country at least, that business is generally left with the officers of the bank, rather

than with the directors. And in all such cases the position of a director would be intolerable if, having his own money invested in the bank, and himself acting without compensation, and having exercised all the diligence in his power in the proper selection of the officers, he were to be chargeable with the mistakes and shortcomings of such officers. I think the banking act places their liability upon the true ground, and that it stands about as it would in the like circumstances at the common law. In either case the director is bound to good faith. He must act honestly. He must not commit fraud, nor be privy to it, nor willfully shut his eyes, and abstain from making inquiries. If he has knowledge that an illegal transaction is to be enacted by the officers in charge, and consents to it, or connives at it, or willfully shuts his eyes, and permits it to be done, or is guilty of such gross and willful neglect of duty as amounts to bad faith, he will be held responsible. This was so at the common law, and is no doubt so under the banking act. But where the directors act in entire good faith, and select a person to manage the affairs of the bank, whom they have every reason to believe is competent and honest, they themselves having had no experience in banking, they have done just what the stockholders themselves would have done in the same circumstances. They have acted prudently, and with proper caution, as ordinarily prudent business men would act in reference to their own affairs. Under such circumstances, to hold them chargeable with knowledge of all the illegal acts of the person selected to manage the bank would be a harsh rule. The honor of being a resident director would scarcely compensate for such a responsibility. The directors, in this case, I think used all proper caution and diligence in the selection of a cashier. He was the person recommended by the principal stockholders, and the one in whom they placed their confidence. His reputation was good, and the directors had entire confidence in his honesty, and ability to run the bank; and, when they had reason to distrust his competency, they took the management of the bank into their own hands. The evidence does not even raise a suspicion that they did not act in entire good faith from first to last, and I think they acted with ordinary prudence and discretion. They had their own money invested in the stock of the bank. They were giving a portion of their time to forward the common interests of the bank, without pay. Under these circumstances, to hold them liable for the mistakes of the cashier, whom all trusted alike, in making loans in excess of the statutory limitation, to which the directors were not privy, nor consenting, would seem to be harsh and inequitable. And I cannot think that such a construction of the act of congress can be maintained, and I am the more confirmed in this view by the few adjudged cases that have arisen under these provisions. See *Movius v. Lee*, 30 Fed. Rep. 298; *Witters v. Sowles*, 31 Fed. Rep. 1. Also cases adjudged upon general principles of common law and equity jurisprudence, as follows: *In re Denham*, 25 Ch. Div. 752; *Dunn's Adm'r v. Kyle*, 14 Bush, 134; *Jones v. Johnson*, (Ky.) 6 S. W. Rep. 582; *Assignee v. Caperton*, (Ky.) 8 S. W. Rep. 885. The complainants' bill must be dismissed, with costs.



CENTRAL TRUST CO. OF N. Y. *et al.* v. WABASH, ST. L. & P. RY.  
Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. November 13, 1888.)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—FORECLOSURE—COSTS.

An insolvent railroad corporation, the various divisions of whose road were incumbered by separate mortgages, and the whole by a junior general mortgage, filed a bill praying for the appointment of receivers of the whole of its property for the benefit of all parties concerned, and receivers were appointed. Subsequently the trustees in the general mortgage filed a bill to foreclose, and the same was consolidated with the first bill, and a sale took place under a decree foreclosing the general mortgage, subject to all the divisional senior mortgages. Certain trustees of divisional senior mortgages, who had been made parties defendant to the original bill, and had employed counsel to protect their interests, thereupon filed claims against the proceeds of sale, to be reimbursed for their own services and expenses for counsel fees pending the proceedings. On a reference to a master, said claims were allowed, and taxed as costs, but the claim of one trustee was disallowed on the ground that, pending the proceedings, it had filed a bill in another court to foreclose the divisional mortgage in which it was trustee, and had procured the appointment of other receivers for that division. *Held*, on exceptions to such ruling, that it was erroneous; that such trustee was entitled to reimbursement for services and expenses by it incurred as a party defendant to the original bill, up to the time its division was withdrawn and other receivers thereof were appointed.

2. SAME.

*Held, further*, that inasmuch as the general mortgage bondholders had consented to the allowance of similar claims in favor of other trustees in senior divisional mortgages, as recommended by the master, it had established the rule for the taxation of costs in the particular case, and that the court would not re-examine the question whether such allowances were proper.

On Exceptions to Master's Report on Claim of United States Trust Company and Edward W. and Theodore Sheldon.

The order of November 9, 1885, referred to in the opinion is as follows:

"Now, on this day come the Central Trust Company of New York, and James Cheney, by Butler, Stillman & Hubbard, and Phillips & Stewart, their solicitors, and the Mercantile Trust Company of New York, by H. S. Greene, its solicitor, and upon motion it is ordered that this cause be referred to Edmund T. Allen; as special master, to take and report, with all convenient speed, evidence and his conclusions on the following questions and matters: \* \* \* (7) Said master will also report the probable amount of costs incurred in this cause in this court, and in all courts entertaining ancillary jurisdiction thereof; also the amount of reasonable compensation to be paid to said trustees, receivers, their solicitors and counsel, for services already rendered. \* \* \* (11) Said master will also take evidence and report upon such other matters pertinent to the issues made herein as may be brought before him. It is ordered that said master take such portions of the evidence on said questions and matters as may be taken most conveniently in the city of New York or elsewhere, particularly when a number of witnesses reside in said city, or away from the city of St. Louis."

The master reported June 11, 1887, as follows, under the eleventh paragraph of said order of reference:

"A large amount of evidence was produced before me in respect of claims for services rendered in this litigation by trustees of the senior mortgages upon

the property of the Wabash Railway Company, by trustees of mortgages upon property leased by said railway company, and for services rendered such trustees by their respective solicitors; also in respect of claims for services rendered by solicitors who have appeared in this cause for lessor corporations, made defendants in the original and cross-bills, the property of which lessor corporations came into the possession of the receivers. The purchasing committee contest the right of the trustees of both classes above named, to be paid for their services, or to have their costs, as between solicitor and client, paid out of the fund; and contest the right of the lessor corporations to have their costs as between solicitor and client, taxed against the fund. It is contended by the purchasing committee that the trustees above referred to were not necessary parties to the cross-bills of the Central Trust Company of New York and James Cheney, trustees, under the general mortgage, nor to their bill for the foreclosure of the general mortgage, removed from the state court, and consolidated with the original cause, nor to the cross-bill of the Mercantile Trust Company, trustee under the collateral trust mortgage; that the interests of all the trustees of mortgages other than the general mortgage and collateral trust mortgage were correctly stated in the original bill of complaint of the Wabash Company, or in the amendment to its original bill, and in the several cross-bills above mentioned, and in the petition of the Central Trust Company of New York and James Cheney, removed from the state court; that no relief was sought by said defendants and cross-complainants against the interests represented by the trustees, whose claims for compensation and costs are now under consideration; that the decree entered in this cause recognized and protected all the interests represented by said trustees; that no necessity existed for any action on the part of said trustees in respect of this litigation, and hence no occasion arose for the employment of solicitors to represent them in the cause; that it has not been the practice of courts of chancery to make allowances to parties so related to the cause for compensation for services rendered, nor to tax their costs, as between solicitor and client, to be paid out of the proceeds of a sale insufficient to satisfy junior mortgagees who sought and secured the foreclosure of their mortgages; that in such cases the practice has been to add the taxable costs, particularly as between solicitor and client, to the securities of the senior mortgagees. These contentions of the purchasing committee are well sustained by the English and American cases. They seem to me, however, to overlook certain features of this litigation, which are, so far as my reading goes, exceptional, and which may well warrant exceptional treatment. Whatever it has since become, this suit was not, in its inception, a suit by a junior mortgagee to foreclose his mortgage, nor by junior mortgagees to foreclose their mortgages, without interfering with or trenching upon the rights of prior mortgagees. The original bill filed by an insolvent debtor corporation prayed, among other things, 'that your honors will cause all the liens upon said property, or any part thereof, and all rights, claims, and equities of all persons interested therein, to be ascertained, defined, and determined, and that the proceeds arising from the sale of such property, or any part thereof, be applied under the orders and decrees of this court, according to the rights, interests, and equities of parties or persons interested in said fund.' This was, then, at the commencement, a proceeding for the administration of the affairs of this insolvent complainant, and might have resulted in the sale of all its assets free from all the many incumbrances upon it, and an application of the proceeds of such sale, 'according to the rights, interests, and equities of parties or persons interested in said fund.' In such cases—that is, cases of administration of an estate—it was the practice of the English court of chancery to pay the costs of the proper and necessary parties in the first instance, and before the fund was administered. *Ford v. Earl of Chesterfield*, 21 Beav. 426.

"While the outcome of this litigation has been the foreclosure of the two junior mortgages, leaving unimpaired the rights and equities of senior mortgagees, the proceeding has never ceased to be what it was at its commencement, a suit for the administration of the estate of the Wabash Railway Company, an insolvent corporation. The receivers were appointed under the prayer of the original bill filed by the Wabash Company. A motion for their appointment under the cross-bill of the general mortgage trustees, and under the petition of those trustees removed from the state court, was denied. The original cause was consolidated with the removed cause, and the two causes culminated in a final decree, which was a decree in one cause as well as in the other. The consolidated cause partook of the characteristics of each of its constituent parts, and in determining the question under discussion, the character of the original bill should, in my judgment, be kept in mind. From the original bill the insolvent condition of the complainant corporation was clearly apparent. It averred that large sums of money were due to a multitude of laborers; that the corporation was indebted to the St. Louis, Iron Mountain & Southern Railway Company in the sum of \$1,150,091.50 for advances; that the negotiable paper of the corporation, to the amount of over two millions of dollars, was outstanding, which paper was indorsed by certain parties, who held collateral trust bonds as security for their indorsements. The prayer was made that the court would make such orders as would enable the receivers to be appointed 'to protect the indorsers upon said promissory notes.' It averred that the complainant was indebted to a number of other railroad corporations on balances arising from exchange of business, and that, unless such indebtedness should be promptly paid, the earnings of the complainant's property would be greatly impaired. It averred that the floating debt of the corporation amounted in the aggregate to the sum of \$4,784,145.01; but whether this large sum was inclusive of any or all of the amounts previously above stated, did not clearly appear. To any one at all familiar with the history of railroad receiverships during the last twenty years, such recitals as above stated foreboded a cloud of receivers' certificates. There would, in the nature of things, be no other method, ordinarily, of providing the means for paying off promptly labor claims, traffic balances, and other pressing preferential demands, and, at the same time, for keeping the property in repair, paying its current operating expenses, rentals, taxes, and interest on underlying mortgages. Indeed, on the 30th day of May, 1884, the day after the receivers were appointed, the complainant, by its petition, prayed for an order directing the receivers to protect by their obligations as receivers the promissory notes above mentioned, as they should severally mature, amounting in the aggregate to \$2,300,000. The case of *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140, had been decided at the October term, 1882. In that case Mr. Justice BLATCHFORD commented upon the want of equity in the objections of first mortgagees (who had been made parties to a bill of foreclosure by a second mortgagee) to the indebtedness incurred by the receiver, under the orders of the court, because they had been lying by and seeing the court and the receiver dealing with the property in the manner complained of, and contented 'themselves with merely protesting generally, and disclaiming all interest under the receivership.' 106 U. S. 308, 1 Sup. Ct. Rep. 159. After these comments of Judge BLATCHFORD, considering the averments of the original bill, and the petition of the complainant filed immediately after the appointment of the receivers, it does not seem to me reasonable to claim that no necessity existed for any action on the part of trustees of senior mortgages, nor occasion for the employment of solicitors to represent them in this cause. Again, the purchasing committee are inconsistent in contesting these claims. On the 22d day of September, 1886, General Swayne testified before me that the purchasing committee consented to the payment out of the fund to James R. Jessup, as one

of the trustees named in the mortgage of the Great Western Railway, and as trustee named in the mortgage to secure the consolidated sinking fund bonds of the Toledo, Wabash & Western Railroad, and as trustee named in the mortgage of the Illinois & Southern Iowa Railway, he having 'acted also as counsel for himself, and in one or more instances for his co-trustees,' the sum of three thousand dollars. By reason of this evidence of General Swayne I recommended an order making such allowance, which order was made, without objection from any one, on the 6th day of October, 1886, and the money paid by me accordingly from funds subject to my check as commissioner. These considerations induce me to recommend the allowances to trustees and their solicitors hereinafter stated. The foregoing allowances are all that I think should be made, on the evidence produced before me, to trustees named in mortgages upon property owned by the Wabash Railway Company, at the date of the receivership, and to their solicitors. Messrs. Edward W. and Theodore Sheldon made proof before me of services rendered as solicitors to the United States Trust Company, the trustee named in the Omaha Division mortgage. Inasmuch, however, as the United States Trust Company, on the 6th day of January, 1886, secured an order for the surrender to it of the property described in its said mortgage, and has since prosecuted the foreclosure of said mortgage in a separate proceeding, I am of the opinion that they and the trust company should be remitted to that proceeding for such allowances regarding their services as they may show themselves entitled to receive, from funds arising from such foreclosure. EDMUND T. ALLEN, Special Master."

*Theodore Sheldon*, for intervenors.

*John W. Noble and Wells H. Blodgett*, for receivers.

THAYER, J. 1. The master, in his report filed June 11, 1887, bases his right to report upon the claims for compensation made by trustees under senior mortgages upon the eleventh paragraph of the order of November 9, 1885, and not upon the seventh paragraph. His right to investigate and report on claims of trustees in underlying mortgages under the eleventh paragraph of that order has been heretofore recognized by the court by making numerous allowances on such claims in accordance with the master's recommendation. I must accordingly overrule the point now made that the master had no authority under the order of reference to consider the claims of the United States Trust Company, and Messrs. E. W. and Theodore Sheldon, its solicitors. That question cannot be treated as now open for consideration. The master's power to report on those claims is derived from the eleventh paragraph of the order of November 9, 1885.

2. The question whether trustees under senior mortgages, and their solicitors, ought to be allowed compensation out of the funds realized from the foreclosure sale under the general mortgage, is a question which the master has examined at some length in his report. His conclusion is that, inasmuch as this proceeding was originally brought by an insolvent corporation to obtain administration of its affairs, and might have resulted in a sale of all of its assets free from all incumbrances, that all of the trustees in underlying mortgages who were made parties to the proceeding, rightfully employed counsel to guard their several interests, and are entitled to compensation out of the fund realized from the foreclosure sale. It is unnecessary to re-examine the master's conclusion on

that point, at this stage of the case. With the consent of the purchasing committee, the court has already made numerous allowances to the trustees of underlying mortgages, and to their solicitors, in accordance with the master's views. That settles the rule for the taxation of costs, so far as the present case is concerned, and it should be applied to the claim preferred by the United States Trust Company, unless it differs essentially from claims in favor of other trustees that have heretofore been allowed.

3. I cannot regard the fact that the United States Trust Company began proceedings to foreclose its mortgage on the Omaha Division, and at a certain time withdrew that division of the road from the custody of the receivers appointed in this case, as of sufficient importance to distinguish its claim from those of other trustees in underlying mortgages whose claims have been recognized. It may be assumed that the trustees in all of the underlying mortgages were entitled to compensation out of the property covered by their respective mortgages, for all of the services by them rendered, or expenses incurred, while they were parties to this suit, in guarding their respective interests in the property then in the custody of the court. That being so, those trustees of underlying mortgages who did not begin foreclosure proceedings, or withdraw the property in which they were concerned from the court's custody, appear to me to have no greater right to have the expenses by them incurred in this proceeding taxed as a part of the costs of this suit, than a trustee who did at a certain time withdraw property in which he was concerned, and begin foreclosure proceedings against it. The distinction which the master made as against the United States Trust Company appears to me to be purely arbitrary. Such allowances as have heretofore been made in favor of trustees in underlying mortgages and their solicitors, can only be sustained on the ground that, having been made parties to a proceeding which might have resulted in a sale of all the property of the Wabash system free from all incumbrances, and having been forced to employ counsel to guard their several interests, they are entitled to reimbursement out of the fund realized in this case for the trouble and expense so incurred. The same reasons, in my opinion, necessitate an allowance to the United States Trust Company for all expenses by it incurred, at least up to the date of its withdrawal. If the allowance is right in one instance, it is in the other.

4. According to the view I have taken it is unnecessary to recommit the matter to the master. I have therefore examined the testimony before the master with respect to the amount of compensation that should be allowed the United States Trust Company and its solicitors, and I conclude that an allowance of \$500 to the former and \$1,500 to the latter will be adequate, considering the allowances that have already been made to other trustees and solicitors for similar services and expenses.

The fifth paragraph of the order made herein on April 14, 1888, (overruling the exception to the master's report, filed June 11, 1887, on the claim of the United States Trust Company and Messrs. E. W. and Theodore Sheldon) is rescinded, and claimants' exceptions, filed June 29, 1887,

are sustained, and an allowance is hereby made as above indicated of \$500 to the United States Trust Company, and \$1,500 to Messrs. E. W. and Theodore Sheldon.

### FOSTER v. MANSFIELD, C. & L. M. R. Co. et al.

(Circuit Court, N. D. Ohio, E. D. August 24, 1888.)

#### 1. RAILROAD COMPANIES—BONDS AND MORTGAGES—COLLATERAL AGREEMENTS—CONSTRUCTION.

A railway company employed a construction company to build some of its track, agreeing to issue bonds therefor to a certain amount per mile of track, in installments, as sections of the work should be completed. By a subsequent agreement the bonds were delivered in advance of the building of the track, the construction company agreeing to take care of and pay all interest accruing before the railway became in a condition for traffic, and the former agreed to reimburse the latter for all interest paid, not properly chargeable to it, out of the first earnings of the road. *Held*, that the construction company was only bound to pay interest on so many of the bonds as it received and used to which it was not entitled under the construction contract.

#### 2. SAME—RIGHT TO FORECLOSE.

The agreement of the construction company to pay the interest is no defense to a bill for foreclosure of a mortgage to secure said bonds and coupons, brought by the trustees in the mortgage at the instance of a corporation to whom the bonds were negotiated.

#### 3. SAME—DECREE—ACTION TO SET ASIDE—LACHES.

In such case the property was purchased at the foreclosure sale by another railway company, which held the bonds, and a bill was filed by a stockholder of the mortgagor to set aside the sale as fraudulent. The fraud was predicated on an alleged defense to the foreclosure bill, which the directors, a majority of whom were averred to be connected with the creditor company, ordered withdrawn, whereby a decree *pro confesso* was taken. All the facts charged in the bill appeared to have been, on the face of the foreclosure proceedings, easily accessible to complainant, if not already known to him, and well-known to the officers of the corporation. No concealment of any of the transactions was charged, and no reason shown for the delay in filing the bill, which was 10 years after the sale. *Held* that, regardless of fraud in the transaction, the bill showed such laches that equity would not relieve complainant, and a demurrer should be sustained.

#### 4. SAME—CORPORATIONS—STOCKHOLDERS—ACTIONS.

A stockholder may file such a bill on behalf of the corporation, after the directors have refused to do so.

#### 5. COURTS—FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

A federal court has jurisdiction of a suit to set aside its former decree for being fraudulently obtained, although by reason of present citizenship a purely original bill between the parties could not be maintained, as such a suit is but a continuation of the former controversy.

In Equity. On demurrer to bill.

Bill by Charles Foster against the Mansfield, Coldwater & Lake Michigan Railroad Company and others to set aside a foreclosure decree and sale of the property of said company as fraudulent. Demurrer sustained.

Doyle & Scott, for complainant.

*J. Twing Brooks and R. P. Ranney, for demurrants.*

Before JACKSON, Circuit Judge, and WELKER, District Judge.

JACKSON, J. The object and purpose of the present bill is to open the decree of this court, rendered in 1877, in the foreclosure proceeding in the case of "Thomas A. Scott and George W. Cass vs. The Mansfield, Coldwater & Lake Michigan Railroad Company," under which said company's line of road, with its franchises and property, was sold. The decree in said cause is sought to be set aside and vacated on the ground that it was obtained by fraud, and worked an injury and wrong to said railroad company, which the corporate management, after request on the part of the complainant as a stockholder therein, have refused or neglected to take steps to remedy or redress. There is no want of jurisdiction growing out of the fact that some of the defendants to the present suit are citizens of the same state (Ohio) with the complainant, inasmuch as this suit may properly be regarded as ancillary or supplementary to the original suit in which the decree complained of was made. It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties. See *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609-633; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; and *Railroad Co. v. Railroad Co.*, 111 U. S. 505, 4 Sup. Ct. Rep. 583. It is also well settled that a shareholder may interpose and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuse or fail to act in the matter. Generally, when it is necessary to sue in order to enforce corporate rights or avert wrongs threatening the corporate interests, the suit must be brought by the corporate management in the name of the corporation. This rule applies to suits both at law and in equity. Individual shareholders are not, ordinarily, the proper parties to sue or defend on behalf of corporate interests. If, however, the corporate management fails or refuses to protect or enforce corporate rights after proper request so to do, or commits breaches of trust, or is guilty of fraudulent acts and conduct, whereby irreparable injury is done or threatened to corporate interests, a shareholder, in a case where the corporation itself would be entitled to sue and obtain relief, may bring suit on behalf of himself and others in like situation, for the protection or assertion of corporate rights and interests. The conditions and circumstances under which the individual stockholders are allowed to sustain, in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself would be the proper complainant, are fully set forth in *Hawes v. Oakland*, 104 U. S. 450-460, and in the requirements of equity rule 94. It is important to bear in mind that the rights involved in such suits are not those of the shareholder who sues, but of the corporation, whose rights are sought to be asserted. The cause of action which the individual stockholder is allowed to enforce in such cases is one belonging, not to the stockholders, but to the corporation itself. Thus in *Davenport v. Dows*, 18 Wall. 626, it is said:

"But such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert on behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. \* \* \* The relief is asked on behalf of the corporation, not the individual shareholder; and, if it be granted, the complainant derives only an incidental benefit from it."

The present suit falls within this rule, and the case presented by the demurrer to the bill then divides itself into two leading questions: *First*, has the Mansfield, Coldwater & Lake Michigan Railroad Company, under the showing made by the bill, any right to complain of the decree rendered by this court in 1877, in the foreclosure suit of Thomas A. Scott and George W. Cass against said corporation; and, *secondly*, if the company was ever entitled to have said decree set aside and vacated for fraud in its procurement, has that right been lost by the "laches" of itself or of complainant in the assertion of said rights?

The record in the case of "Thomas A. Scott and George W. Cass *vs.* The Mansfield, Coldwater & Lake Michigan Railroad Co. *et al.*" is filed with and made a part of complainant's bill. It appears from the bill and said record that said Scott and Cass, as the trustees under the original and supplemental mortgages executed by said Mansfield, Coldwater & Lake Michigan Railroad Co. on the 1st October, 1871, and 1st October, 1872, respectively, to secure the payment of certain coupon bonds issued by said company, filed their bill in this court on January 20, 1876, against said railroad company and Swan Rose & Co., general creditors thereof, to have said mortgages foreclosed by a sale of the road and other property covered by or embraced in the mortgages, because of the default of the mortgagor in the payment of the interest on \$1,600,000 of said bonds then outstanding in the hands of *bona fide* and lawful holders thereof. The interest accrued thereon and alleged to be in default was stated to be \$270,000, \$35,000 of which was due October 1, 1873; \$35,000 was due and payable April 1, 1874; \$56,000 became due April 1, 1875, and \$56,000 matured October 1, 1875, which several installments, with interest since date of maturity till time of filing the bill, amounted to the sum of \$270,000. The trustees further alleged that the railroad company had failed to pay or provide the sinking fund of 1 per cent. required by the mortgages on the \$1,600,000 of bonds so issued and outstanding, and, that under and in accordance with the terms and provisions of said trust deeds or mortgages said bonds had been properly declared and made due as to the principal thereof, because of such defaults on the part of the mortgagor. Said original and supplemental trust deeds or mortgages were filed with and made parts of the bill to foreclose, as Exhibits A and B thereto, and purported on their face to be regularly executed by proper officers of the corporations under proper authority from the company.

The defendant railroad company was duly served with process on the 24th January, 1876, and on the 17th April, 1876, it filed its answer in the cause. In said answer it denied that it was duly and legally organized and incorporated as a corporation, when said mortgages were exe-



cuted and said bonds issued. It averred that its incorporation and organization was not perfected and completed until January 6, 1873, and that prior to said date it possessed no power or authority to execute and deliver either said bonds or mortgages. It therefore denied that said mortgages were the proper act of the corporation, or constituted any valid lien on its railway and property. The answer, then, by the eighth paragraph thereof, proceeded to set out how and under what circumstances the corporation was formed and organized. Showing that it was legally organized on June 1, 1871, when the agreement of consolidation with the record of the action thereon by the stockholders of the respective companies properly certified by the secretary thereof was filed in the office of the secretary of state of Ohio. But the claim of a want of proper organization was based on the alleged fact that no election of directors was had under the consolidation till January 6, 1873. Said clause of the answer further set out in detail how one Willard S. Hickox, assuming to act in the name of and on behalf of said company, had entered into contracts for the ironing and equipment of said company's lines of road, for which the other contracting party, the Pennsylvania Company, was to be paid in stock and bonds, the latter to be secured by mortgages; and that said original and supplemental mortgages, made a part of complainant's bill, and the bonds mentioned and provided for therein, were the same mentioned and provided for in said agreement of July 20, 1871, between said Pennsylvania Company and said Hickox, assuming to be president of the said railroad company. The answer admitted that under said contract with the Pennsylvania Company the latter had "pretended to place the iron and rails upon about 75 miles of the line of said railway, and had put about 47 miles of it in condition for the passage of trains," but claimed that the same are insufficiently and improperly done, and not according to the terms of said contract, which provided that the Pennsylvania Company should receive, besides stock of the defendant company, \$20,000 in said bonds per mile as each 10 miles of the road was laid with rails, and ready for traffic. As a further defense the answer set up that said Pennsylvania Company, claiming to be entitled thereto, had on the 4th May, 1872, wrongfully obtained \$1,500,000 of the stock in defendant's company (being more than a majority thereof) under said contract of July 20, 1871, by means of which it secured a majority of the members upon defendant's first board of directors, and still managed and controlled the affairs of said company, etc. And further:

"That on the 4th day of May, 1872, the said complainant Thomas A. Scott, then the president of said Pennsylvania Company as aforesaid, and acting as one of said trustees, procured and induced the said Willard S. Hickox to deliver to him all of the bonds so executed by said Hickox in the name of defendant as aforesaid. There were 4,460 of the bonds so delivered, numbered from 1 to 4,460 inclusive, for \$1,000 \$200 each, dated October 1, 1871, with interest coupons attached, [the coupons maturing April 1, 1872, having been canceled and cut off.] In consideration of the delivery of said bonds as aforesaid, and simultaneously therewith, as a part of said transaction, the said Pennsylvania Company, by its president, the said Thomas A. Scott, executed and delivered to said Hickox, for the benefit of defendant, a written under-

taking, bearing date May 4, 1872, wherein it was recited that said Hickox had delivered to complainant as said trustee the bonds above described under said supposed contract of July 20, 1871, by the terms of which said bonds were to be delivered to said Pennsylvania Company at the rate of \$20,000 per mile, so fast as material should be delivered to the value thereof, and in full as each ten miles of iron should be laid and the track in condition for the passage of trains; after which recital it was stipulated and agreed by said Pennsylvania company in and by said last-mentioned agreement, that in consideration of the delivery of all of said bonds as aforesaid, before said iron was laid, the said Pennsylvania Co. obligated itself to take care of and pay all interest which might become due thereon prior to said line of railway of defendant being in condition for traffic; and it was provided that for all interest so paid for the Pennsylvania Co., and not justly and equitably chargeable thereto, under said contract of July 20, 1871, said Pennsylvania Co. should be reimbursed out of the earnings of defendant's road after the same should be completed in sections under said contract, and begin to make earnings on the respective sections, as required by the terms of said agreement."

The answer further alleged that at the date of the delivery of said bonds said Pennsylvania Company was entitled to no part thereof; "that said bonds are now held by said Pennsylvania Company under said supposed contract of July 20, 1871; that if any of said bonds are held by other parties, they are held in the interest of and for said Pennsylvania Company. None of said bonds are held by *bona fide* owners, but the pretended holders and owners thereof have and are chargeable with notice of all the matters herein set forth, and of all the equities of the defendant arising therefrom." It was further claimed in said answer that the cost of the work done by the Pennsylvania Company had not exceeded \$7,000 per mile; that it had never earned the stock wrongfully delivered to it; nor had it entitled itself to any interest on the bonds delivered as aforesaid. And defendant further averred that the complainants in prosecuting said foreclosure suit were moved by, and acting in the interest of, said Pennsylvania Company. That their object and purpose was to annihilate and destroy so much of defendant's road as lay west of Tiffin in Seneca county, Ohio, and to destroy its stock, that the interest of said trustees, and of said Pennsylvania Company, and of the holders of said bonds, are one and identical, that under said agreement of May 4, 1872, said Pennsylvania Company were bound to pay the interest alleged to have matured upon said bonds, and the subsequently accruing interest thereon, until the full completion of said road by said Pennsylvania Company under said contract of July 20, 1871, that complainant Scott, who acted for said company in making said contracts, controls and directs the affairs of said Pennsylvania Company and the holders of said bonds.

To this answer the complainants duly filed their replication on the 26th day of May, 1876. On the 19th of August, 1876, while the cause was regularly at issue, and all parties in interest were before the court, on the motion of complainants, to which the defendant filed its written consent, an order was made by the court allowing the ties and rails to be removed from one portion of the line and relaid upon another part thereof. Said order, after reciting the written consent of the defendant company thereto, proceeds as follows:

"And it further appearing to the court that the Pennsylvania Railroad Company, [a separate and distinct corporation from the Pennsylvania Company referred to in the answer,] being the owner and holder of all of the bonds of said Mansfield, Coldwater & Lake Michigan Railroad Company, has also filed herein its written consent that said motion be granted. And it also further appearing that the interests of said Mansfield, Coldwater & Lake Michigan Railroad Co., as well as of said Pennsylvania Railroad Co. as the owner of said bonds, will be promoted by the removal of said ties and rails and the relaying the same as described in said motion, it is therefore ordered and decreed by the court that said motion be, and the same is hereby, sustained. And it is further ordered and decreed that the complainants herein be permitted to enter into such arrangements with the said Coldwater, Marshall & Mackinaw Railroad Company as may be agreed upon between themselves relative to the taking up, removing, and relaying by the last-named company the ties and rails that are now laid and unused on said Mansfield, Coldwater & Lake Michigan Railroad south-east of and for a distance of about eight miles from Monteith; and, after the same have been relaid on the graded line of said Mansfield, Coldwater & Lake Michigan Railroad near Coldwater, the said Coldwater, Marshall & Mackinaw Railroad Co. may use so much of said line as is covered by said ties and rails, for such time, and upon such terms and conditions, as may be agreed upon between said last-named Co. and the complainants, provided that before any such arrangement shall be finally consummated said Coldwater, Marshall & Mackinaw Railroad Co. shall execute and deliver to said complainants a bond with approved sureties, for not less than the sum of \$100,000, conditioned that all the covenants on the part of said Coldwater, Marshall & Mackinaw R. R. Co. in respect to the taking up and relaying said ties and rails between Monteith and Coldwater, as well as in respect to the subsequent use of that part of said Mansfield, Coldwater & Lake Michigan R. R. Co. wherever said ties and iron shall be relaid, shall be fully and faithfully performed by said Coldwater, Marshall & Mackinaw R. R. Co. It is further ordered that nothing in this decree nor in the agreement that may be made in pursuance hereof shall give said Coldwater, Marshall & Mackinaw R. R. Co. any rights whatever in relation to the removal of said ties and iron, nor to the use of said railroad wherever the same shall be laid after the termination of this case; nor beyond the time when said Mansfield, Coldwater & Lake Michigan R. R. Co. may be sold under and pursuant to any other or further orders that may be made by the court herein. It is also further ordered that nothing in this decree, nor in the arrangement that may be hereafter made between the complainants and said Coldwater, Marshall & Mackinaw R. R. Co., shall in any way interfere with the rights or remedies of the owners of said bonds of the M., C. & L. M. R. R. Co., nor of the trustees, complainants herein, either in this or any other proceeding that may be brought to enforce the rights of said bondholders or of said trustees, nor in any way to hinder or delay the further proceedings in this case."

On the 3d of November, 1876, the directors of the Mansfield, Coldwater & Lake Michigan Railroad Company, by resolution instructed their attorneys to withdraw all defense to said suit of Scott and Cass, trustees, Henry C. Hodges, and Stephen B. Sturges, two of said directors, and the former one of the defendant company's attorneys, who signed its answer, entered their written protest against this action of the board of directors. Afterwards, at the January term, 1877, of this court, and on the 3d day of January, 1877, as appears by the record, "came Messrs. Jno. B. Shipman, Henry C. Hodges, and C. H. Scribner, solicitors for the said Mansfield, Coldwater & Lake Michigan R. R. Co.

in the above entitled proceeding, and show to the court here that by resolution of the board of directors of said Railway Co., adopted November 3, 1876, the said solicitors were directed to make no further defense on behalf of the said company to the proceedings of the complainants herein; and thereupon the said solicitors withdraw the appearance of said respondent heretofore entered herein, and on their motion it is ordered that they have leave to withdraw the answer of respondent to the bill of complaint of complainants, and the same is now withdrawn accordingly." On the 21st of March, 1877, an order *pro confesso* was taken and entered against said defendant railroad company, and the cause continued to the next term of the court, and on June 27, 1877, a decree was entered finding said company in default in the payment of interest since October 1, 1873, and amounting to \$426,650, also in the payment of the sinking fund as provided by the mortgages, and all other facts material and necessary in a decree in complainant's favor, and directing a sale of the company's line of road and property covered by the mortgages upon its failure, within the time allowed, to pay said indebtedness. The sale was made on the 4th day of August, 1877, when the property was struck off at the price of \$500,000, the minimum price fixed by the court, to Joseph Lessley, who, as it appears, was acting as the agent of the Pennsylvania Railroad Company, the holder of the bonds and past-due coupons. This sale was confirmed, and the special master commissioner, under the direction of the court, made proper conveyance of the property to the purchaser, who, as appears from the allegations of the bill of complainant Foster, subsequently transferred the same to the Northwestern Ohio Railway Company, which was chartered and organized after the date of said transaction, and which is claimed to be only a branch of said Pennsylvania Company, and identical with it.

The present bill seeks to have that decree and sale set aside and vacated as having been fraudulently obtained, and the defendant's answer in said suit reinstated, with leave to complainant and the company to make any and all other defenses which they may be able to set up and establish. It is conceded by complainant's bill, now under consideration, that the Mansfield, Coldwater & Lake Michigan Railroad Company "were duly and legally created, incorporated, and organized as a railroad corporation of the states of Ohio and Michigan," on or about June 1, 1871. So much of the answer of said company to the foreclosure suit as denied its legal organization and want of power to make the mortgages of October 1, 1871, and October 1, 1872, and to issue the bonds secured thereby, may therefore be dropped out of consideration. The other grounds of defense set up in that answer are substantially repeated, and relied on by complainant as entitling him to relief on behalf of the corporation. Of these defenses the only one worthy of notice grows out of the contract of May 4, 1872, which, it is assumed, bound the Pennsylvania Company to pay the interest on the bonds then turned over to it until the full and final completion of said road; and that, the Pennsylvania Company being so bound, there was no default on the part of the Mansfield, Coldwater & Lake Michigan Railroad Company, as alleged

by the trustees in the foreclosure suit. This defense, whether good or bad, was known to and was set up by the defendant railroad company in the foreclosure suit. Complainant says it was concealed from him and other stockholders, and was not discovered by him till shortly before the bringing of this suit. By whom or how concealed from him is not stated. But the time at which he acquired his knowledge of or information about said contract is not at all material. The corporation in whose behalf he institutes the present suit, and whose rights he is seeking to enforce, was fully aware of the existence of said contract, which was set up and relied upon as a defense in its answer to the foreclosure suit. Complainant's ignorance of its existence, however superinduced, whether by fraudulent concealment or negligence, in no way changes or affects the material fact that the corporation in whose behalf he now interposes labored under no such want of knowledge or information. The corporation, whose rights this suit seeks to protect and enforce, can take no benefit or advantage from the fact that complainant was ignorant of what was well known to the corporation itself, well known to one of its directors and solicitor, Henry C. Hodges, who opposed the resolution of the board directing a withdrawal of the defense. But if this were not so, and if complainant's ignorance of what was known to the corporation, could avail the latter in cases like the present, can it be said that complainant's want of knowledge of that contract of May 4, 1872, was excusable? We think not. As a stockholder he was affected with notice of the foreclosure suit, and of the result of that proceeding. He does not intimate in his bill that he did not know of its existence and of the defenses interposed thereto by the company. When the property of the corporation, in which he had an interest as a shareholder, was being sold under judicial proceedings open and accessible to his inspection and examination, he is not in position to claim the benefit of ignorance in respect to matters within easy reach of himself and within the knowledge of his company. But aside from this, the court is by no means satisfied that the contract of May 4, 1872, admits of the construction which the defendant railroad company in the foreclosure suit and complainant in the present suit seek to have placed upon it. Read in the light of the contract of July 20, 1871, and of the supplemental mortgage executed October 1, 1872, the agreement of May 4, 1872, will hardly warrant the construction that the Pennsylvania Company undertook and agreed to pay interest on bonds which it was entitled to receive by virtue of its ownership of such bonds. The true meaning of the contract seems to be, that the Pennsylvania Company would pay the interest on all such or so many of said bonds as might be used, and to which it was not entitled under said contract of July 20, 1871. The interest to which it was then or should thereafter be entitled upon bonds earned under said contract, was not to be paid by it. Such an interpretation would be unreasonable. But it might well assume to provide for the interest on said bonds before its own right to the interest accrued, and such is the fair and rational meaning of the agreement. What became of the interest falling due prior to October 1, 1873, does not appear. It

is not intimated or suggested in either the answer of the corporation to the foreclosure suit or in the present bill that it was not provided for by said Pennsylvania Company, or that it was paid by the Mansfield, Coldwater & Lake Michigan Railroad Company.

Again, the court found, as appears from the consent order of August 19, 1876, to which the Mansfield, Coldwater & Lake Michigan Railroad Company gave its written assent, that the Pennsylvania Railroad Company, a corporation separate and distinct from that of the Pennsylvania Company, was the owner and holder of said outstanding bonds and of the past-due coupons from October 1, 1873. Assuming that such was the fact, was the Pennsylvania Railroad Company, as such holder and owner, bound to look to the Pennsylvania Company for payment of such interest under the contract of May 4, 1872, between the latter and the Mansfield, Coldwater & Lake Michigan Railroad Company? This will hardly be insisted upon. The contract of May 4, 1872, if it went to the extent claimed for it by the bill, being only between the Mansfield, Coldwater & Lake Michigan Railroad Company, and the Pennsylvania Company, might be binding between themselves, but would certainly not require the owner and holder of the bonds and past-due interest to look to the liability of the Pennsylvania Company thereunder before resorting to the makers and the mortgages executed to secure the payment of his bonds and interest on the same as it accrued. The suggestion of the bill that Thomas A. Scott was the president, and had the practical control of both the Pennsylvania Company and the Pennsylvania Railroad Company, is not material. If the bonds had been fraudulently issued within the knowledge of said Scott, his knowledge might have operated as notice to the latter company when it acquired the bonds. But the case made by the bill, and the defense set up in the answer of the railroad company to the foreclosure suit, does not present the question of a fraudulent issue of bonds, so as to put the holder upon proof of purchase before maturity for value and without notice, but the defense was and is want of complete and full consideration paid or given therefor by the Pennsylvania Company under the contract of July 20, 1871, which it is claimed was not fully performed by said company. It is conceded, in the answer of the railroad company in the foreclosure suit, that said Pennsylvania Company put about 47 miles of road in condition for the passage of trains, and that it pretended to place the iron and rails upon about 75 miles of the line of said railway. It is claimed that this was not properly done, that the iron was of inferior quality, the road was not properly ballasted, etc. These facts, if true, might have justified and warranted a counter-claim for damages for breach of contract on the part of the Pennsylvania Company, but they do not impeach or tend to impeach the validity of the bonds in the hands of the Pennsylvania Railroad Company, who, in the absence of fraud in the issuance of the bonds, is presumed to be an innocent holder for value and before maturity.

Again, the contract of July 20, 1871, imposed certain duties and obligations upon the Mansfield, Coldwater & Lake Michigan Railroad Company in respect to preparing and getting the road-bed, etc., ready for

the iron. It is not averred in said company's answer to the foreclosure suit, nor in the present bill of complainant, that said undertakings on the part of said Mansfield, Coldwater & Lake Michigan Railroad Company were complied with, so as to show that the Pennsylvania Company was in default on its part, so that want of consideration for the \$1,600,000 of bonds placed in the hands of the Pennsylvania Company under that contract, and which it is claimed to have averred in the building of 75 miles of said line of railway, is not well pleaded, even as against the Pennsylvania Company; while in respect to the Pennsylvania Railroad Company, to whom the bonds were transferred and by whom they were held when the mortgages were foreclosed, the facts presented constitute no defense.

Now, aside from the statements of the company's answer to the foreclosure suit, largely repeated and relied upon in the present bill, what new and extrinsic facts are alleged? There is, first, the allegation that the resolution of the board of directors of November 3, 1876, directing the solicitors of the company to make no further defense to the foreclosure suit, was fraudulent. How and in what way fraudulent is not disclosed except in the most vague and general way. As to Henry C. Lewis and Joseph Fisk, two of the directors of the Mansfield, Coldwater & Lake Michigan Railroad Company when said resolution was passed, it is stated that they were also directors in the Coldwater, Marshall & Mackinaw Railroad Company, to which said Scott and Cass were to give a large portion of the property of said defendant the Mansfield, Coldwater & Lake Michigan Railroad Company, to induce said directors to favor a withdrawal of said answer and defense. It is not suggested how Scott and Cass, as trustees, could give to another corporation a portion of the trust property then being foreclosed. It is not intimated that any such arrangement was carried out. It is not charged that Lewis and Fisk, in voting for the resolution, acted upon the inducement so held out to them, which looked to some benefit to another road in which they were directors; nor is it alleged that they held a larger interest in the latter road than in the Mansfield, Coldwater & Lake Michigan Railroad Company. Corrupt action on their part is barely insinuated, not charged. If this intimation of corrupt action on the part of Lewis and Fisk was based on the provisions of the consent order of August 19, 1876, (as was suggested at the hearing of the demurrer,) it is manifestly not well founded. By the terms of that order the ties and rails which were allowed to be removed from one part of the line and relaid upon another were to be used by the Coldwater, Marshall & Mackinaw Railroad Company only until the termination of the foreclosure suit, or not beyond the sale of the Mansfield, Coldwater & Lake Michigan Railroad. Hence there was no advantage to the Coldwater, Marshall & Mackinaw Railroad in Lewis and Fisk withdrawing defense, and allowing an early sale. On the contrary, the interest of the Coldwater, Marshall & Mackinaw Railroad Company was in postponing the sale. It is said that Reuben F. Smith, George W. Layng, and Frank James, three other directors of the Mansfield, Coldwater & Lake Michigan Railroad Company, were employes of the Penn-

sylvania Company, and, acting in the interests of said company, voted for the resolution of November 3, 1876. This does not charge fraudulent and corrupt conduct on their part. But it is said that said action of the board was "solicited" by Thomas A. Scott in the interest of said Pennsylvania Company, and that J. Twing Brooks, in the same interest, being both a director in the Mansfield, Coldwater & Lake Michigan Railroad Company and the general attorney of the Pennsylvania Company, favored said resolution, and aided in securing its adoption. That is no sufficient allegation of corrupt and fraudulent action and conduct on his part. The bill nowhere intimates or charges that the directors voting for said resolution, did so with the knowledge or belief that the facts set up in the company's answer were true or that they constituted a valid and proper defense to the foreclosure suit. It is not intimated, either, that they derived any personal benefit from their action. Both the trustees and several of the directors who participated in said transaction have since departed this life, and in calling their actions in question in a way to impute turpitude and breach of trust something more is required than vague generalities and insinuations. No specific acts are charged. No specific facts are stated which fairly or by necessary implication make or render the action of the board of directors in withdrawing said defense corrupt or a breach of duty. It is not sufficient, in general terms, to allege on information and belief "that the withdrawal of said defense was the fraudulent act of said Thomas A. Scott and J. Twing Brooks, aided and abetted by such of said directors as voted in favor of said withdrawal." There was no concealment of this action, and after its adoption there was ample opportunity before the final decree for complainant or any other stockholder to have intervened and made defense. Every fact alleged in the bill upon information and belief was then disclosed by the record in said foreclosure suit, or otherwise readily accessible to complainant upon the slightest inquiry or investigation. Under such circumstances and conditions, if it be conceded that a fraud was actually committed against the corporation, the question next arises whether the company or the complainant who seeks to assert its right has not been guilty of such "laches" as to bar his or its right to any relief.

The allegations of the bill in reference to the concealment of the frauds or fraudulent acts relied on for relief are wholly insufficient to have arrested the running of the statute of limitations, in analogy to which courts of equity generally act in considering and testing the question of "laches" in seeking relief. In *Wood v. Carpenter*, 101 U. S. 143, it is said by Mr. Justice SWAYNE, speaking for the court, that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself, \* \* \* and the delay which has occurred must be shown to be consistent with the requisite diligence." This rule was repeated and applied by the supreme court in the equity suit of *Bank v. Carpenter*, Id. 567. It is suggested by counsel for complainant that the rule announced and applied in *Wood v. Carpenter*, Id. 138-143,



which clearly establishes the insufficiency of the present bill, is not in harmony with *Bailey v. Glover*, 21 Wall. 346, which has been recognized in the later cases of *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382; *Traer v. Clews*, 115 U. S. 528-536, 6 Sup. Ct. Rep. 155; and *Kirby v. Railroad Co.*, 120 U. S. 130-139, 7 Sup. Ct. Rep. 430. But in respect to what will constitute the concealment of a fraud such as will arrest the running of the statute, or excuse delay in seeking relief because of such fraud, no conflict is perceived between the decisions in their application to the facts of the present case. In *Bailey v. Glover*, 21 Wall. 347, Mr. Justice MILLER says:

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

All the authorities agree in the proposition that the party seeking to excuse his delay in asking relief on the ground of fraud must show that his ignorance was not negligent. That he remained ignorant without any fault of his own, that he could not by reasonable diligence have discovered the fraud sooner and "that, where the means of knowledge are open to him, he is chargeable with knowledge from the date when he should have ascertained the facts." Now, testing the complainant's bill by these rules, it is clearly insufficient to excuse the long delay that has elapsed since the rendition of the decree in 1877 till the commencement of the present suit in 1887. It is not alleged that during the 10 years of delay that the corporation whose rights are sought to be enforced was ignorant of the alleged fraud committed against it. It is not charged that the complainant's ignorance of the alleged frauds was "produced by affirmative acts" of the guilty parties in concealing the facts from him or other stockholders. It is not stated that during this long period the complainant ever made or caused to be made the slightest inquiry in relation to the transactions now complained of. The facts were all either matters of record in the foreclosure suit or readily accessible upon inquiry. He could have learned in 1877, (if he did not then know,) as easily as in 1887, the relation which Scott and Brooks and the directors Smith, Layng, and Janes bore to the Pennsylvania Company, and which Lewis and Fisk bore to the Coldwater, Marshall & Mackinaw Railroad Company. The resolution of the board of directors of November 3, 1876, was made a matter of record in the foreclosure suit. Two of the directors within easy reach of complainant had protested against that action, and in its answer the company had set up all the defenses now relied on by the complainant in its behalf. Under such circumstances, complainant's ignorance,

even assuming that his ignorance would excuse delay on the part of the corporation, was negligent. It was not without fault on his part. It is also manifest from the situation of the parties and the history of the transaction as stated by himself, and as disclosed in the contracts and foreclosure proceeding, that by reasonable diligence he could have discovered the alleged fraud sooner; that the means of knowledge were open to him from 1877; and that he must be chargeable with knowledge from the date when he should have ascertained the facts. But the case is far stronger as against the corporation, as to whom it is not alleged that it was during any period of time ignorant of any of the facts now set up as a ground of relief.

Under the facts and circumstances of this case as disclosed by the bill, even assuming the existence of the frauds alleged, such laches are shown as should, in the judgment of the court, defeat the relief sought. This objection to the bill may be taken by demurrer. Thus in *Landsdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350, it was held that a bill is bad on demurrer when it appears therefrom that there has been laches in operating the rights which it seeks to enforce. The bill in the present case is, upon its face, open to this objection. It presents no sufficient excuse for the delay that had elapsed, and, tested by the decisions of the supreme court, it must be held bad, and not sufficient to entitle complainant to the relief sought. See *Moore v. Greene*, 19 How. 69; *Burke v. Smith*, 16 Wall. 390-401; *U. S. v. Throckmorton*, 98 U. S. 64-69; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Godden v. Kimmell*, 99 U. S. 201; *Wood v. Carpenter*, 101 U. S. 139-143; *Coddington v. Railroad Co.*, 103 U. S. 409. In this last case relief was sought eight years after sale, and was denied because of laches and the statute of limitations.

Again, the present bill is defective in not showing any valid defense to the foreclosure proceeding which is sought to be opened. As already indicated, the answer which the corporation filed in that suit showed that the Pennsylvania Company had in fact earned a considerable portion of the bonds placed in its hands; that it had equipped, under the contract of July 20, 1871, from 47 to 75 miles of the Mansfield, Coldwater & Lake Michigan Railroad Company's line of railway, for which it was entitled to bonds to the extent of \$20,000 per mile. It is not pretended in said answer or in the present bill that the Mansfield, Coldwater & Lake Michigan Railroad Company ever paid the interest on said bonds, or provided the sinking fund required by the mortgages thereon. To the extent of such defaulted interest, sinking funds and bonds, which the holder had the right to treat as due, the trustees in the foreclosure suit were clearly entitled to a decree for the benefit of the Pennsylvania Railroad Company. It is reasonably certain that the amount so due the Pennsylvania Railroad Company as the holder and owner of said bonds exceeded the minimum price placed upon the road in the decree, and for which it was sold. The present bill neither negatives this fact nor offers to pay the sum so due. It shows no valid defense to the bonds so earned by the Pennsylvania Company, and which afterwards passed into the hands and ownership of the Pennsylvania Railroad Company. It is

nowhere denied that the Mansfield, Coldwater & Lake Michigan Railroad Company accepted the work done by the Pennsylvania Company, and that the bonds were to be given for the work so done. To this extent, then, there was a valid cause of action, which entitled the trustees to enforce the mortgages of October 1, 1871, and October 1, 1872. This equity and lien is in nowise affected by anything appearing in the company's answer to the foreclosure suit, or in the averments of the bill under consideration. The decree, to that extent, could not or would not have been reversed on a direct appeal, as held by the supreme court in *Thomas v. Railroad Co.*, 109 U. S. 525, 3 Sup. Ct. Rep. 315. The rule as well settled that when the decrees of courts possessing jurisdiction of the parties and subject-matter of the litigation are sought to be opened or vacated, merits must be shown; that the party seeking such relief must show the existence of a valid defense, which he has been prevented from asserting because of the fraud or misconduct of the successful party. The Pennsylvania Railroad Company, for whose benefit, as the holder and owner of the bonds, the foreclosure suit was prosecuted, is not charged with any fraud or misconduct, nor is any case made by the bill showing that it was not entitled to that decree. By complainant's amended bill, filed herein on the 24th February, 1888, it is alleged that the mortgage or trust deed of October 1, 1872, was, after its execution and delivery, altered and changed in a material way by erasing therefrom a reference made to the contract of May 4, 1872. That mortgage was filed as Exhibit B to the foreclosure suit. The company executing it had full opportunity to examine it and discover any changes or alterations made therein, as alleged, but in its answer it made no such claim. The court is unable to see how this fact, if true, can or could have affected the rights of the parties under the mortgage of October 1, 1871. The trustees, if the alleged alterations were made, did not conceal the fact from the corporation. They exhibited the mortgage with the bill, and the corporation made no point on its having been altered or changed. The complainant now, invoking the aid of this court in behalf of that corporation, which knew or could have known the alleged fact in 1876 by simple inspection of the instrument brought directly to its attention, comes forward too late with such a complaint. The suggestion that the answer of the Mansfield, Coldwater & Lake Michigan Railroad Company having been withdrawn under the resolution of November 3, 1876, was not thereafter notice to the complainant and other stockholders, need hardly be dwelt upon. The answer remained on file, and is certified by the clerk of this court as a part of the record in the foreclosure suit, which is made a part of complainant's bill. But aside from this, the answer of Swan Rose & Co. set up precisely the same facts, and defenses, as the answer of the Mansfield, Coldwater & Lake Michigan Railroad Company, and an inspection of that answer would have disclosed to the corporation and its stockholders all the material facts set up and relied upon in the present bill relating to the contract of May 4, 1872, which constitutes the main grounds for the relief now sought. After a careful examination of the matters the conclusion of the court upon the whole case is that the demurrer to the bill should, for the reasons

above stated, be sustained. It is accordingly so ordered, and that the complainant's bill be, and the same is hereby, dismissed, at his costs.

WELKER, J., concurs.

OBERMILLER v. WYLIE *et al.*

(Circuit Court, W. D. Michigan, S. D. October 2, 1888.)

1. TRUSTS—EXPRESS TRUSTS—DECLARATION.

A written instrument, executed in form to be recorded, by which the grantee of land declares that he holds it "in trust for the Indians whose names are hereunto attached, they having paid towards the purchase of the said lands the sums set opposite their names, respectively," to which is attached the list of names and amounts paid, is a sufficient declaration of a trust, in Michigan, in favor of the persons whose names appear in the list.

2. SAME—RIGHTS OF BENEFICIARIES.

The beneficiaries under the trust will take in proportion to the amount of purchase money paid by each.

3. SAME—PARTITION—IN PROBATE COURT—ACQUIESCENCE.

Where the probate court, after the death of the trustee, directs the administrators to convey the land in severalty to the beneficiaries, who acquiesced therein, such conveyance will vest the equitable title in the beneficiaries, though the probate court had no power to make the order.

4. DESCENT AND DISTRIBUTION—REALTY—SEIZIN.

Under the Michigan statute providing that an interest, to pass by inheritance, must be one of which the ancestor had seizin, such equitable title will pass by descent; seizin in law as well as seizin in fact being contemplated by the statute.

In Equity. On demurrer to amended bill, by the defendant Rose.

The bill of complaint in this cause seeks to establish a trust-estate in and quiet the title to certain lands in the county of Emmet and state of Michigan. The essential facts are indicated sufficiently by the opinion. The document relied upon by the complainant, and held by the court to be sufficient as a declaration of the trust alleged in the bill, is in the following form:

"Know all men by these presents, that I, Alexander Nishawakwad, of Little Traverse, Michigan, having received a deed of Francis Pierz, conveying to me the title to the lands below described, viz.: The E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section thirty-two, (32,) town N., range 5 W., containing eighty acres; also the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section thirty-three, (33,) town 35 N., range 5 W., containing forty acres; also the fractional number section (28,) town 35 N., range 5 West, containing 13 77-100 acres; also fractions No. (2) & (3) of section 12, town 36 N., range 7 W., containing 77 11-100 acres; also fractions No. 1 & 2 of section 32, town 35 N., range 5 W., containing 65 85-100 acres; also fractions No. 1, 2, & 3 of section 33, town N., range 5 W., containing 104 68-100 acres; also having vested in me by patent from the United States the title to the following lands, to-wit: Fractional section No. 28, town 35 N., range 5 W., containing 13 77-100 acres; also the east  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 33, town 35 N., range 5 W., containing 80 acres; also fractional section No. 24, town 35 N., range 6 W., containing 12 8-100 acres; also fractions 1, 2, 3, 4, & 5 of section 13, town 35 N., range 6 W., containing 299 17-100

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acres: Now, be it known that I, Alexander Nishawakwad, do by these presents acknowledge the having received and holding the above-described lands, in trust for the Indians whose names are hereunto attached, they having paid toward the purchase of the said lands the sum set opposite their names respectively.

his  
"ALEXANDER X NISHAWAKWAD. [L. S.]"  
mark.

"Signed and sealed for record in the presence of  
"A. S. WADSWORTH. LANI WASSO."

To this instrument was attached a list of the Indians who had contributed for the purchase of said lands and of the sums paid by them respectively.

*Taggart & Denison*, for complainant.

*Fletcher & Wanty*, for defendant Rose.

SEVERENS, J., (*orally, after stating the facts as above.*) The principal ground of the demurrer is predicated on the statute of the state of Michigan in regard to the creation of trusts. It is argued that the effect of the statute upon a conveyance which upon its face denotes an intent to create a passive trust in one for the benefit of another is to vest the whole legal and equitable title in the *cestuis que trustent*, or the beneficiaries, creating no estate, either legal or equitable, in the trustee; and this is undoubtedly so in those cases where the instrument creating the estate is one which upon its face denotes who are to become the beneficiaries of the trust intended to be created; but the statute does not apply in a case where a conveyance is made of property upon trust, passive though it may be, where the trust arises out of the operation of some other instrument or some other means; that is, where the trust is shown independently of the instrument creating the estate. This is affirmed in several cases, and clearly in that of *Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. Rep. 1073. In the case at bar there was a conveyance in the ordinary form by one Pierz to the Indian, Nishawakwad, and the question arises whether upon the facts alleged in the bill it is shown that the estate was a trust-estate for the benefit of other Indians. It is alleged in the bill that those other Indians contributed the means with which to buy the lands,—quite a large area; the purpose being to have Nishawakwad purchase these lands, and hold them in trust for the benefit of these Indians so contributing. It seemed to be understood by those who furnished the means that Nishawakwad would take a conveyance to himself. Now, if there were nothing in writing independent of that instrument, it would be impossible, under the Michigan statute, to fix upon that instrument the character of a trust; the statutes of Michigan declaring that a trust shall not be created except by writing, and also declaring that no resulting trust can arise on such facts only. But soon after Nishawakwad had obtained the title from Pierz, he executed an instrument manifestly intended to be a declaration of trust. The instrument was informal, but, such as it was, it was executed by him, and acknowledged in form to be recorded. In that instrument he declares that he holds these lands in

trust for those Indians whose names are upon a schedule attached, and who have contributed in the amounts which are specified opposite their names. I think that is a sufficient declaration of trust in behalf of those Indians.

It is argued in behalf of defendant Rose that the instrument is not sufficiently definite in determining the proportions of interest in which these Indians hold through the trust. It is true that in terms it does not specify. It specifies the amount in which each of the beneficiaries had contributed; and, taken in connection with what is alleged in the bill to be the purpose, I think it is fairly to be implied that the trustee intended a declaration in favor of these persons in the proportion which the respective amounts which they had contributed bore to the whole fund contributed. It has been held, and indeed it was in the case to which I just referred in 118 U. S., that where a trust was created in favor of two or more persons, and the proportion which each was to take was not specified in the writing, if there was nothing to indicate the contrary, the beneficiaries would take in equal shares. That simply establishes the proposition that the trust is not so indefinite as to be nugatory from the fact that the respective interests of the beneficiaries are left to be inferred by implication; and I think the fair implication contained in this instrument is that these beneficiaries were to take in proportion to the respective amounts which they had contributed, and those amounts are specified in the declaration of trust, or in the exhibit which is referred to therein, and which is made part of it.

After this there were certain proceedings in the probate court for the county in which the lands were situated, Nishawakwad having died. These proceedings were, first, the appointment of administrators; and, next, and what is pertinent to the present issue, proceedings had upon a petition filed by certain persons interested in the purchase of Nishawakwad, and which petition was very anomalous in its character. It seemed to be framed upon the theory that the probate court had jurisdiction to order a conveyance by the administrator of the legal estate which Nishawakwad had acquired, for these beneficiaries, under the authority of the statute which authorized the probate court to direct administrators and executors to execute a contract for the sale of land by giving deed. The petition is not in any formal shape, even for that purpose. The order which the probate court made upon it, however, seemed to treat it as being filed under the provisions of the statute to which I have referred, and an order was made by the probate court that the administrators should convey the legal title to the beneficiaries; and it undertook further to state in what proportions it should be conveyed, and further ordered a partition of the lands, so as to have them conveyed to these beneficiaries in severalty. I have no doubt that these proceedings were void for want of jurisdiction in the probate court to take them, and, if nothing further had been done, if that was the end of the facts in reference to that transaction, I should be of the opinion that the action of the probate court was utterly nugatory. But it is alleged in the bill that the commissioners appointed by the probate court for that purpose

set off these lands in severalty wherever the beneficiaries desired them in severalty, and parcels in a lump to several persons where that form of conveyance was agreed upon; and the particular lands in question were conveyed by the administrators, under the order of the probate court, to the three Indians, Asiniwi, or J. A. Stone, as he was known in English, and the heirs of two other Indians, original beneficiaries in the trust. Both had died before these proceedings were taken. And it is further alleged in the bill that this partition and these conveyances were acquiesced in and were satisfactory to all of the parties interested,—by which I understand, and it is so treated in the argument, the beneficiaries under the original trust; and it seems that some, at least, of the persons who were concerned in that transaction have acted upon it by making conveyances. I lay no stress, however, upon this last suggestion, but upon the allegations in the bill, and which must be deemed to be admitted by the demurrer, that the other beneficiaries, who were alone concerned in the mode in which the land should be divided, were satisfied with what was done, and have acquiesced in it; and I am of the opinion that, if that is so, while the probate proceedings would be void if standing alone, yet, when coupled with the assent and acquiescence of the parties interested, and their having acted upon it, it amounts to the creating of an equitable estate in severalty in the lands thus set apart and apportioned, and it would operate to vest in those three Indians, or their heirs, which is the same thing, the equitable title to the lands in question. And it is alleged in the bill, and admitted by the demurrer, that the complainant has by mesne conveyances acquired the interest of all those persons. And it is alleged in the bill, and admitted by the demurrer, that the legal title has passed by mesne conveyances to the defendant Rose,—who, upon the facts as they appear, will stand in no better position than the person from whom he derived his title, namely, Nishawakwad, as there is nothing in the facts exhibited to show any circumstances creating any equitable estate in him. The facts leave him as the bare holder of the legal title, charged with the trust which attached while the title was held by the original trustee, Nishawakwad.

The question is raised in the brief whether this equitable interest which these beneficiaries had was capable of inheritance. This is denied by defendant Rose; and he claims that by the statute, the interest of these beneficiaries, being a mere equitable interest, of which there was no seizin, it did not descend to the heirs, and the statute of Michigan should be applied, in which it is declared that an interest to pass by inheritance must be one of which the ancestor had seizin. But this statute does not necessarily mean a seizin in fact. There are two kinds of seizin: seizin in law, and seizin in fact. The statute includes both of these. The seizin of an equitable interest must, in the nature of things, be intangible. But even in regard to legal estates, it is settled, in the law of Michigan, that an estate passes notwithstanding the ancestor is not at the time of his death seized in fact; by which is meant, in actual possession. It results from these propositions that the complainant has acquired the interest of the

beneficiaries,—the three beneficiaries to whom, or their heirs, the lands were set over in severalty; and that the defendant holds the legal title charged with that trust. Upon these facts it would seem that the bill can be maintained, and the case brought within the equitable jurisdiction of the court.

Other objections to the bill are argued in the brief filed in support of the demurrer, which is a very elaborate one, but these objections are such as should have been put in by special demurrer. The demurrer is general, and can only cover, therefore, the general ground of the bill upon the facts alleged. There is an objection as to multifariousness. There is another objection founded upon the allegation of the bill that the defendant holds some tax titles. It is argued that the bill should specify the particulars in which the illegality of the tax titles consists. It is alleged in the bill that they are invalid, and that they constitute a cloud upon the title; and that allegation is good, as against a general demurrer. The objection, I think, if taken by a special demurrer, would be well taken, because I think that one who files his bill to remove the cloud created by tax deeds is bound to allege the particulars by which the deeds are rendered invalid. Another objection made in the brief in support of the demurrer, and which possibly might have been well taken if there had been a special allegation as a ground of demurrer, is based upon the fact appearing, as it clearly does upon the bill, that certain persons became possessed of these interests, and that they have died leaving heirs, and there being no allegation that those persons owned those interests at their death. Nothing appearing to the contrary, it should be presumed, I think, the demurrer being general, that no disposal was made by the ancestors. In other words, in the absence of any indication to the contrary, it would be presumed that at the death of the ancestors the title remained as stated in the bill. So that on the whole I think that the demurrer must be overruled.

I may say that the questions involved in this case are not without difficulties. They were elaborately argued, especially in the brief for the defendants. I have held the case for some time, and have given it a good deal of attention, and this accounts for the delay. Some of these propositions, and especially the propositions in regard to those probate proceedings, taken in connection with what is alleged in the bill to have been done by the parties who were concerned in those proceedings, give rise to questions of extreme difficulty, but there are analogies which will occur by which the questions, perhaps, may be determined. No case has been cited, and I have not been able to find any which is very closely in point on the facts and circumstances; but an instance of illustration may be found in those cases where it has been decided that upon a judicial sale of property for the purpose of satisfying a mortgage or other lien, although the sale was void, the transaction operates to transfer the equitable interest in the lien to the purchaser. The case is not precisely parallel, but it furnishes an illustration. I cannot see upon what ground or right the court could now overturn—for that would be the effect of a contrary decision—what those beneficiaries did at that



time, and the proceeding which they have acquiesced in. If they have so acquiesced, they are now bound, and are estopped from disputing its validity. The demurrer of the defendant Rose will be overruled, and leave given to answer.

BEATTIE v. WILKINSON *et al.*

(Circuit Court, W. D. Virginia. October 29, 1888.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—MARRIED WOMEN.

Plaintiff's interest in an estate was on partition thereof assigned to the purchaser at bankrupt sale of her husband's life-estate, who had also bought plaintiff's interest. *Held*, that the statute of limitations did not run against her right of action arising out of the nullity of her deed and of the partition proceedings until the termination of her husband's life-estate, which had vested in the purchaser and his vendees.

2. WRITS—SERVICE OF PUBLICATION—SUFFICIENCY—COLLATERAL ATTACK.

A recital in a decree that the order of publication awarded against the absent defendants had been duly posted and published must, on a collateral attack, be received as evidence that the statutory requirements as to orders of publication had been observed, the original process, order of publication, and other papers having been lost from the files.

3. JUDGMENT—RES ADJUDICATA.

The partition having been made by a circuit court which, under Code Va., 1849, c. 124, § 1, had jurisdiction of the subject-matter, and authority to take cognizance of all questions of law affecting the legal title, in a proceeding in which it had acquired jurisdiction of the parties, and in which plaintiff's deed to the purchaser of her interest was in evidence, the sufficiency of that deed to convey that interest is *res adjudicata*, though plaintiff was not personally served with process, and did not appear.

In Equity. On final hearing. Bill for partition, brought by Ann Beattie against Samuel Wilkinson and others.

*F. B. Hutton*, for plaintiff.

*A. M. Dickinson* and *A. P. Cole*, for defendants.

PAUL, J. This suit is brought by the plaintiff for the partition and the assignment of an interest claimed by her in certain lands in Smyth county, Va. The cause presents the following state of facts: Joseph Scott, of Smyth county, died in the year 1842, intestate, and seized of considerable real estate. He left a widow, Ann Scott, and six children, his heirs at law, viz., William Scott; John H. Scott; Elizabeth, who intermarried with James Porter; Rachel, who intermarried with Hiram Greever; Isabella, who intermarried with James Higginbotham; and Ann, the plaintiff in this suit, who intermarried during the life-time of her father, the said Joseph Scott, with James C. Beattie, now deceased. In 1843 William Scott purchased the interest of James Porter and wife in the said real estate of Joseph Scott, deceased. In the same year John H. Scott purchased the interest of Greever and wife in said lands, and at a bankrupt sale bought the life-estate of James C. Beattie in the interest of his wife, the plaintiff here. And in December, 1843, the plaintiff

sold to the said John H. Scott, at the price of \$650 cash, and the further consideration that the said John H. Scott should pay her proportion of any debts that should come against the estate of Joseph Scott, deceased, her interest in said lands, for which she executed and acknowledged a deed, but in which deed her husband, James C. Beattie, did not join; he being at that time a non-resident of the state of Virginia. This deed was not put on record. In July, 1847, said John H. Scott brought a chancery suit in the circuit court of Smyth county for a partition of the lands of said Joseph Scott, deceased. To this suit he made the widow of Joseph Scott, deceased, and all other parties in interest, including the said James C. Beattie and his wife, the plaintiff in this suit, parties defendant. The said James C. Beattie and wife being non-residents, were proceeded against by order of publication in the manner provided by the statute of Virginia in case of non-resident defendants. In his bill the said John H. Scott claimed as his interest in said lands his own share and the interests of Greever and wife and of Beattie and wife, and filed his deeds therefor as exhibits with his bill. At the October term, 1847, a decree was entered in said cause appointing commissioners to make partition of said lands, directing them to assign dower to the widow of said Joseph Scott, deceased, and directing that in the assignment of the residue of said lands they should "allot to John H. Scott the interests of Hiram A. Greever and wife and James C. Beattie and wife, which has been conveyed to him by deeds." In January, 1848, the commissioners made their report to the court, in which they assigned the interests of Greever and wife and of Beattie and wife to John H. Scott, in addition to his own interest. At the May term, 1848, of the circuit court of Smyth county, the report of the commissioners was affirmed, and the decree of affirmation directed the execution of mutual deeds of conveyance by Higginbotham and wife and John H. Scott and Susannah Scott, one of the heirs of William Scott, deceased, and appointed P. S. Buchanan a commissioner, to make a conveyance on behalf of the infant children and heirs of William Scott, deceased, which he did. The record fails to show whether the other deeds of mutual conveyance were made or not. The suit in Smyth county circuit court, though ordered to be stricken from the docket by the decree at May term, 1848, appears to have remained on the docket until the August term, 1866. The children, heirs at law of Joseph Scott, deceased, are all dead, except the plaintiff. The land assigned to John H. Scott by the decree of the circuit court of Smyth county, is now owned by Alexander Richardson, E. M. James, and others, who claim to be purchasers for value. The plaintiff in this suit asks to have assigned to her one-third of the land allotted and assigned to John H. Scott by the decree and proceedings of the circuit court of Smyth county.

The plaintiff, in support of her right to recover one-third of the land assigned to John H. Scott in the suit in Smyth county, being one-sixth interest in the estate of her father, Joseph Scott, deceased, relies on the following grounds: *First*, that she and her said husband, James C. Beattie, were not made parties defendant to said partition suit in Smyth

county, and that she is not bound by the decrees and proceedings of that suit; and, *second*, that if she and her husband were made parties, that the deed which she executed to John H. Scott, conveying her interest in her father's estate, was null and void, because her husband failed to join in the execution of the deed, and because the same was not recorded as required by the statute of Virginia, prescribing how a deed to land by a married woman shall be executed, (Code Va. 1849, §§ 4, 5;) that her deed to John H. Scott being void, no title passed to him by said deed, nor could any pass to him under the decrees and proceedings of the chancery suit for partition in the circuit court of Smyth county.

It is insisted on the part of the defendants that the right of the plaintiff to bring this suit is barred by the statute of limitations of entry on, or action to recover, land. Chapter 146, §§ 1, 4, 5, Code Va. 1873. Section 1 provides that "no person shall make an entry on, or bring an action to recover any, land \* \* \* but within ten years next after the time at which the right to make such entry or bring such action shall have first accrued to himself, or to some person through whom he claims." Section 4 provides:

"If at the time at which the right of any person to make entry or to bring an action to recover land shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the said period mentioned in the first section shall have expired, make an entry on and bring an action to recover such land within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened."

Section 5 provides:

"The preceding section is subject to these provisions: That no such entry or action shall be made or brought by any person, who, at the time at which his right to make or bring the same shall have first accrued, shall be under any such disability, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under the same during the whole of such thirty years, or although the term of ten years from the period at which he shall have ceased to be under any such disability, or have died, shall not have expired; and when any person shall be under any such disability at the time at which his right to make an entry or bring an action shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or to bring an action beyond the time prescribed in the first section next after the right of such person shall have first accrued, or the ten years next after the period of his death, shall be allowed by the reason of the disability of any other person."

The defendants claim that the plaintiff's right to bring this suit is by the foregoing provisions of the statute barred by a lapse of 30 years, and this notwithstanding she was under the disability of coverture during the whole of that time. They insist that her right of action accrued in 1842, and that she did not institute her suit until the year 1886, a period of 44 years having passed from the time she might have brought it, and that, after deducting the time during which the Virginia stay law

was in existence, which suspended the operation of the statutes of limitation a period of about 8 years, still 36 years had elapsed before the commencement of the suit. To determine this question it is necessary to ascertain when the plaintiff's right to make an entry on, or to bring an action to recover, the land in controversy first accrued. The court is very clearly of the opinion that this right first accrued to the plaintiff on the death of her husband James C. Beattie, which, as the evidence shows, occurred in July, 1877. The life-interest of her husband in said land was sold in 1843, by Gibboney, assignee in bankruptcy, to John H. Scott, and continued in said Scott and his vendees until the death of the husband. The plaintiff was not entitled to possession of the land until after the death of her husband. The right to make entry on, or to bring an action for the recovery of, land first accrues to the remainder-man on the termination of the life-estate. *Ball v. Johnson's Ex'rs*, 8 Grat. 281; *Hope v. Railroad Co.*, 79 Va. 283, 289.

The defendants, in answer to the allegation in the plaintiff's bill that she and her husband, James C. Beattie, were not made parties to the proceedings in the partition suit of John H. Scott v. Joseph Scott's widow and heirs, in the circuit court of Smyth county, and that there were no legal proceedings as to her, rely upon the recitals in the decree entered in said suit October 6, 1847, to show that she and her husband were duly summoned by order of publication. It appears that the original process, the order of publication, if any, and other papers, have been lost from the files of the chancery suit in Smyth county. The decree of October 6, 1847, as to the order of publication says:

"And the order of publication awarded against the absent defendants having been duly posted and published, and the subpoenas against the other defendants having been returned executed more than two months since, and all the said defendants failing to answer, the bill is taken for confessed as to them."

The plaintiff in her bill states she and her husband were at the time of the institution of that suit citizens of the state of Missouri, and of course absent defendants. So far as the records in that suit, and the proceedings in this, show, all of the other defendants in that suit were residents of the state of Virginia. The recital in the decree that the order of publication was duly posted and published, must be received as evidence, that the statutory requirements as to orders of publication were complied with, and is conclusive of the fact that the plaintiff was made a party defendant to the suit in Smyth county. This is established by numerous decisions.

In *Craig v. Sebrell*, 9 Grat. 131, on an appeal from the circuit court, it was held in the case of an absent defendant, that when the decree recited that the cause came on to be heard as to him on the bill, answer, exhibits, etc., and an order of publication duly executed, this was conclusive that the order had been made, published in the newspaper, and posted at the front door of the court-house. If the recital in a decree of service of notice be sufficient on an appeal to a court of errors, it surely cannot be successfully assailed in a collateral suit. In another case of

appeal,—*Hill v. Woodward*, 78 Va. 765,—in which the question of a want of notice is very elaborately discussed, it was held that the failure of the record to show affirmatively that notice had been given was insufficient to impeach it, and that the burden of showing want of notice is upon the party alleging that he was not properly made a party to the suit. Numerous cases are cited in support of this position. As to recitals in record of facts necessary to give jurisdiction see *Comstock v. Crawford*, 3 Wall. 396; *Wilcher v. Robertson*, 78 Va. 602. See, also, *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714.

The order of publication, being duly executed as to the absent defendants Beattie and wife, gave the court jurisdiction of all the parties and of the subject-matter of the suit. It is not contended that the court was without authority to decree a partition of the lands of Joseph Scott, deceased, among the persons entitled thereto. It must be conceded that, under the provisions of Code Va. 1849, §§ 1-3, c. 124, the court had jurisdiction to decree a partition of the lands by allotment, by metes and bounds, or by a sale of the lands, and division of the proceeds. Section 1 of said chapter says: "The court, in the exercise of such jurisdiction, may take cognizance of all questions of law, affecting the legal title, that may arise in any proceeding." The court having jurisdiction of the parties and of the subject-matter of the suit, and the authority to take cognizance of all questions of law affecting the legal title that might arise in the proceedings, we are brought to the consideration of the question: Is it in the power of this court to pass upon the correctness of the decisions, decrees, orders, and proceedings of the circuit court of Smyth county, in the case of *John H. Scott v. Joseph Scott's widow and heirs*, wherein the court decreed that the interest of the plaintiff in this suit in the lands of her father, Joseph Scott, deceased, and for which she is suing here, was the property of her brother, John H. Scott, and which was accordingly assigned to him by commissioners appointed by the court, which assignment was reported to and confirmed by the court? It is well settled by numerous authorities, that when a court has jurisdiction of the parties and of the subject-matter of litigation, and it has not exceeded its jurisdiction, or acted beyond its authority, the correctness of its judgments, decrees, or proceedings cannot be inquired into collaterally. We will quote briefly from a few of the many cases in which this principle has been distinctly recognized:

"When a court has jurisdiction, it has a right to decide every question which occurs in the case; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities." *Elliott v. Petrosol*, 1 Pet. 328.

In another case the court said:

"The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it." *Cooper v. Reynolds*, 10 Wall. 308.

The same court, in another decision, said:

"And, in considering the grounds on which it is sought to repel the bar of this decree, we must disregard at once all that do not attack the jurisdiction of the court over the cause or the parties. It cannot be assailed collaterally for mere error." *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. Rep. 553.

The following is from a decision of the Virginia court of appeals:

"No matter how irregular or how erroneous may have been the proceedings in that suit, they cannot be inquired into in this. That would be to assail collaterally the judgment of a court of record which had jurisdiction of the parties and of the subject-matter. This can never be done." *Lancaster v. Wilson*, 27 Grat. 624.

See, also, *Woodhouse v. Fillbates*, 77 Va. 317; *Wimbish v. Breeden*, Id. 324; *Wilcher v. Robertson*, 78 Va. 602; *Hill v. Woodward*, Id. 765; *Argno v. Schmidt*, 113 U. S. 293, 5 Sup. Ct. Rep. 487; *Cox v. Thomas' Adm'r*, 9 Grat. 323; *Cline's Heirs v. Catron*, 22 Grat. 378; *Wilson v. Smith*, Id. 493. In the light of this unbroken line of decisions it is not in the power of this court to pass upon the validity of the deed from the plaintiff to her brother, John H. Scott, conveying to him her interest in her father's estate. That deed was in evidence in the suit of *Scott v. Scott's widow and heirs* in the circuit court of Smyth county. Whether it was accompanied by other testimony the record does not show, and it is immaterial. That court decided that the deed conveyed the plaintiff's interest in her father's lands to John H. Scott, decreed the assignment of the same to said Scott, which was done, and the assignment confirmed by the court. Whatever errors were committed by that court were matters to be corrected on appeal. Its decisions cannot be called in question in this collateral way. The plaintiff's bill must be dismissed. This conclusion of this cause is not only in accordance with well-settled legal principles, but is in harmony with the demands of substantial justice. The plaintiff has once received pay for the land which she claims in this suit. It would be a great hardship on the present owners of the land to require them to surrender it to the plaintiff, they being innocent purchasers for value without notice. A decree will be entered dismissing the bill, with costs to the defendants.

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### DIZE v. LLOYD *et al.*

(Circuit Court, D. Maryland. November 21, 1888.)

#### 1. FISHERIES—OYSTER DREDGING—LICENSE—CONSTITUTIONAL LAW—TONNAGE DUTY.

The Maryland oyster law of 1886, c. 296, exacting a license fee of three dollars per ton for every vessel employed in dredging for oysters in the waters of the state, held not a tonnage tax, but a lawful compensation, demanded by the state as the proprietor of the oyster-beds for the privilege of taking the oysters, which it is reasonable to rate according to the size of the vessel used.

## 2. SAME.

A section of the law enacts that having instruments for oyster dredging on board any vessel within the state, without having first obtained a dredging license, shall be *prima facie* evidence of an intention to use the vessel contrary to the law. *Held*, that this was a reasonable provision, required for the proper enforcement of the law, and was not a regulation of commerce, nor a prohibited interference with the freedom of navigation.

(*Syllabus by the Court.*)

At Law. Action for trespass.

*T. S. Hodson and Johnson & Johnson*, for plaintiff.

*William Pinkney Whyte*, Atty. Gen., for defendants.

Before BOND and MORRIS, JJ.

MORRIS, J. This is an action of trespass brought against certain officers of the state of Maryland composing the board of public works and the state fishery force, for seizing an oyster vessel belonging to the plaintiff. The plaintiff alleges that his vessel was duly enrolled and licensed under the laws of the United States, and was engaged in navigating the Chesapeake bay, when she was seized by orders from the defendants in the enforcement of the provisions of an act of the general assembly of Maryland, approved April 7, 1886, c. 296, which law the plaintiff asserts is contrary to the constitution of the United States, and void, in that it exacts a duty upon tonnage, and also attempts unlawfully to regulate commerce. The question of the constitutionality of the law is raised by a demurrer to the defendant's plea alleging the plaintiff's non-compliance with the act of 1886, c. 296, and setting up as a justification of the trespass the provisions of that law, making it their duty to arrest all persons, and to seize all boats violating its provisions. Similar questions were before us in the *Case of Insley*, 33 Fed. Rep. 680, and in the case of *Booth v. Lloyd*, Id. 593. In those cases it was held that the act of 1884, c. 518, which exacted a license fee of three dollars per ton for every vessel engaged in buying, selling, or carrying oysters in the waters of Maryland, was an attempt to exact a tonnage tax within the prohibition of the federal constitution; and we also held that, as that law provided that no such license should be granted to any but persons who had been for twelve months residents of Maryland, it was an unconstitutional discrimination against non-residents of Maryland, in denying them the right to buy, sell, or carry an article of merchandise. We are unable to see that the law of 1886, c. 296, which is now invoked, is open to any such objection. It provides that no boat shall be used in catching oysters in any of the waters of Maryland, in which taking oysters is by law permitted, unless the owner has been a resident of the state for twelve months, and unless he shall pay to the state at the rate of three dollars per ton of the boat's measurement for the privilege of dredging for the whole season from the 15th of October to the 1st of April, or at the rate of fifty cents per ton per month for the remainder of the season, if the license is issued after the season has begun. The supreme court of the United States has put it beyond debate in the cases of *Smith v. Maryland*, 18 How. 71, and *McCready v. Virginia*, 94 U. S. 391, that

the state is the owner of the oyster-beds in its waters, and can rightfully prohibit the taking of oysters from them by any but its own citizens, and can regulate the times, instruments, and conditions for taking them, and make valid laws for the seizure and forfeiture in her own courts of any vessel, although enrolled and licensed under the laws of the United States, if such vessel be the instrument used in the violation of such laws. It is not to be questioned, also, that, as a condition of permitting her own citizens to take the oysters, she may exact such compensation from them as the legislature may decide.

The sole contention, as we understand it, upon this branch of the present case is that, because the amount of the compensation exacted by the state is measured and determined by the tonnage of the boat used in dredging, it is thereby converted from a constitutional exaction for a special privilege into an unconstitutional tonnage tax on vessels. We are not able to see that this contention is in accordance with either reason or authority. It is the substance we are to consider, and not merely the name. If the exaction is in reality but a price paid to the state for the oysters, gauged by the capacity of the instrument employed in taking them, then the fact that the instrument is an enrolled and licensed vessel of the United States cannot convert the compensation so exacted into a tonnage tax. While engaged in dredging, the vessel is not engaged in commerce, but is an instrument for catching oysters; and, as the oysters are the property of the state, and she may lawfully exact payment for them, there is nothing more reasonable than that the exaction should be proportioned to the capacity of the vessel. It has nothing to do with commerce or navigation, and cannot be said to be a tax upon either. It was pointed out by the supreme court in *Packet Co. v. Keokuk*, 95 U. S. 80, that a charge by a state or city, although regulated according to the tonnage of a vessel, did not make it a tonnage tax, provided it was in reality a compensation for a special benefit conferred, which it was reasonable to estimate by that standard. The court said:

"When compensation is demanded for the use of a wharf, the demand is an assertion, not of sovereignty, but of a right of property. \* \* \* No one would claim that a demand for the use of a dry dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax; no matter whether the dock was the property of a private individual or of a state, and no matter whether proportioned or not to the size or tonnage of the vessel."

And, in *Transportation Co. v. Parkersburg*, 107 U. S. 699, 2 Sup. Ct. Rep. 732, speaking of a charge by a city for wharfage, the supreme court again said:

"It is obvious that the mode of rating the charge, \* \* \* whether according to the size or capacity of the vessel or otherwise, has nothing to do with its essential nature."

In *Packet Co. v. Catlettsburg*, 105 U. S. 561, the court said:

"If, however, the trustees of the town had a right to compensation for the use of the improved landing or wharf which they had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that its size was ascertained by the tonnage of



each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage."

It appears, therefore, most clearly that it is no objection to the Maryland oyster law of 1886 that it adopts the tonnage of the vessel employed in dredging as the most reasonable and convenient standard by which to determine the rate of charge to be made for the privilege of taking the oysters which are the property of the state.

The other objection urged against the constitutionality of the law is directed against the provisions for its enforcement. By section 4 it is enacted that it shall not be lawful, prior to obtaining a license, to affix any crank, winder, or other machinery for operating scoops, scrapes, or dredges, or to have them on board with intent to affix them to any vessel in this state, for use in taking or catching oysters; and that the fact of having such implements on board shall be *prima facie* evidence of intent to use them contrary to law. The reasonable intendment of this section is that it shall not be lawful, before obtaining an oyster-dredging license, to have the implements for dredging on board any vessel in this state with intent to use them for taking oysters; and the having them on board without such a license shall be *prima facie* evidence of the intent to use them. The right of a state to exact a license to dredge in the waters of the state being conceded, the only question is whether this is a reasonable provision for the enforcement of that right, or is it an encroachment upon the exclusive power of congress to regulate commerce with foreign nations, and among the several states, or does it interfere with the freedom of such commerce? It is urged that under this section an oyster vessel of Virginia navigating the Chesapeake might be seized simply because she had dredging implements on board, and have her voyage interrupted and her owners subjected to the expense of proving her innocence. This is a possible case, but it is to be considered that no law can be enforced without the possibility of hardship to some unjustly suspected person. Similar provisions enacting that certain facts shall be *prima facie* evidence of intention or guilt are found in many penal statutes, and particularly those for the protection of game, fish, or oysters. There is nothing unusual, unnecessary, or unreasonable in such an enactment. To require the court to declare such a provision an unconstitutional interference with the freedom of interstate commerce, it should be clearly established that the law must result in such unjustifiable interference, not that by possibility it might so result. In our judgment the demurrer should be overruled.

BOND, J., concurred.

## STATE, to Use of BLACK, v. BALTIMORE &amp; O. R. Co.

*(Circuit Court, D. Maryland. November 13, 1888.)***INSURANCE—RAILROAD RELIEF ASSOCIATION—BY-LAW—PUBLIC POLICY.**

The widow of an employe of the B. & O. R. Co., after the death of her husband, released any claim she might have against the railroad company for causing his death, for the purpose of enabling her husband's mother to obtain from the B. & O. Relief Association, payment of an amount of life insurance, which, under its constitution, was payable only on condition that all persons entitled to sue the railroad company for his death should release the railroad company from liability. *Held*, in a suit by the widow against the railroad company, that the release was not invalid as against public policy.

*(Syllabus by the Court.)*

At Law. Action for damages. On demurrer to replication.

*J. H. Keene, Jr., and A. Stirling*, for plaintiffs.

*Cowen & Cross and George Dobbin Penniman*, for defendant.

MORRIS, J. This is an action brought by the widow of Cassius Black, who was an employe of the Baltimore & Ohio Railroad Company, to recover damages from the railroad company for causing his death by negligence. The action is given by article 67 of the Maryland Code, which directs that it shall be brought in the name of the state of Maryland for the use of the wife, husband, parent, and child of the person whose death has been caused, and within 12 months after the death. The defendant railroad company pleads a release under seal, executed by both the mother of the deceased and by his widow; the equitable plaintiff in this case, in which release it is recited that in consideration of \$1,000, paid to them by the Baltimore & Ohio Relief Association, they release and discharge both the relief association and the Baltimore & Ohio Railroad Company from all claims and demands whatsoever arising from the said death. To this plea the plaintiff has replied that the release pleaded was obtained by fraud, and on this replication the defendant has joined issue. The plaintiff has filed also five other replications, to which the defendant has demurred, and it is the questions of law raised by these demurrers which are now to be passed upon. Some of these replications deny the facts recited in the release, but it is clear that, as the release set out in the plea is a technical release under seal, the plaintiff cannot be heard to allege or allowed to prove to the contrary of what she has solemnly admitted under hand and seal. So long as the release stands unassailed for fraud, the plaintiff is concluded from denying the facts recited in it. The other replications demurred to proceed upon the theory that the release is void because obtained as the result of a scheme which should be held illegal as against that rule of public policy which forbids an employer contracting with an employe for exemption from liability for his own negligence. The constitution of the Baltimore & Ohio Relief Association, a corporation chartered by the Maryland legislature, and which all the employes of the Baltimore & Ohio Railroad Company are compelled to become members of, provides that

before the person named by the member as the beneficiary of the insurance upon his life shall be paid there must be executed a release, signed by all persons who might be entitled to recover damages from the railroad company, releasing the railroad company from all damages to which it might be liable by the reason of the death. The question of the reasonableness of this provision of the constitution of the relief association came before the Maryland court of appeals in *Fuller v. Association*, 67 Md. 433, 10 Atl. Rep. 237, and it was held to be a reasonable stipulation, and that no suit could be maintained against the relief association for the amount insured upon the life of a member who had been killed while in the service of the railroad company, if the persons legally entitled to recover damages from it for his death refused to release their claim for damages against the railroad company. It is solely by reason of the statute of Maryland giving a right of action to the wife, husband, parent, or children of the person whose death has been caused by negligence, that the plaintiff has any standing at all in court, and in *Fuller v. Association*, we have the decision of the highest court of the state declaring that the condition in the contract of insurance which requires such a right of action to be released before the insurance can be claimed is a reasonable and valid provision. Notwithstanding the rule of public policy which prohibits railroads as common carriers from stipulating for exemption from responsibility for negligence, it is lawful for them to limit the amount for which they will be responsible, or to stipulate that any insurance effected by the owner on the goods shipped shall be applied to their exoneration. *Insurance Co. v. Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176. The Baltimore & Ohio Railroad Company has promoted the relief association, and guaranteed its contracts, and contributed to its funds, and it does not appear to me that it is contrary to any rule of public policy which has the sanction of the courts to hold that it may avail of a release obtained by the relief association for its benefit under a provision of the constitution of the relief association which the Maryland court of appeals has held to be reasonable and lawful. This view of the lawfulness and validity of the release required by the relief association was also held by Judge SAGE in *Owens v. Railroad Co.*, 35 Fed. Rep. 715. It is also to be considered that the release pleaded as a discharge was executed by the plaintiff after the cause of action upon which she sues had arisen. The insurance upon the life of her husband did not affect her rights at all, as it was made payable to her husband's mother. She had no contractual relations with either the railroad company or the relief association, and cannot complain of any contract made with her husband as being against public policy, because she is unaffected by any such contract except so far as she herself has chosen to respect it since his death. If, in consideration of the payment by the relief association of \$1,000 to her husband's mother, she has released her claim for damages, why should it not be valid? She could have released her claim in consideration of five dollars, or any valuable consideration whatever, and it would have been valid; or, if she was advised that she could prove the necessary allegations of negligence, she had a

perfect cause of action which she could maintain in court against the railroad company for whatever damages a jury might assess in her favor. If, having this right of action, she has, since her husband's death, voluntarily and without deception practiced upon her, released it, induced to do so by the certain benefit which would thereby accrue to her husband's mother, I can see no ground upon which the release can be treated as a nullity. The demurrers are sustained.

## HARDY v. MINNEAPOLIS & ST. L. RY. Co. *et al.*

(Circuit Court, D. Minnesota. November 14, 1888.)

### 1. NEGLIGENCE—PROVINCE OF COURT AND JURY.

In an action for negligence, where the evidence on the material issues is conflicting, the court will not set aside a verdict, though it would have been entirely satisfied if the result had been the other way.

### 2. MASTER AND SERVANT—NEGLIGENCE OF VICE-PRINCIPAL.

M., defendants' yard-master, mounted the switch-engine, and, while acting as engineer, gave deceased directions to assist in uncoupling cars. The latter, while so employed, was run over and killed. *Held*, that the court properly refused an instruction that, while M. was acting as engineer, he was a fellow-servant of deceased, and defendant would not be liable for his acts as such. Though actually engaged as an engineer, he was none the less yard-master, and entitled to be obeyed in the work of making up trains.

### 3. DEATH BY WRONGFUL ACT—ACTION—EVIDENCE.

In an action by the next of kin to recover damages for the negligent killing of the deceased, the damages being limited to the pecuniary loss, evidence to show the good or bad reputation of such next of kin is inadmissible to affect that question.

At Law. On motion for new trial.

Action by Emeline A. Hardy, as administratrix of the estate of Frank S. Hardy, deceased, against the Minneapolis & St. Louis Railway Company and the Burlington, Cedar Rapids & Northern Railway Company, to recover damages for the alleged negligent killing of her intestate. There was a verdict for plaintiff, and defendants moved for a new trial.

*D. F. Morgan* and *W. Bowman*, for plaintiff.

*J. D. Springer* and *F. D. Larrabee*, for defendants.

SHIRAS, J. The question of negligence, upon which this case turned before the jury, was whether the deceased, Frank Hardy, was required by his superior officer, to-wit, Murphy, the yard-master, to perform the duties of a switchman, and as such to go between the cars of the moving train for the purpose of uncoupling the same. There can be no doubt that a person who performs such duties is placed in a dangerous position. The deceased, a lad of 16, had been engaged to perform the duties of a call-boy at the yard of defendants at Albert Lea. He met his death by being crushed between two cars in the defendants' yard, while engaged in uncoupling the same. The question of fact upon

which the case depended, was whether the yard-master caused the deceased to undertake the duties of a switchman, and in the performance thereof to go between the moving cars. The jury found the issue for the plaintiff, and it is strongly urged in support of the motion for new trial that there was not sufficient evidence to justify the jury in so finding. It cannot be questioned that the evidence is not at all clear upon this point. One witness for plaintiff, who testified to facts strongly supporting plaintiff's theory of the case, was sought to be impeached in many ways. The question of his veracity, and the weight to be given to his evidence, if any, was fairly submitted to the jury, whose province it was to determine the question. The court does not know whether the jury gave any credence to the witness or not. Should another trial be had, and the same witness should testify on behalf of plaintiff, the court would be compelled to submit the same question touching the credibility of the witness to the jury. Leaving the testimony of this witness out of the case, there is still left some evidence tending to support the theory of the plaintiff and the verdict of the jury. Murphy, the yard-master, who had charge of the engine at the time of the accident, testified that he did not order the deceased to go between the cars, but he also just as positively testified that he did not receive or act on any signal given through the deceased, and did not notice him except as he saw him go towards the cars. In this latter important particular Murphy was expressly contradicted by the testimony of the witnesses Johnson and Marsh, introduced on behalf of the defendants. The latter was the brakeman, who was on the rear end of the two detached cars, and he testified that, being on the rear end of the cars, he could not give the signals to Murphy upon the engine direct, and that he gave a signal to go ahead, which was repeated by Frank Hardy to Murphy, who thereupon pulled ahead; and then, when the engine had cleared the switch, he gave the signal to back down to Hardy, who repeated it to Murphy, and the latter then backed the engine and car attached down towards the cars on which the witness was standing. The witness Johnson was not an employe of the defendants. He testified that he saw Hardy come down by the engine; that deceased was between himself and Murphy, who had his head out of the cab window; that Murphy was looking northward, that is, towards Hardy, which would be in the contrary direction from the cars on which Marsh was then standing; that he saw Hardy give a signal with his hands, and thereupon Murphy pulled in his head, and the engine began moving, and the deceased stepped in between the cars, and then the accident happened. This testimony, coming from witnesses introduced on behalf of the defendants, clearly shows that Murphy expected to receive signals from Hardy, and that he acted upon them when received; otherwise he would not, as testified to by Johnson, have been looking northward from his cab, and watching Hardy, instead of looking towards the cars. Murphy himself admits that he saw Hardy go towards the cars, just as Johnson testified that he did. The evidence, therefore, clearly proves that Hardy was engaged in the performance of the duties of a switchman, and that Murphy knew it, and accepted such services, and acted thereon, at

least so far as the giving and receiving signals were concerned. It no less clearly appears that Hardy, after receiving and giving the signals to Murphy, then undertook to perform the next duty, which ordinarily would have been expected of a switchman in his position, to-wit, that of going between the tender and car, for the purpose of uncoupling the same. The theory of the plaintiff was that he undertook this duty by the direction or procurement of Murphy, who was his superior officer, and who thus subjected him to the dangers incident to such a position. The theory of the defendants was that Hardy voluntarily placed himself in this position; that he was a bright, ambitious young fellow, desirous of pushing himself forward in the service of the company; and that he undertook to uncouple the cars without direction or control on the part of Murphy. The jury was instructed that, to enable plaintiff to recover, it must be shown that Hardy went between the cars by the direction or procurement of Murphy, the yard-master, and that, if he went between the cars of his own volition, without being directed or required so to do by Murphy, then plaintiff could not recover.

There are circumstances proven which tend strongly to support the theory of the plaintiff, although no witness testified that he heard Murphy order or direct Hardy to go between the cars, or to make the uncoupling. Unless, therefore, it was the duty of the court to instruct the jury, as a matter of law, that it was incumbent on plaintiff to prove that some express command or direction was given by word of mouth by Murphy to Hardy to thus go between the cars, all that could be done was to submit the question as one of fact to the jury for their determination in view of all the facts disclosed in the evidence. This was done, and, the jury having settled the question of fact thus submitted to them, the court is not justified in reversing their finding simply because the evidence is circumstantial. The case is of such a character that a verdict for the defendant would have been entirely satisfactory to the court. Yet it cannot be said that the verdict is entirely without support, even taking the evidence introduced by defendant solely into account. Under these circumstances the verdict cannot be set aside on the ground that it is unsupported by evidence.

It is also urged in support of the motion for new trial that the court erred in not instructing the jury that when Murphy, the yard-master, went upon the engine to act as engineer thereon, he then ceased to be a superior officer or vice-principal; and his negligence, if proven, would be that of a co-employee, for which, under the law of Minnesota, as it was when the accident happened, the common master would not be liable. See *Quinn v. Lighterage Co.*, 23 Fed. Rep. 363. If the accident had been caused through negligence in the handling or running of the engine by Murphy, then we would have had a state of facts which would have presented the question ruled on in the case just cited. The negligence relied on in the case on trial was the allegation that the yard-master required or directed Hardy to undertake the dangerous duty of uncoupling the cars, and thereby necessarily subjected him to a risk greater than that pertaining to his proper employment. When Murphy undertook the duty of running the engine,

he did not cease to be yard-master. The duty of seeing to the making up of the trains in the yard belonged to him, as yard-master. If he directed Hardy to undertake the duties of a switchman, which the jury have found he did, he so directed him as yard-master, and not as an engineer. If, when Murphy was on the engine, he had given him some proper order in connection with his duties as call-boy, the latter could not have justified a refusal to obey the same on the ground that Murphy had ceased to be yard-master simply because he had assumed the additional duties of an engineer for the moment. It is the negligence of Murphy as yard-master, and not as engineer, for which the company is held liable, and there is nothing in the evidence which would justify the finding that Murphy had ceased to occupy the position of a superior towards the deceased when the latter was called upon to act as a switchman.

Exception was taken at the trial to the exclusion of certain depositions taken for the purpose of attacking the reputation of the plaintiff. The ruling was that evidence tending to show the wealth or means of support of the plaintiff, she being one of the next of kin, was admissible, but not evidence merely tending to show the reputation of the plaintiff. This evidence, if admitted, could only affect the amount of recovery, and it seemed to the court upon the trial that it was immaterial. In cases of this character, where the damages are limited to the pecuniary loss of the next of kin, caused by the death of the relative, is it permissible, in order to increase or diminish the amount of the damages, for either party to prove that the next of kin are possessed of a high character, or the contrary? If it be true that a poor reputation should diminish the damages, then a good reputation should increase the same. Yet this cannot be true. There may be cases presenting peculiar features in which such evidence might be competent, but in a case like the present, the introduction of such evidence would not enlighten the jury upon the question of loss, caused by the death of the son and brother, but it would introduce an issue which would, unless it was clearly sustained, and might even then, tend to prejudice the jury against the defendants, and lead to the rendition of larger verdicts than would otherwise be given. The motion for new trial is therefore overruled. For the information of counsel, I would say that the conclusions announced on the several points relied on in support of the motion for new trial are concurred in by Judge BREWER, although the opinion itself has not been submitted to him.

## McINTOSH v. CHICAGO, M. &amp; ST. P. RY. CO.

*(Circuit Court, D. Minnesota. November 14, 1888.)*

## RAILROAD COMPANIES—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

Deceased was driving a heavily loaded wagon on a street in a large city, crossed at its intersection with another street by four tracks of defendant's road. A gate was usually lowered across the street, controlled by men in an observation tower, who, being unable to see by reason of the fog, were at the time acting as flag-men, the gate being raised. Several teams were in waiting for a passing freight train, and when the track was clear they attempted to cross, deceased being last. As his horses were on the rails an alarm was given of a passenger train approaching, and two men on the wagon with deceased jumped off safely. Deceased struck his horses to urge them forward, the wagon was dashed against the curb-stone, the foot-board upon which deceased's feet rested broke, he fell under the wagon wheels, and was killed; the horses escaping. It was uncertain whether deceased attempted to jump, and springing from the foot-board broke it. There was evidence that it was defective, but none that deceased knew it, and one of the other men who was heavier than deceased sprang off of it without its breaking. *Held* no evidence of contributory negligence in the use of the defective foot-board, to require the submission of the question to the jury

At Law. On motion for new trial.

Action by James W. McIntosh, administrator of William Fry, deceased, against the Chicago, Milwaukee & St. Paul Railway Company, for negligently causing intestate's death. Verdict for plaintiff, and defendant moves for a new trial.

*Hunt & Wilkinson, Howard & Richardson, and J. H. Randall, for plaintiff.*

*Flandrau, Squires & Cutcheon, for defendant.*

SHIRAS, J. On the 31st day of October, 1887, William Fry was engaged in the business of teaming in the city of Minneapolis, and on the morning of that day he drove his wagon and team along Tenth avenue, to the point where the same crosses the line of defendant's railway; it being his intent to pass over the railway track. The wagon was heavily loaded with ashes and garbage; there being on it two men besides Fry, who was driving the team. At the point of intersection of Tenth avenue and the railway track, which is likewise the point of intersection of Third street, the railway company had erected gates worked by a pneumatic pump in a tower, which were ordinarily lowered across the streets when a train was approaching. On the morning in question a fog had prevailed, so that the men could not from the tower keep watch of the track, and they had left the gates upraised, and had been acting as flag-men upon the ground. A short-line train from St. Paul was due at the crossing about the time Fry drove down Tenth avenue, and there was also a freight train at or on the crossing; so that all teams approaching in either direction on Tenth avenue or Third street were compelled to halt. The freight train was being moved out of the way, and as soon as it cleared the crossing the way was left open for the passage of the teams,



as the gates were not closed. One of the two men at the crossing had gone into the tower for the purpose of pumping air into the cylinder of the pneumatic pump, and there was left, therefore, to keep guard at the double crossing, only one man. As soon as the passage was left clear the teams that were waiting, including that driven by Fry, started across the track. The short-line train was now approaching the crossing, and the flag-man made some effort to warn the persons of the danger, but owing to the fact that there were practically four crossings to watch and warn, with a large number of teams approaching, he was unable to give any effective signals, and the teams started over the track. The wagon driven by Fry, being heavily laden, was the last to reach the railway tracks, and just as the horses were passing upon the line of rails on which the coming train was approaching, the man sitting by Fry saw the same, gave the alarm, and sprang from the wagon. At the same instant the flag-man rushed forward, exclaiming: "Get out of here; get out of here." Fry was seated on a spring seat in the front of the wagon, with his feet resting on a foot-board attached to the front end of the wagon box. When the alarm was given him, he rose up, and, as some of the witnesses testify, he struck the horses with the reins to urge them forward. At that instant he fell between the horses and the wagon wheels, and, the horses starting forward at a rapid pace, the wheels of the wagon passed over Fry, causing injuries which resulted in his death within 24 hours. The flag-man pulled the body from the track, so that it was not touched by the locomotive. By the running away of the horses, the wagon was carried clear of the track, and it escaped an actual collision with the train.

Upon the trial the question was submitted to the jury whether the defendant company had been negligent in not having a proper guard kept at the crossing, and whether Fry had been himself guilty of negligence in attempting to drive across the railway tracks. The jury, by their verdict, found negligence on part of the company, and freedom therefrom on the part of Fry, and these findings are entirely justified by the evidence. The verdict being in favor of the plaintiff, the defendant now moves for a new trial on the ground that "the court in its charge withdrew from the consideration of the jury the question as to whether the deceased, Fry, was guilty of contributory negligence in rising and putting his weight upon the foot-board of his wagon when the same was in a defective condition, and by reason of such defect broke under his weight and precipitated him under the heels of his horses." The evidence showed that when Fry was warned of the danger caused by the coming train, he rose upon his feet on the foot-board; but whether he did so for the purpose of trying to escape by jumping from the wagon, or for the purpose of whipping up his horses, was left uncertain. It was also in dispute whether the foot-board broke beneath his weight, or whether his foot slipped, and caused his fall. It was with more especial reference to the first of these points that the part of the charge excepted to had reference. The jury were instructed that it made no difference whether Fry's purpose was to attempt to escape by jumping from the wagon, leav-

ing it to its fate, or to urge the horses forward, and so attempt to clear the track; that if the company by its negligence had placed Fry in a position of danger, it would be responsible for the consequences; and that it did not lie with the company to say that he was in fault because he attempted to jump from the wagon, or because he attempted to urge the horses forward. But granting that the effect of the charge in this particular was to eliminate the question of contributory negligence from the case, as is claimed by defendant's counsel, was it reversible error so to do? The point made by the defendant is that it should have been left with the jury to determine whether Fry was guilty of contributory negligence in rising and putting his weight upon the foot-board of the wagon, when the same was in a defective condition, by reason of which defect it broke under his weight. This embraces three propositions, to-wit: That the jury would have been justified in finding that the foot-board was in a defective condition; that it did break under his weight, and that it was in such a defective condition within Fry's knowledge, that he was guilty of negligence in rising on the same when the sudden emergency came upon him. There was some evidence by one witness, who examined the foot-board after the accident, showing that there was an old fracture in the foot-board. Reliance is placed upon certain statements said to have been made by the witness Thornton, who was one of the men upon the wagon, to the effect that if the foot-board had been sound the accident would not have happened, and that he had told Fry to have the foot-board repaired. Thornton denied making any such statements. If Thornton did in fact make these statements, they are not competent evidence against the plaintiff. Thornton has no interest in the case, and the statements, if made at all, were made after the accident had occurred; were no part of the *res gestæ*; and if a new trial were had these statements could not properly be put in evidence. There was direct and positive evidence introduced by plaintiff tending to show that the breaking of the foot-board was caused by the team running the wagon against the curb-stone after it had passed over the railway track. So, also, there is no direct evidence on the subject of Fry's knowledge of the defective condition of the foot-board, if we assume that it was defective.

Admitting, however, that there was some evidence tending to show that the foot-board was in bad order, and that it broke when Fry's weight came upon it, and thereby precipitated him beneath the wheels of the wagon, would the jury have been justified in finding that Fry was guilty of negligence in rising on the foot-board in his effort to escape from the on-coming train? The testimony of Thornton and James, the two men who were upon the wagon with Fry when the accident happened, was to the effect that the wagon had been in daily use since the 5th of July preceding the accident; that there had not been any visible defect in the foot-board; that the foot-board was used daily by them, and it had never given way; and that Thornton, who was sitting by Fry when they came down upon the railway track, jumped from the wagon in making his escape, using the foot-board to spring from, and it did not give way beneath his weight. Under such circumstances would the jury have been

justified in finding that Fry was guilty of contributory negligence in "rising and putting his weight upon the foot-board" in his effort to escape from the coming train? The uncontradicted evidence shows that the foot-board had been in daily use for weeks before the accident, and at the very moment of the accident Thornton, who was a heavier man than Fry, had before his very eyes placed his weight upon the foot-board, and used the same as a means of support in springing from the wagon. If it would—as it did—support Thornton's weight, why was not Fry justified in acting upon the belief that it would equally support his weight? The evidence shows without dispute that the wagon-bed was full of ashes, and the seat was so placed that the feet of the men in the seat rested on this foot-board. When the necessity arose of attempting to escape from the sudden danger caused by the approach of the train, what was more natural than for the men to throw their weight upon the foot-board? Thornton, being the first to notice the danger, rose upon the foot-board, and by jumping to the ground he escaped injury. Fry, however, was in charge of the team, and probably made the effort to urge the horses forward, and for that purpose struck the horses with the reins, and in doing so threw his weight upon the foot-board, and in doing so defendant claims he was guilty of negligence defeating the right of recovery. I wholly fail to see any fair view of the evidence that would have justified the jury in finding that Fry was guilty of negligence in so doing. A finding to that effect would have been without support in the evidence, and had the jury upon that ground found for the defendant, it would have been the duty of the court to set aside the finding.

There is nothing proved in the case that would have justified the jury in finding that Fry, in the exercise of ordinary care, should have foreseen that the probable result of his putting his weight upon the foot-board would be that it would give way beneath him. If, in the exercise of ordinary care, he was not bound to anticipate such a result, how can it be said that the fact that he did put his weight upon the foot-board was negligence? The fact, if it be one, that the foot-board gave way beneath Fry does not show that Fry was negligent in placing his weight thereon. To show negligence it would have to appear that the condition of the foot-board was such that Fry, when he was about to place his weight thereon, knew or should have known that it would probably give way beneath him. The evidence wholly fails to show such a state of facts as would justify a jury in finding that Fry knew or ought to have known that he could not make the use that he did of the foot-board. Under such circumstances it was not only not error to withdraw the question of contributory negligence in the particular named from the consideration of the jury, but it would have been error to have submitted the question to them, for the reason that the evidence submitted did not present the question. The motion for a new trial is therefore overruled.

## CHANDLER v. CALUMET &amp; H. MIN. CO.

(Circuit Court, W. D. Michigan, N. D. November 14, 1888.)

## 1. PUBLIC LANDS—SWAMP LANDS—PAROL EVIDENCE.

Under the provisions of the act of congress of September 28, 1850, conferring swamp lands, and the Michigan act of June 28, 1851, evidence *in pais* that a parcel of land was at the date of the first-named act of the quality therein described, is incompetent, after the secretary of the interior has discharged his duty, and approved lists of swamp lands, made under his directions from the field-notes of survey, which lists do not contain the land in question, although embracing other lands in the township in which it lies, and where no judicial or other proceedings have been had to modify his action, or to extend or renew his powers, over lands not so approved. In such case the state cannot claim that lands not so approved passed to it under the language of the act of congress.

## 2. SAME—ESTOPPEL BY STATE.

The state of Michigan, having accepted from the United States a grant of lands to build a canal, provided for the selection of the same by its own agents, subject to approval by the secretary of the interior, made a contract with a corporation for its construction, and patented the land in question, (with other lands,) duly selected and approved, in accordance with its legislation and that of congress on the subject, to such contractor, in 1855, who received the same *bona fide*, is estopped from setting up that the land inured to it under the swamp grant, and not under the canal grant. 10 St. at Large, 35; Sess. Laws Mich. 1853, No. 88, p. 48.

(Syllabus by the Court.)

## At Law.

The action was ejectment for the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 23, township 56 N., range 33 W., in Houghton county, Mich. This land lies close to the outcrop of the Calumet lode, the lode underlying the whole of it. Plaintiff claimed the land under a patent issued by Michigan to him, November 3, 1887, describing the land as "swamp" land. By the act of congress of September 28, 1850, the United States gave to Michigan (and other states) the whole of the swamp and overflowed lands made unfit thereby for cultivation, within the state, and made it the duty of the secretary of the interior to make accurate lists and plats of all such lands, and transmit the same to the governor of the state, and at his request to cause patents thereof to issue to the state, conveying to it the fee-simple of such lands. It appeared on the trial, by the records of the land-offices of Michigan and the United States, that the secretary had, in 1854, "listed" and approved to Michigan a large number of descriptions lying in the above township and range as swamp lands; the land in dispute not being included therein, nor in any list of swamp lands made at any time by the secretary. It appeared also that in 1850, after the passage of the above act of congress, the secretary of the interior had written to the United States surveyor general a letter of instructions as to the mode of selecting or segregating the swamp lands from the other public lands, in which he had directed that in cases where the field-notes of the United States survey of lands should be accepted by the state as the basis of segregation, and the intersections of the lines of swamp or overflow with those of the survey alone were given, those intersections

might be connected by straight lines; and all legal subdivisions, the greater part of which should be shown by those lines to be within the swamp or overflow, should be certified to the state as swamp lands. Michigan, by act of its legislature of June 28, 1851, accepted the grant, and adopted the notes of the United States surveys as the basis upon which they would receive the swamp lands. The surveyor general for Michigan, under the legislation and letter of instructions, caused plats to be made in accordance with the field-notes, and made lists of the swamp lands, including those in the township mentioned, and transmitted the same to the United States land-office. This list did not contain the land in question, and the list was approved by the secretary, as above mentioned. The plats so made by the surveyor general from the field-notes were, after the swamp selections had been listed by him from them, lodged in the Michigan land-office at Lansing. The plat of this township showed a number of lines in pencil upon it, supposed to have been drawn in accordance with these instructions, and a number of parcels marked "S" in pencil, and among those so appearing to be marked was the land in question. The plaintiff claimed that the land in question, being marked "S," and being more than half within pencil lines so drawn, was swamp land, although never listed as such by the surveyor general, and never listed or approved as such by the secretary, and offered the plat with said pencil notations as proof thereof. He claimed further that the evidence of witnesses was competent to prove that the land in question was, in 1850, in fact swamp land, thereby made unfit for cultivation, and offered such evidence. By act of congress of August 26, 1852, there was granted to Michigan, for the purpose of building the Sault Ste. Marie canal, 750,000 acres of public lands, to be selected by agents to be appointed by the governor of Michigan, subject to the approval of the secretary of the interior, from any lands in Michigan subject to private entry. Michigan accepted this grant by act of February 5, 1853, empowering the governor to appoint agents to select the land, to contract for the building of the canal, and to confer upon the builders the grant, or such part thereof as should be agreed upon as the price for doing the work. It appeared that the contract was made, the entire grant being the price agreed upon, and the canal was built in accordance therewith, and the lands (including the land in question) were patented by the state to the contractor after having been duly selected by the state agents, and duly approved by the secretary. One of these patents, including the land in question, was executed by the state in 1855. The Michigan act provided that patents should be issued by the state of the lands selected by the state agents. The defendant introduced deeds and records showing itself the owner of the land in question by intermediate conveyances from the first patentee of the state.

*Ball & Hanscom, Frank E. Robson, and Isaac Marston, for plaintiff.*

*T. L. Chadbourne and Ashley Pond, for defendant.*

SEVERENS, J., (*after stating the facts as above.*) In giving effect to the grant of 1850, it has been held by the supreme court of the United States

that, in order that the grant should accomplish its purpose, rather than fail, where the secretary of the interior had taken no action in executing a duty devolved upon him of designating the lands which should be included in the grant, and where, after the lapse of a reasonable time for the segregating of the lands in that way, nothing had been done in that direction, parol proof might be received for the purpose of showing that the lands were of the character described in the general language of the act. There is some analogy in this to the case of an appointed arbitrator or umpire, who refuses or fails to act. Other means are then allowable to determine the matter, because justice should not be withheld, even though the instrumentalities to it, more especially in contemplation, fail. That was the consideration which led to the decision of the court in *Railroad Co. v. Smith*, 9 Wall. 95. This, however, does not at all impugn the general proposition that the secretary of the interior was intended by congress to act as the agent of the government in determining the lands, in respect of their character, upon which the grant should operate; nor the further proposition that, where the secretary has discharged his duty, and made the determination throughout a state, or a comprehensive locality, and no objection has been made by the state to the mode and result of the exercise of that duty, and no proceedings, judicial or otherwise, have been resorted to for the purpose of modifying the secretary's action, or extending or renewing the exercise of his powers over other lands, the state cannot assume that other lands, not claimed theretofore under the act, and never listed or approved under it, passed to it by the general language of the act, and rest its right to them upon evidence *in pais* in respect to their quality. Such a course would render nugatory the substantial purpose of appointing the secretary at all, which manifestly was to identify the lands, and thus fix the grant. It was a matter of great public convenience and importance that this extensive grant of parcels out of the government lands should be identified; and that identification is nothing, if, after it has taken place, the whole matter remains at large. These are the conclusions which I think result from the course of adjudication in the supreme court from the case of *Railroad Co. v. Smith*, 9 Wall. 95, to *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985.

But upon another ground I am of the opinion that the plaintiff cannot prevail. That the swamp-land grant of 1850 conferred upon the states complete dominion over the granted lands, and absolute proprietorship therein, so far as third persons are concerned, has been repeatedly held. The question has been somewhat widely discussed as to whether there was anything in the nature of a trust between the general government and the state, in respect of these lands, but the result of the discussion upon it is that it is settled in the negative. The authorities which may be cited in support of this general proposition are the cases known as the "Iowa Railroad Cases,"—*Emigrant Co. v. County of Adams*, 100 U. S. 61; *Mills Co. v. Railroad Cos.*, 107 U. S. 557, 2 Sup. Ct. Rep. 654; and the cases in Louisiana, *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, and *U. S. v. Louisiana*, 127 U. S. 182, 8 Sup. Ct. Rep.

1047. It was an absolute gift to the states, without any limitation in the nature of a property trust, or anything to prevent the application by the state of the swamp-land fund to general purposes. The obligation of the state should be commensurate with the proprietary rights accorded to it, and its dealings with such rights, tested by the principles applicable to a proprietor. The most that can be claimed on the facts, interpreted most favorably to the plaintiff, is that the state—the state of Michigan, in this case—had a right to have this land listed and approved by the secretary of the interior as swamp land, and thus designated as part of the grant. But it was a right which was not asserted by the state. If it had been, it might have been disputed by the secretary; and, if he had denied it, it would never have ripened into title. At least, this would be so unless some further proceedings should be taken to vindicate and enforce that right. Instead of insisting upon this right, if it had it, the state selected and received this description under another grant, and conveyed it for a valuable consideration to a third person, who took it *bona fide*. The state could not, after this had been done, be heard to say that it would repudiate its own course, and, dishonoring its patent, claim title under the act of 1850, and resell it to another. Certainly this could not be done without a judicial proceeding instituted for that purpose. How that might have resulted, it is not for me to say, but it is the inclination of my opinion that the result here indicated must be the result even in such a proceeding as that, or anywhere where these facts came in controversy. The result of these views is that the offers of oral evidence will be declined. The oral evidence offered to show that these lands were swamp lands mentioned in the grant, is, upon what appear to be undisputed facts, rejected; and the court will therefore instruct the jury that, upon the facts as they are made to appear in this case, the defendant is entitled to the verdict.

The jury were instructed accordingly.

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AMADOR MEDEAN GOLD MIN. CO. *v.* SOUTH SPRING HILL GOLD MIN. CO. *et al.*

(Circuit Court, N. D. California. November 5, 1888.)

1. MINES AND MINING—MINING LODES—DIPPING INTO AGRICULTURAL LANDS.

An owner under a patent of mineral lands, including a gold-bearing vein or lode having its apex within the boundaries of the land patented, is not entitled to follow his vein or lode down on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands.

2. PUBLIC LANDS—AGRICULTURAL LANDS—EQUITABLE TITLE.

The equitable title to public lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon. After such entry, no proprietary or pecuniary interest remains in the United States, and no subsequent grant of any character can affect the right of such prior purchaser.

(Syllabus by the Court.)

At Law. On final hearing.

Action by the Amador Medean Gold Mining Company against the South Spring Hill Mining Company and others to recover possession of property.

*Onley, Chickering & Thomas*, for plaintiff.

*A. C. Adams and Egan & Rust*, for defendants.

Before SAWYER, Circuit Judge.

SAWYER, J. It appears from the agreed statement of facts, that one Calvin Hammack, under a warrant issued in pursuance of the provisions of the Revised Statutes relating to bounty lands for soldiers of the war of 1812, made application, at the land-office in Sacramento, to purchase from the United States certain agricultural lands, which application was approved, the payment of purchase money for the excess made, and the usual certificate of purchase issued on June 15, 1874. Afterwards, in pursuance of this entry, a patent of the United States was duly issued on September 13, 1876, embracing the premises in controversy. The title acquired by this entry, and the patent to the premises in controversy, by proper mesne conveyances, became vested in the plaintiff prior to the commission of the acts complained of, and it was in plaintiff at the commencement of this action. After the said entry and payment for the land by Hammack, and the issue of the certificate of purchase on June 15, 1874, and before the issue of said patent in pursuance of such purchase and entry, to-wit, on July 18, 1876, one McKim located and acquired the right to a gold mining claim, situated on land adjacent to the lands so entered by and patented to said Hammack. Having acquired the right to the mineral location, McKim conveyed his title to the South Spring Hill Mining Company, after which, upon application regularly made, and the performance of all the conditions required by the statute, a patent embracing said McKim's mining location was duly issued to said company by the United States under the act authorizing the sale of mineral lands. All the title and rights acquired under said mineral patent were conveyed to, and became vested in, defendant, before the performance of the acts complained of. The defendant, after thus acquiring the title, proceeded to work its claim, and develop the mine; and, in so doing, discovered the apex of a vein or lode within the exterior boundaries of the location as patented. The defendant, in working this lode, followed it down on the dip, without departing therefrom until it crossed the line of the adjacent agricultural land held by the plaintiff under the said patent issued upon the entry by Hammack; and worked the lode beneath the surface within the plaintiff's land. The value of the ore removed is \$200, and of the land in dispute not less than \$5,000. The action is to recover possession of the portion of the premises from which plaintiff has been ousted by these acts, and damages for the injury sustained.

The only question is whether, under the Revised Statutes, a party discovering and acquiring title by patent from the United States to a mineral gold-bearing vein or lode having its apex within the land purchased, is entitled to follow the vein or lode down on its dip, across the bounda-



ries of his own lands into the agricultural lands of an adjoining proprietor, who has the elder title? In my judgment he, clearly, has not. The equitable title to the agricultural lands, held by plaintiff, fully vested on the entry and payment by Hammack on June 15, 1874. After that the United States merely held the dry legal title in trust for the purchaser without any pecuniary or beneficial interest in it. From the moment of the entry, payment, and issue of the certificate of purchase, these lands cease to be public, and became private property. *Milling Co. v. Spargo*, and *Same v. Fick*, 8 Sawy. 647, 16 Fed. Rep. 348, and cases cited. Also *Wirth v. Branson*, 98 U. S. 118; *Deffebach v. Hawke*, 115 U. S. 405, 6 Sup. Ct. Rep. 95. By the entry and payment by Hammack, there being no known mine on the land, the entire interest to the center of the earth vested in him, and there was nothing left in the United States for a subsequent grant to other parties to operate upon. The only exceptions in the patent relate to easements and other prior rights already vested in other parties, before the date of the entry, as was held in the case of *Milling Co. v. Spargo*, cited. No other exceptions are authorized by the statute to be inserted, and exceptions not so authorized, if inserted, would be void. *Cowell v. Lammers*, 10 Sawy. 254, 21 Fed. Rep. 200; *Deffebach v. Hawke*, 115 U. S. 402, 406, 6 Sup. Ct. Rep. 95. Section 2322, Rev. St., relied on by defendant, does not authorize any such exception, and it only applies, at most, to public lands, and to rights acquired to such lands before other parties acquire interests therein. It, certainly, does not apply to agricultural lands disposed of years—perhaps half a century—before by the government and before any easement, or other right, has become vested in other parties. The United States can undoubtedly grant easements, and other limited rights, in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights, but when it has once disposed of its entire estate in the lands to one party, it can, afterwards, no more burden it with other rights than any other proprietor of lands. *Mining Debris Case*, 9 Sawy. 493, 18 Fed. Rep. 753. The defendant acquired no rights in the premises in question under the section cited, or any other statute of the United States, brought to the notice of the court, as against the prior grant under which the plaintiff holds. The result is that there must be a judgment for plaintiff, and it is so ordered.

RAND v. UNITED STATES.

(District Court, D. Maine. October 25, 1888.)

1. CLAIMS AGAINST UNITED STATES—JURISDICTION OF FEDERAL COURTS—PRIOR REJECTION.

Act March 3, 1887, giving to United States courts jurisdiction of claims against the United States, contains a proviso "that nothing in this section shall be construed as giving either of the courts herein mentioned jurisdiction to hear and determine claims which have been heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." *Held* that, the comptroller of the treasury having charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same, within the meaning of the proviso. Following *Bliss v. U. S.*, 34 Fed. Rep. 781.

2. UNITED STATES COMMISSIONERS—FEES—DRAWING COMPLAINTS.

It being important to the liberty of the citizen and the due administration of justice that complaints and recognizances in criminal cases should be technically full and complete, a United States commissioner is entitled to compensation for such papers as drawn and entered by him in good faith, and in accordance with the practice of the state within which he acts, although the comptroller of the treasury may be of opinion that such papers may be comprised within a given space, and that all beyond is "unnecessary verbiage."

3. SAME—CRIMINAL RECOGNIZANCE—OATHS TO SURETIES.

Compensation at the statutory rate cannot be denied to commissioners for oaths administered to sureties in criminal cases, on the ground that such oaths were unnecessary, as they cannot be held to know the sufficiency of a surety offered until he has been examined under oath.

4. SAME—ACKNOWLEDGMENTS TO RECOGNIZANCE.

Commissioners, being allowed the same fees as clerks for taking acknowledgments, are entitled to a fee for each person acknowledging a recognizance, and not simply to one fee for all the acknowledgments of a recognizance.

5. SAME—DOCKET FEES.

Act Aug. 4, 1886, entitled "An act making appropriation to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, and for prior years, and for other purposes," and enacting that certain sums be "appropriated to supply deficiencies in the appropriation for the fiscal year 1886, and for other objects hereinafter stated, \* \* \* for fees of commissioners, \* \* \* \$50,000: provided, that for issuing any warrant or writ, or for other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services. but they shall not be entitled to any docket fees,"—does not take away the right of commissioners to receive docket fees, but only excepts their payment out of the sums so appropriated.

6. SAME—PER DIEM.

Under Rev. St. U. S. § 847, allowing commissioners, "for hearing and deciding in criminal charges, five dollars a day for the time necessarily employed," the commissioner is entitled to a *per diem* for "hearing and deciding" a charge, though no evidence be produced or witnesses examined.

Petition for the Allowance of a Claim against the United States for fees as commissioner.

*E. M. Rand, pro se.*

*George E. Bird, U. S. Atty., for the United States.*

WEBB, J. The petitioner, a commissioner of the circuit court in this district, prosecutes his claim against the United States for fees for services, his charges for which have been suspended or disallowed by the first comptroller of the treasury. It is admitted that accounts for all these

services have been regularly presented, and that he has performed all the work for which he claims compensation. But it is objected that for some services his charges are excessive by reason of unnecessary length of papers, and for others he is not legally entitled to anything. A portion of the account set out in the petition was presented to and rejected by the comptroller prior to March 3, 1887, and to so much of his demand it is objected that the court has not jurisdiction. Precisely this question is decided in favor of the government in *Bliss v. U. S.*, 34 Fed. Rep. 781, and, while not asserting a conviction of the absolute conclusiveness of the reasoning of that case, I am not prepared to dissent from it, especially in view of the importance of harmony and uniformity of decisions in the courts of the United States. Accordingly, so much of the petitioner's claim as was passed upon and rejected by the comptroller before the approval of the act under which these proceedings are had, is disallowed. This strikes out \$115.05. The remainder of the account, consisting of a large number of small charges, need not be considered in detail, as all the particulars fall into a few classes. They are for compensation in excess of the amount allowed by the comptroller on complaints and recognizances; for oaths to sureties justifying; for acknowledgment of recognizances; and for *per diem* fees, in hearing and determining on criminal charges. There is no controversy in respect to what the commissioner actually did, and if there were, the evidence is conclusive that he has charged for no service which he did not perform. Section 1014 of the Revised Statutes provides:

"For any crime or offense against the United States, the offender may, by any commissioner of a circuit court to take bail, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

Thus the proceedings before commissioners in criminal matters are regulated by the proceedings for similar purposes under the laws of the state where they take place, and are assimilated thereto as closely as may be. *U. S. v. Rundlett*, 2 Curt. 41. The usual mode of process in Maine is regulated by statute. The first steps are complaint on oath and warrant for arrest. The magistrate may adjourn the examination from time to time, not more than 10 days at a time; and the accused, if the offense is bailable, may recognize with sureties for his appearance at the time of adjournment; but if the offense is not bailable, or if sufficient sureties are not offered, the accused shall be committed to jail by an order of the magistrate stating briefly the offense, and that the party is committed for further examination. The complainant and witnesses for the prosecution shall be examined on oath, in the presence of the accused. Upon its appearing that an offense has been committed, and that there is probable cause to charge the accused, if the offense is bailable, and sufficient bail is offered, it shall be taken, and the accused discharged. If the offense is not bailable, or no sufficient bail is offered, the accused shall be committed to await trial. If the accused is committed or bound over

for trial, the magistrate shall order material witnesses for the prosecution to recognize, with or without sureties, as may be considered necessary; and if they refuse to recognize as required, the witnesses may be committed to prison, and remain till discharged by law. Magistrates must certify and return to court all examinations and recognizances, and for neglect and refusal are liable to attachment for contempt. Rev. St. Me. c. 132, §§ 5, 6; c. 133, §§ 9-17, inclusive. The proceedings before this commissioner are shown to have conformed to these requirements in every instance. The objections made to his charges are not that the services were not actually performed, or that the rates of charge are improper, but that the services were, in whole or part, unnecessary. The comptroller undertakes by inflexible rule to determine the necessary length of complaints and recognizances, and refuses compensation for anything in excess of the limit he so fixes, declaring the same to be "unnecessary verbiage." It is true that commissioners have power only to examine and hold to bail or commit for appearance at court parties arrested and brought before them. But this power authorizes the imprisonment of accused persons for considerable periods to await trial. This incarceration, if the party is finally convicted and sentenced, constitutes no part of the sentence, and, in most cases, is not regarded in passing sentence. It may, and often does, exceed the time of imprisonment finally imposed as a punishment for the offense committed. Accused persons are also subjected to the burden of finding sureties, and the sureties to trouble, expense, and loss of time in appearing before the commissioner to recognize. It is by no means certain that a grand jury will present an indictment against every accused person held by the commissioner to answer, or, if they do, that conviction will follow. A due regard to personal rights seems, therefore, to require that all proceedings before the examining magistrate should be conducted with care and exactness. If the technical fullness and precision essential in an indictment is not requisite in a complaint,—a question in respect to which, under our constitutional system, there may be room for doubt,—complaints should be full enough to show clearly the particular offense charged, and contain substantial, if not formal, allegations of its essential elements, as well as the details of time, place, and persons. *State v. Smith*, 2 Me. 62. If the complaint, which is the basis of all the proceedings, fails to set out, even informally, an offense against the laws; if its statements may be all admitted without confessing any violation of law,—of what can it be held that there is probable cause to believe the party accused guilty, or why should he be ordered to recognize with sureties, and for want thereof to be confined in jail? It has been well said:

"There is no necessity, nor even apology, for a careless or incorrect manner of conducting any judicial process; especially one which controls the personal liberty of the subject, and requires him to defend himself against a criminal accusation. When, therefore, a magistrate institutes such a process, it is his duty to make it conformable to the requirements of technical precision."

In a recognizance less fullness and particularity may be sufficient; but it should be carefully drawn, to avoid defects which may prove fatal in a  
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proceeding by *scire facias* or debt against principal or sureties. It should contain the names and residences of the recognizers, and the amount in which they are bound. The condition should show the proceeding in which the recognizance is taken, the particular offense for which the principal is held to answer, or, if it be the obligation of a witness, the matter with respect to which he is held to testify, and the court before which the appearance is required. The authority of the magistrate to require and take the recognizance must appear from the description of the offense charged. *State v. Hatch*, 59 Me. 413; Rev. St. Me. c. 133, § 25. It is not possible to determine beforehand, and for all cases, the necessary length of recognizances or other records. The petitioner, in his practice, has conformed to long-established usage in this district, and has followed the requirement and directions of the court made known years ago. There is no suggestion or reason to suspect that for the purpose of increasing his fees he has willfully expanded any papers. Every one who has had experience in framing complaints and indictments under the statutes of the United States knows the great care necessary to make them conform to the statutory provisions and the requirements of criminal pleading. Officers should rather be commended for exactness and precision, even though sometimes unnecessarily particular, than invited to loose and slovenly practice, by a denial of legal compensation. The evidence establishes that this petitioner has performed all the services for which he has charged. He is entitled to be paid for those services, and it is no justification for withholding from him that payment, even if it be the fact that another pleader might have drawn his papers more concisely.

The charges for oaths of sureties have been disallowed as unnecessary. Unless the requirement of sureties is idle and meaningless, it is important that they be responsible, and able to perform the obligation they assume. Whether they are so or not, cannot, in the greater proportion of cases, be within the personal knowledge of the magistrate. It is his duty to inform himself of their sufficiency. The oath of the individual offered as surety in respect to his residence, property, and means is an assurance, the omission of which would justly subject the commissioner to censure if the bail should be found worthless. 1 Chit. Crim. Law, 99. The rate charged for these oaths is in conformity with the statute regulation of fees, and the petitioner has the right to be paid them. Though fees for taking acknowledgments are given in the fee-bill for clerks of courts, and commissioners are for like services allowed the same compensation, it is argued that items of account under this head should be rejected, because a fee is charged for each acknowledgment, instead of one fee for each recognizance acknowledged. The statute which prescribes the fee contains no such rule. It is not in the power of one person to acknowledge an obligation so as to bind another who does not. The responsibility assumed is personal, and should be personally assented to. It is quite a different proceeding from the acknowledgment of deeds, which in this state is necessary only that the instrument may be admitted to registration, and, by statute, is sufficient if

made by one of several grantors. As every service of this kind charged has been performed, the compensation demanded is due.

The right to docket fees, under the decision in *Wallace's Case*, 116 U. S. 398, 6 Sup. Ct. Rep. 408, is fully established, unless the proviso in the deficiency bill of August 4, 1886, (24 St. 274,) defeats it. That act is entitled, "An act making appropriation to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, and for prior years, and for other purposes." Section 1 enacts:

"That the following sums be, and the same are hereby, appropriated out of any money in the treasury not otherwise appropriated, to supply deficiencies in the appropriation for the fiscal year eighteen hundred and eighty-six, and for other objects hereinafter stated, namely, \* \* \* 'judicial,' \* \* \* 'fees of commissioners.' 'For fees of commissioners, and justices of the peace acting as commissioners, fifty thousand dollars: provided, that for issuing any warrant or writ, and for other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees.'"

Whether the title of this act does or does not show that it includes and was intended to include general legislation for other purposes than the appropriation of money, only a violent construction can find such other purposes in this section. "The following sums are hereby appropriated, etc., to supply deficiencies, and for other purposes," can only mean that the moneys are appropriated for other purposes, in addition to the purpose of making up deficiencies. If there could be any uncertainty as to this interpretation of the section, it would be dissipated by examination of the objects it enumerates, every one of which is for the payment of money. Then what is the effect of this proviso, and why was it inserted? "A proviso carves special exceptions only out of the enacting clause." Per STORY, J., *U. S. v. Dickson*, 15 Pet. 165.

"It would be somewhat unusual to find ingrafted in an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and when the language admits of no other reasonable interpretation." *Minis v. U. S.*, Id. 443-445.

The plain intention of this statute, so far as it deals with commissioners' fees, was to authorize the use of a definite amount of money in the treasury for the payment of fees that, by reason of inadequate previous appropriations, remained unpaid. Without the proviso, legal fees of commissioners for every kind of service might have been paid from the appropriation until it was exhausted. From this application of the fund to fees generally, the proviso, in the language of Judge STORY, "carves out the special exception" of docket fees. It is not difficult to suggest a reason why this exception was made. Until the supreme court, in *Wallace's Case*, had sustained the legality of commissioners' charges for docket fees, those charges had been uniformly held by the treasury officers improper, and had been disallowed. Naturally, therefore, in estimating the amount

of appropriation needed to supply deficiencies, and to meet the unpaid expenses of preceding years, no account would be taken of such charges, and a sum adequate to pay all the admitted and recognized expenses of commissioners would be made up; and, that the money might be devoted to the use for which it was estimated necessary, the proviso, upon attention being directed to the decision in *Wallace's Case*, would be inserted. Congress could not by any legislation deprive commissioners of their right to docket fees previously earned. It could refuse to grant money for the payment of those fees, and by this proviso did refuse to permit any of the fund appropriated in this act to be applied to that use,—a use for which it had not been estimated.

The Revised Statutes, § 847, allows commissioners, "for hearing and deciding in criminal charges, five dollars a day for the time necessarily employed." The difference between this commissioner and the accounting officers of the treasury is as to the interpretation to be given the words "hearing and deciding." For the United States it is contended that nothing but the production of evidence and the examination of witnesses to support the accusation and show probable cause, with, perhaps, the addition of discussion of the evidence, can be considered "hearing and deciding;" and that all charges for *per diem* allowances, when there is no hearing on the merits of the cases, should be summarily rejected. To this construction I cannot accede. In the course of proceedings before an examining magistrate "agreeably to the usual mode of process," in Maine, much time is consumed, and many duties are performed in hearing and deciding criminal charges, when no evidence on the guilt of the accused is offered or discussed, and before the case is ready for final hearing and decision on its merits.

"Acts upon which counsel ought to be heard, if desired, which necessitate some investigation and decision, such as determining whether the complaint is of a nature to constitute an offense for which the party can be criminally held, whether a continuance should be granted when required by one of the parties, and, in such case, the amount and sufficiency of bail, come within the terms, 'for hearing and deciding,' and the daily compensation should be allowed. *Harper v. U. S.*, 21 Ct. Cl. 56; *Com. v. Hardy*, 2 Mass. 303.

As such services were performed by the commissioner in this case, on the days for which he now demands compensation, his claim to be paid is well founded and is allowed.

Having thus considered all the questions presented, and finding as matter of fact that the services charged for were actually performed, and that the allowances asked are proper, I have only to order judgment for the petitioner for the sum of \$330.40, being the whole amount claimed except the \$115.05, which had been rejected anterior to the act giving jurisdiction in cases of this kind.

FISH v. UNITED STATES.<sup>1</sup>*(District Court, E. D. New York. October 29, 1888.)***1. DISTRICT AND PROSECUTING ATTORNEYS—UNITED STATES ATTORNEY—AUTHORITY TO EMPLOY STENOGRAPHER.**

The general authority to prosecute delinquents, given to a United States district attorney by Rev. St. § 771, authorizes him to employ a stenographer in criminal cases, and to render the United States liable to pay a reasonable compensation for services rendered, without first obtaining the authorization of the attorney general of the United States.

**2. SAME—AUTHORITY OF ATTORNEY GENERAL.**

Section 362, Rev. St., conferring upon the attorney general power to superintend any criminal prosecution instituted by the district attorney, does not authorize the attorney general to control the action of the district attorney in criminal cases by general regulations.

**Petition for Compensation for Services as Stenographer.**

In this case I find the following facts: (1) That the petitioner, at the time of the filing of the petition herein, was a resident of the county of Queens, in the Eastern district of New York; (2) that the petitioner was employed to take stenographic notes of the testimony given in criminal cases in the courts of the United States for the Eastern district of New York, from the year 1882 to the 9th day of December, 1887; (3) that the petitioner performed such duties under the employment and direction of the duly appointed attorney for the United States for the Eastern district of New York; (4) that the petitioner from time to time presented bills to the United States for his services as aforesaid, which bills, including the items in suit, were approved and allowed by the United States attorney; (5) that until June, 1885, the petitioner's bills, so rendered and approved, were paid by the United States of America through the treasury department by treasury drafts drawn on the subtreasurer at New York to the order of the petitioner; (6) that no notice was given to the petitioner that his employment was unauthorized; (7) that the services charged for, and for which the petitioner prays judgment herein, were necessary to the proper conduct and economical disposition of the criminal cases of the United States in the Eastern district of New York; (8) that the services so rendered by the petitioner were accepted by the United States of America; (9) that the services so rendered by the petitioner and accepted by the United States were reasonably worth the sum of \$909.20; (10) that on or about the 20th day of December, 1887, the petitioner duly demanded of the proper department of the government of the United States of America payment of said sum of \$909.20, which was refused, and no part thereof has been paid. The following are my conclusions of law: (1) That the United States of America employed the petitioner to perform the work and render the services, for the value of which he prays judgment herein; (2) that the petitioner is entitled to judgment against the United States of America for the sum of \$909.20;

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.



and \$47.74 interest, amounting in the aggregate to \$956.94, together with the costs provided by section 15 of the act of March 3, 1887, to be taxed.

*G. E. P. Howard*, for petitioner.

*Mark D. Wilber*, for the United States.

BENEDICT, J., (*after stating the findings as above.*) This is the case of a petition instituted under the provisions of March 3, 1887, (24 St. at Large, c. 359, p. 505,) to recover of the United States the sum of \$909.20, for services rendered by the petitioner to the United States in taking stenographic notes of the testimony in criminal trials in the circuit and district courts of the United States for the Eastern district of New York. The facts are not in dispute. The evidence shows that the petitioner, since 1882, has been employed continuously in the courts of the United States for the Eastern district of New York to take stenographic notes of the testimony given in criminal cases in those courts. This duty has been performed under the employment and direction of the attorney of the United States for the Eastern district of New York. Up to June, 1885, the petitioner from time to time rendered bills against the United States for his services, which bills were certified by the district attorney, and paid by the treasury department by treasury drafts to the order of the petitioner. On the 24th of June, 1885, a change was made in the office of the attorney for the United States for the Eastern district of New York, and Mark D. Wilber was appointed attorney in place of the former attorney, Mr. A. W. Tenney. Thereafter Mr. Wilber requested the petitioner to continue in the service of the United States as theretofore, and accordingly upon the request of the attorney the petitioner continued to render his services to the United States at various terms of the court down to the 9th day of December, 1887. For these services down to the 9th day of December, 1887, the petitioner from time to time presented bills to the United States as heretofore. These various bills, which included the items in suit, were from time to time approved and allowed by Mr. Wilber, then United States attorney. No notice was ever given to the petitioner that his services were not required, nor was he informed that his employment was unauthorized; and it was assumed by the United States attorney that the petitioner's bills, approved and rendered from time to time, were paid as rendered. The evidence shows that the services charged for in these bills were necessary to the proper conduct and economical disposition of criminal cases in the Eastern district of New York. It appears also that the charges made therefor are reasonable and proper, and no objection has been raised to the bills on the ground of amount. On the 31st day of December, 1887, the following communication respecting these bills was addressed to the petitioner by the attorney general:

"*James H. Fish, Esq., New York City, N. Y.*—SIR: Your letter of the 20th inst., with accompanying account, has been shown to me. The account is for services by yourself as stenographer in the United States court at Brooklyn, New York. I have examined the account thoroughly, and reply as fol-

lows: As there is no previous authority from the department to contract this expense, so far as I can see, I am entirely without authority to allow the claim. Very respectfully,  
A. H. GARLAND, Attorney General."

No allowance of the claim has since been made by the attorney general, and the petitioner has for that reason never been paid. Upon these facts I am asked to determine whether or no the United States is liable to the petitioner for the services in question.

In regard to the communication of the attorney general, above set forth, it is to be observed that no opinion is expressed as to the liability of the United States to pay the petitioner. The attorney general simply declined to allow the claim for want of power, and the question presented is whether any allowance of the claim by the attorney general is necessary to create a liability on the part of the United States to the petitioner. The petitioner was employed to render these services by the attorney of the United States for the Eastern district of New York. If the district attorney, in the absence of a direction to that effect from the attorney general, had authority to employ him, the United States is liable; otherwise not. The powers and duties of an attorney of the United States are described in section 771 of the Revised Statutes as follows:

"It shall be the duty of every district attorney to prosecute, in his district, all delinquents, for crimes and offenses cognizable under the authority of the United States."

This language seems to me sufficient to authorize the employment by the district attorney of a stenographer to take down the testimony given in court in the course of prosecutions for crimes cognizable under the authority of the United States. Such services, as shown by the evidence, are necessary for the proper conduct of these cases by the district attorney. Without the services of the petitioner the district attorney could not properly conduct the prosecution in question. The authority to prosecute by implication includes authority to secure a record of the testimony given in the prosecution as a necessary incident to the discharge of the duty imposed by law. The attorney of the United States is not a member of the department of justice. He is a separate judicial officer. His powers and duties are defined by the statute above quoted. He is, of course, limited in the exercise of his powers by the law, but, as was held by the supreme court in *U. S. v. Macdaniel*, 7 Pet. 1, it does not follow that it is necessary to show a statutory provision for everything he does. And as was further said in the same case:

"Whilst the great outlines of the movement of the government may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usage can have a retrospective effect, but must be limited to the future."

These remarks are pertinent here, because it appears in evidence that for a series of years the authority exercised by the present district at-

torney to employ the stenographer in the prosecution of criminal suits had been approved by the government, and the petitioner's bills for compensation therefor rendered from time to time have been paid by the treasury department.

I have been referred to no statute requiring a previous authorization from the attorney general to enable the district attorney to discharge the duties imposed upon him by section 771. No such limitation of the power of the district attorney with reference to the employment of the petitioner is to be derived from the provisions of section 362. By that section the attorney general is authorized to exercise general superintendence and direction over the attorneys and marshals of all districts and territories, as to the manner of discharge of their respective duties, and the section no doubt confers upon the attorney general power to superintend any criminal prosecution instituted by the district attorney, and to direct the district attorney in regard to the method of discharging his duties in any particular prosecution instituted by him. But it does not, in my opinion, authorize the attorney general to control the action of the district attorney in criminal cases by general regulations. The supervision and direction contemplated by section 362 must, as I think, be a particular instruction, given in a particular case, and based on the facts of the particular case. To hold otherwise would in many instances deprive the court of the aid of counsel, learned in the law, which is contemplated by the statute, and substitute in place of counsel a set of general regulations issued by the attorney general; and in some cases the ends of justice would be defeated by such a practice. A general regulation of the department of justice that all district attorneys should in all cases refuse to consent to any postponement of a trial, should never admit a fact, should always move for the infliction of the extreme penalty of the law, would hardly be upheld. The statute must have some limit; and one proper limitation, as it seems to me, is to require, for the validity of any direction by the attorney general in criminal cases, that it be made in a particular case, and with reference to the duties of the district attorney in that particular case. These remarks are perhaps not required by the facts here before the court, for there is no evidence in this case either of any direction from the attorney general to the district attorney in regard to any of the cases where the testimony was taken down by the petitioner, nor of any general direction instructing district attorneys in the matter of incurring expense in criminal trials. No instruction or direction of the attorney general, of any kind, has been put in evidence. So far as this case stands, therefore, the petitioner's right to recover rests upon the statutory authority of the district attorney to employ a stenographer, in the absence of any direction or instruction from the attorney general. As before stated, I consider the statutory authority of the district attorney, conferred upon him by section 771, sufficient to authorize the employment of the petitioner in the manner stated. The authority of the district attorney to employ a stenographer in criminal cases seems to me as clearly to be derived from section 771 as his right to subpoena a witness, and thereby render the United States liable for witness fees.

The equity of the petitioner's case is strong. He rendered the services in question in the same manner in which he had rendered similar services for a long period of time, for which he had always been paid by the government. No intimation was conveyed to him that his employment was considered irregular. His services were accepted in behalf of the government, and his bills allowed by the district attorney; and then, after receiving the benefit of the services, the government refuses to pay him anything because the district attorney had not, before employing him, obtained from the attorney general authority so to do. If it were necessary, such authority in the district attorney, in this instance, could easily be implied from the course of dealing with the petitioner in paying his bills incurred by the former district attorney. But it is not necessary. In my opinion the district attorney was not bound to apply to the attorney general for authority to employ the petitioner; and when, in the absence of any direction from the attorney general, he did employ the petitioner, and accept his services in behalf of the United States, he thereby rendered the United States liable to pay the reasonable compensation for those services, which the petitioner now claims. As says the supreme court in the case already referred to:

"There may be cases in which, the services having been rendered, a compensation may be made within the discretion of the head of the department; and in that case the court and jury will do, not what an auditor was authorized to do, but what the head of the department should have done in sanctioning an equitable allowance."

My opinion is, therefore, that the petitioner is entitled to the relief he asks. A statement of facts as found by me, and of my conclusions of law, required by the statute to be made, is filed with this opinion.

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*In re KELLER.*

(*District Court, D. Minnesota. November 20, 1888.*)

**1. EXTRADITION—INTERSTATE—COMMISSION OF CRIME—AFFIDAVIT—EMBEZZLEMENT.**

Under Rev. St. Wis. § 4418, providing for the punishment of an employe of a private person or corporation who, being intrusted with the care, custody, or possession of property, shall embezzle or fraudulently convert the same, and section 4667 providing that in a prosecution for embezzlement a general allegation of the embezzlement of a sum of money, without the particulars being given, shall be sufficient, an affidavit alleging that defendant, as affiant's employe, had the care, custody, and possession of a named sum of affiant's money, which he embezzled and fraudulently converted to his own use, without affiant's consent, authorizes the governor of another state to which defendant has fled from Wisconsin to grant a warrant for his extradition.

**2. SAME—AFFIDAVIT—SWORN TO BEFORE MAGISTRATE.**

An affidavit, laying the venue as "State of Wisconsin, Municipal Court, City and County of Milwaukee," and certified as "Sworn to before me, J. M., Clerk of the Municipal Court," complies with the act of congress providing that an affidavit upon which a requisition may be granted shall be sworn to before "a magistrate."

## 3. SAME—AFFIDAVIT.

Such an affidavit, charging the crime directly and positively, is not vitiated by the conclusion, "as said deponent verily believes."

## 4. SAME—FUGITIVE FROM JUSTICE.

Though a resident of the state where found, if defendant is accused of a crime in another state, of which he has never been a resident, he may be extradited.

On Petition for *Habeas Corpus*.

Petition for *habeas corpus* by Siegmund Keller, who was under the custody of the sheriff of Ramsey county, Minn., by virtue of a warrant issued by the governor. Keller was arrested on a requisition by the governor of Wisconsin, to answer a charge of embezzlement. The affidavit upon which the requisition was made alleged that said Keller, as the servant and employe of A. Blade, Son & Co., "did have the care, custody, and possession of a certain sum of money, to-wit, the sum of \$702.19, of the moneys of said A. Blade, Son & Co., and the said money did then and there and while he was so employed, as aforesaid, feloniously embezzle and fraudulently convert to his own use, without the consent of his said employers, A. Blade, Son & Co., contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin, as said deponent verily believes, and prays that the said Siegmund Keller may be arrested and dealt with according to law."

H. L. Williams, for petitioner.

J. J. Egan, Co. Atty., and James C. Markham, *contra*.

NELSON, J., (*orally*.) In the case of Siegmund Keller, before me under a writ of *habeas corpus*, after due consideration, I have arrived at a decision which I am prepared to render this morning. The case arises under sections 5278, 5279, Rev. St. U. S. The case is important in two respects: Important to the prisoner, who is deprived of his liberty for the purpose of being transported out of the jurisdiction of the state of Minnesota. It is important to the state of Wisconsin, seeking to exercise a constitutional right, claiming that the party who is arrested has committed a crime within the jurisdiction of the state of Wisconsin, and has fled from justice, and has sought refuge in a foreign or another jurisdiction. If the governor of the state of Wisconsin has conformed to the laws of congress passed for the purpose of enforcing a constitutional right, no court can become a barrier to the exercise of that right. It is a duty imposed upon the governor of the state in which the fugitive is found to obey the demands of the executive of the state in which the crime is alleged to have been committed, and, by warrant, arrest the party for the purpose of being delivered up and removed to that state. Section 5278 of the Revised Statutes reads as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state

or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authorities making such demands, or to the agent of such authority, appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

There is another provision, in regard to the time when the agent should appear, and the costs and expenses, which are not important in this case.

On the 17th of November, or 16th of November, a petition was presented to me at chambers by the accused, stating that he was illegally deprived of his liberty; that he was held under an illegal warrant, issued by the governor of Minnesota upon a pretended requisition of the governor of Wisconsin, which requisition and accompanying papers are invalid and void under the constitution and laws of the United States, and that said accompanying papers contained matters that are false in fact, and upon which the authority to issue a requisition is based; and that your petitioner is illegally and unlawfully detained, and is not a fugitive from justice. A sheriff of the county of Ramsey, who had charge of the prisoner, made his return to the writ, setting up the warrant of the governor of the state of Wisconsin, and alleging that it was the warrant which he claimed justified him in holding the prisoner. To that return an answer has been made, and a traverse, in which the petitioner avers that the requisition of the governor of the state of Wisconsin was illegally granted by him; and virtually, in substance, that the demand of the governor of Wisconsin upon the governor of the state of Minnesota was not in accordance with the law of the state of Wisconsin prescribing the manner in which the governor of the state of Wisconsin should make a demand for the delivery of prisoners alleged to be fugitives from justice, and charged with the commission of crime in that state. Also that the affidavit which accompanied the requisition of the governor of the state of Wisconsin was not such an affidavit, or made before the person designated by the act of congress, which I have just read to you, (section 5278 of the Revised Statutes;) and also putting in issue the allegation in the warrant that the prisoner is a fugitive from justice, that he has fled from the state of Wisconsin to the state of Minnesota, within the meaning of the act of congress. On the hearing, certain evidence offered before the attorney general of the state of Minnesota, proceeding in conformity with the laws of the state of Minnesota, passed for the purpose of expediting and aiding the delivery of fugitives from justice, and his final decision upon which the governor acted, is read.

Two questions are presented for determination; one a question of law, and the other a question of fact. I will consider the question of law first. An attack is made upon the affidavit which accompanied the papers presented with the requisition or demand to the governor of Minnesota, and it is claimed, in the first place, that this affidavit was not made before a magistrate. The warrant of the governor of the state recited the fact that the requisition had been made by the governor of the state of Wisconsin, based upon the affidavit made before a magistrate, charging that the ac-

cused had committed the crime of embezzlement, specifying that it was embezzlement of money. The affidavit, charging the commission of the crime within the city of Milwaukee, reads as follows:

*"State of Wisconsin, Municipal Court, City and County of Milwaukee.* Alexander I. Blade, being duly sworn, on oath complains to the municipal court of Milwaukee county that Siegmund Keller, on or about the 1st day of October, 1888, at said city of Milwaukee, in said county, was then and there the clerk, servant, and employe of A. Blade, Son & Co., and he, the said Siegmund Keller, not being then and there an apprentice, nor a person under the age of 16 years, and while he was so employed, did [and so forth.] Subscribed and sworn to before me this 7th day of November, 1888. ALEXANDER I. BLADE. JULIUS MEIZELWICH, Clerk of the Municipal Court."

This affidavit is certified, by the governor of the state of Wisconsin, in his requisition, to be an authentic copy. It also has the certificate of the clerk of the municipal court that it is a copy of the original on file in that court. I say an attack has been made upon this affidavit that it is not taken before a magistrate, as prescribed by the act of congress. Upon its face the affidavit appears to have been taken in the municipal court; the oath being administered by the clerk of the court, who, at the bottom, states that fact. The oath was administered in the municipal court by the clerk. The presumption is that it was made before the presiding officer of that court, for, by the supplement to the Revised Statutes of the state of Wisconsin, § 2499, the municipal court of the city and county of Milwaukee as heretofore established is continued. By previous statutes the municipal court was provided for. It was enacted that this court shall be a court of record, and have a clerk; and this was done at the expense of the city of Milwaukee. The municipal court consists of a judge, who shall be elected as provided for in this act, and a clerk of the court. And upon the face of these papers it appears that this affidavit was taken in the municipal court, made before the court, made in presence of the presiding officer or magistrate. "Before" means "in presence of." The oath being administered, as certified to by the clerk of the court, in criminal proceedings for embezzlement in the court by law having cognizance and jurisdiction of such offenses, it seems to me that that attack upon the affidavit must fail.

It is urged, secondly, that the affidavit is insufficient in substance, and does not specify the crime of embezzlement. By the statutes of Wisconsin the crime of embezzlement by an employe of a person,—that is, the fraudulent conversion of money to the use of any person other than the owner,—is punishable. Section 4418 of the Revised Statutes of the state of Wisconsin provides for the punishment, in the first place, of all public officers, agents, or employes of the state or any municipal corporation, telegraph company, bank, or any other corporation, who shall have the possession or custody, by virtue of his office or employment, or shall be intrusted with the safe keeping or investment for payment of any money or fund belonging to or under the control of the state or such municipal corporation or other corporation; and in addition provides that any agent, clerk, attorney, messenger, employe, or servant of

any private person or corporation, with the exception of persons under 16 years of age, and apprentices, who, by virtue of his employment, shall be intrusted with the safe keeping and disbursement, investment or payment of any money, or shall have the care, custody, or possession of, or shall be intrusted with the safe keeping, carrying, sale, or delivery of any goods, wares, merchandise, and so forth, or any other property or thing which is the subject of larceny, belonging to any other person or association, and so forth, if he shall embezzle or fraudulently convey to his own use, or to the use of any other person except the owner thereof, he shall be punished, declared guilty of embezzlement. It is a crime particularly defined by the statutes of the state of Wisconsin. But it is claimed that the affidavit does not specify particularly enough the offense of embezzlement, so as to warrant a commitment by the justice of the peace, even if it was conceded that the allegation in the complaint may be true. That is the extent to which the claim is made. Certainly, if a crime is substantially charged in this affidavit, if the crime of embezzlement or conversion of property to the use of an employe or the use of any other person without the consent of the employer, and fraudulent conversion of that property is alleged, it would seem to be sufficient. Certainly it would be sufficient under the law of the state of Wisconsin, if it was so alleged in an indictment or information; and the same allegation, made in the same form or substance in the affidavit, must be held good. Under section 4667 it is held that "in any prosecution for the offense of embezzling the money, bank-notes, checks, drafts, bills of exchange, or other security for money of any person, by a clerk, agent, or servant of such person, it shall be sufficient to allege, generally, in the indictment or information an embezzlement of money to a certain amount, without specifying any particulars of such embezzlement." So that a general allegation in the language and form of this affidavit, in an indictment or information under the law of the state of Wisconsin, would be a good information and good indictment. A very significant provision is inserted also in section 4742:

"Any statute relating to the form, substance, or amendment of indictments and informations, the statement of the offense therein, and the evidence thereunder, so far as applicable, shall apply to complaints, amendments, proceedings, and trials in criminal cases before justices of the peace."

And by the law creating the municipal court of Milwaukee that court is endowed with all the authority which had been given to justices of the peace in the city of Milwaukee, where any justice was prohibited from exercising criminal jurisdiction in that city; all the criminal jurisdiction being thrown on the municipal court. So it must be conceded, in that respect, the charge or allegation of the offense is certainly within the terms of the section prescribing the form and substance of indictments and averments charging offenses committed.

But it is stated that the complaint is defective under the Wisconsin statutes, for the reason that the verification is only on belief. Ordinarily, a question of pleading is to be determined by the court in which the pleading is made. If it is conceded that this court can construe this plead-



ing and reject it, still I think it is not faulty. It is a statement of a fact which the deponent, in testifying to, verily believes to be true. A man swears to what he believes to be true; and, when he states a fact under oath, he says he verily believes it to be true. I do not think it is faulty on that account. I think this affidavit is sufficient.

The requisition is in due form, and the only other question to be considered is one of fact, which is put in evidence here, that the petitioner is not a fugitive from justice. In other words, that he has committed the crime in the state of Wisconsin, and fled to the state of Minnesota. Before the governor, or at least the attorney general, who is authorized by the laws of the state of Minnesota to examine into allegations of this character when a party is arrested on a requisition from the governor of any other state as a fugitive from justice, there was evidence on that question. The issue was raised in that investigation, and testimony was taken, which appear in the papers certified to, and introduced before me. There was evidence upon that fact before the governor. I think the warrant itself would have been sufficient without any such evidence, so far as this court was concerned, where the governor in his warrant states or certifies that the party is a fugitive from justice. It would raise a *prima facie* case which must be overthrown by the petitioner when he makes that issue before a court on the *habeas corpus*. That is the ruling announced in a case in the supreme court of the United States, (*Roberts v. Reilly*, 116 U. S. 95, 6 Sup. Ct. Rep. 291.)

Now, what was that evidence before the governor? I have read it over carefully,—I have read it over very carefully,—and, if it is correctly reported, it seems to me that there cannot be any question but that there was sufficient evidence before the governor by which he might determine that the petitioner was a resident of the city of Milwaukee, for he speaks of going home every two months; that is, he calls his home, in the connection in which the testimony was given, Milwaukee. He says, however, in that investigation, although he may not have been correctly reported, that St. Paul was his home. He had boarded here. He visited only occasionally the Milwaukee house. But there was evidence also going to show that he had registered at various points,—taken before me here,—registered in the city of St. Paul as "Siegmond Keller, Milwaukee, Wisconsin;" registered in Red Wing and Hastings,—every place that he had been in out of the state of Wisconsin, or even in the state of Wisconsin; and in Milwaukee, he had registered himself as a resident of the city of Milwaukee, in the state of Wisconsin. Now, it seems to me that was certainly sufficient to justify the governor in coming to a conclusion on that question, having determined, as he did, that the petitioner was a fugitive from justice. It is not necessary that I should determine that he was a resident in Wisconsin, and had committed a crime there, and had fled to avoid prosecution. That is not necessary. If it appeared simply that he was charged with a crime committed by him in the state of Wisconsin, and that, when he was sought to be brought to justice for that crime he was found outside of that jurisdiction, and in the state of Minnesota, I think it is sufficient. The supreme court of the United

States holds so. If a citizen of the state of Minnesota should go into the state of Wisconsin, and commit a crime in the state of Wisconsin intentionally, and afterwards, when prosecution was initiated against him, was found in the state of Minnesota, I take it that the state of Wisconsin would be justified in demanding him, and that the governor of Minnesota would send the prisoner back as a fugitive from justice, having committed a crime in another state. That appears to be this case.

The petitioner admits in his testimony that on the 16th day of September he was in the state of Wisconsin, and in the city of Milwaukee 14 days before the exact date specified in this affidavit. The affidavit charges him with the commission of this crime of embezzlement on or about the 1st day of October. It might have been committed six months before that, or a year before that. The laws of the state of Wisconsin provide that, in regard to crimes of this character, proof can be offered showing that the offense had been committed six months afterwards, within the time alleged in this indictment or affidavit. That is the law of this state. I cannot turn now to the section, but that is the law. And certainly the crime does not outlaw within two years; but, if the prisoner is not taken by surprise, and knows what the charge is, and it is substantially charged in the affidavit, he cannot complain that the person who made the affidavit was not specific in the very day in fixing the time. I think there can be no question—in my own mind there is none, at least—that these papers are conformable to the act of congress, that the obligation imposed upon the governor of the state by these papers and the requisition of the governor of Wisconsin under the act of congress required him to arrest the party for the purpose of delivering him up for removal to the state of Wisconsin. Having come to that determination, the proceedings of *habeas corpus* are discharged, and the petitioner remanded.

#### NOTE.

An appeal has been taken to the circuit court of the United States.

### UNITED STATES v. LEVALLY

(District Court, W. D. Pennsylvania. November 17, 1888.)

#### INDICTMENT AND INFORMATION—FINDING AND FILING—CRIMINAL LAW—ARREST OF JUDGMENT.

Where the foreman of the grand jury wrote his name in blank across the back of a bill of indictment, under the proper date, without more, and no finding by the grand jury was either reduced to writing or publicly announced in court, after plea of not guilty, trial, and conviction, *held*, that judgment must be arrested for want of a finding.

Indictment for Passing Counterfeit Coin. On motion in arrest of judgment.

*William A. Stone*, for the motion.

*The United States Attorney, for the United States.*

ACHESON, J. This case differs essentially from *State v. Freeman*, 13 N. H. 488; *Com. v. Smyth*, 11 Cush. 473; *Price's Case*, 21 Grat. 846, and other cases cited and relied on by the district attorney. In this court the practice is, and always has been, for the district attorney to prepare in advance the bills of indictment, and submit the same, with the evidence to support them, to the grand jury, whose action in each case, finding or ignoring the bill, is indorsed thereon, such indorsement being attested by the signature of the foreman thereunder. The foreman never signs his name at the foot of the bill, and the only written evidence of the action of the grand jury is the indorsement. The grand jury having brought the bill into court, in answer to the usual question hand the indictment to the clerk. The finding is not publicly announced, either by the grand jury or the clerk, nor is any record thereof then made; but subsequently the clerk makes the proper entry on the minute-book and docket, from the indorsement on the bill. In the present case the foreman of the grand jury merely wrote his name in blank across the back of the bill, under the date, "Oct. 16, 1888." It is quite impossible, then, to determine from anything that appears what the action of the grand jury really was. From this incomplete and insensible indorsement it cannot be assumed that the intention was to find the bill to be true. Nor are we at liberty, as suggested, to carry down the word "indictment," printed on the back of the bill, and treat it as part of the finding of the grand jury, even conceding (which we are by no means prepared to do) that the use of that word alone, under the ruling in *Sparks v. Com.*, 9 Pa. St. 354, would suffice. Nowhere upon the record is there any entry importing the finding of the bill as true. The words "indictment filed" have no such significance, and the entry, "a true bill," upon the calendar or trial-list, prepared for the use of the judge, is a matter of no moment. Indeed, the clerk could not properly make any record of the finding of the bill as true, for no such finding was reduced to writing by the grand jury, or publicly announced by them in court. The sum of the matter, then, is that by an oversight the trial here erroneously proceeded, without it appearing in anywise that the bill of indictment had been found by the grand jury. Therefore the motion in arrest of judgment must prevail.

And now, November 17, 1888, it is ordered that judgment be arrested for the reason assigned in the motion.

## HUNTINGTON v. HARTFORD HEEL-PLATE CO.

(Circuit Court, D. Connecticut. November 12, 1888.)

## 1. PATENTS FOR INVENTIONS—INFRINGEMENT—HEEL-PLATES FOR RUBBERS.

Letters patent No. 296,623, issued April 8, 1884, to Frederick Richardson, for a die to attach heel-plates to rubber shoes, describe a die having radially placed planes, inclining in opposite directions, their use being to clinch the prongs of the plate through the heel, also in opposite directions. These planes are depressions in and entirely below the upper surface of the die; their object being to bend and clinch the ends only of the prongs, without bending their heavy bases or plugs, which pass through the heel, as that would tear the material, and admit water. The opposite direction of the prongs, when clinched, was claimed to balance the clinching strain, and imbed the plate firmly and evenly. Letters patent No. 369,554, September 6, 1887, issued to Francis H. Richards, for a machine for attaching heel-plates, describe a die with elevations, only two being radially placed, and without any system of regularly arranged planes. The whole prong, which is slender, without any heavy base, is intentionally bent. *Held* that, as the latter invention would not, and was not intended to, perform the important feature of the former, viz., of bending only the end of the prong, it was no infringement, although two of the planes were radially placed.

## 2. SAME—MACHINE FOR ATTACHING HEEL-PLATES.

Letters patent No. 296,624, of April 8, 1884, to Frederick Richardson, for a machine for attaching heel-plates to rubber shoes, are not infringed by letters patent No. 369,554, of September 6, 1887, to Francis H. Richards, for a machine for the same purpose; the peculiar parts of the former being the holder or guide, and the mechanism connected therewith, and neither the plates, clamp, nor spring in the Richards machine, nor the three in combination, being equivalent thereto.

In Equity. On final hearing of bill.

Bill by William H. Huntington to restrain the Hartford Heel-Plate Company from the infringement of two patents, granted to Frederick Richardson, for a machine and die for attaching heel-plates to rubber shoes. A preliminary injunction was granted as to the patent for the die, but refused as to the machine. 33 Fed. Rep. 281. Afterwards the injunction was dissolved on the ground that the die patent had been anticipated by a prior English patent. *Id.* 838.

*Wm. Edgar Simonds*, for plaintiff.

*Charles E. Mitchell*, for defendant.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of two letters patent, Nos. 296,623 and 296,624, which were granted April 8, 1884, to Frederick Richardson; one of said patents being for a die for securing heel-plates to rubber shoes, and the other being for a machine for the same purpose. A motion under this bill for a preliminary injunction was refused as to the machine patent, and was granted as to the die patent, but that injunction was afterwards dissolved. The opinion upon the motion stated the important facts, which had then been disclosed, in regard to each patent, each invention, and the alleged infringing devices. 33 Fed. Rep. 281, 838. Nothing is required to be added in regard to the questions which are at issue upon the machine patent.

The plaintiff insists, inasmuch as there had been previously no machine for securing metallic heel-plates to rubber shoes, that a liberal construction should be given to the patent, and that machines performing the same functions by analogous means should be regarded as infringing devices. The peculiarity of the Richardson machine consists in the mechanism by which the shoe and the heel-plate, which is placed upon the "holder," are held and guided. In the Richards machine there is no equivalent, and no analogous mechanism for holding and guiding. The holding and guiding devices in the two machines are entirely different.

The other patent is the less important one, but, it having received from the experts and from counsel more careful investigation than it had upon the hearing of the motion, I have also examined it with more attention, and do not now think that it is being infringed. The prongs of the Richardson heel-plate were studs, which had enlarged bases, serving as plugs, and flattened clinching ends. The first operation of the die was, in the language of the specification, "to curve the ends of the pins or nails without bending the portion in the material of the heel." Continuation of the pressure clinched the pins, and compressed the rubber around their shanks, so that water could not enter the shoe. The die was so constructed that the ends of the pins only could be bent. The specification says that to insure the bending of the lower part of the pins, without affecting the upper part of the frame, and also to insure the close fitting of the pins in the rubber, the die was provided with radially placed inclined planes, the incline of which was placed in opposite directions, so as to bend the ends of the pins in opposite directions. These planes were depressions in the surface of the die, so that the entire planes were below the upper surface of the die, and consequently the ends only of the pins were bent, and the plugs were intentionally not bent. Continued pressure compressed the rubber around the entire plug. By virtue of the radially placed planes, the clinching surfaces of the die bend and clinch the ends of the pins in a line parallel with the edge of the die block, whereby, it is thought, the rubber is especially compressed between the bent portions and the inner surface of the heel-plate. By a disclaimer, which was recently filed, the owner of the patent disclaimed a heel-die whose inclines are not "faced in opposite directions." These words, the disclaimer explains, mean that some of the inclined clinching surfaces are faced or inclined in a direction substantially opposite to that or those in which other of the inclined clinching surfaces are inclined or faced. This feature is said to be important, so that the clinching strains may be balanced, and the plate may be evenly imbedded in and evenly secured to the heel.

The operative part of the defendant's die consists of projections above its surface, whereby the prongs, which are slender throughout their length, are set in the rubber by one stroke of the plunger. One side, which is the working face, of each projection is concave. The die of ordinary size has five projections, three of which are not radially placed. The highest elevations of the two end projections are on radial lines, centering at the same point. The first operation of the defendant's die is to curve

the ends of the prong, but the entire slender prong is intentionally bent. The die has no system of similarly arranged planes. The defendant construes the patent to be for a set of radially placed inclines, having their faces in opposite directions; the inclines being arranged either in two equal sets, bending the prongs away from each other in each set, or in pairs which bend the adjoining prongs towards each other. If a die contained, in connection with non-radially placed inclines, a single pair of radially placed inclines, which in fact performed the office which the Richardson die performs, I should be disposed to regard such a die as an infringer, although it did not have a complete set of Richardson inclines. But if a die, having irregularly placed inclines, contains also two radially placed inclines, which are or are not isolated from each other, but which do not perform the office which the Richardson die was designated to perform and does perform, I do not think that such a die, although containing radially placed planes, is an infringing die. These inclines cannot do the work of the Richardson die upon the Richardson plate or upon the Richards plate, because they bend the entire shank. If the shank or plug of the Richardson prong should be bent, the heel-plate would be injured or destroyed. The Richards die is designed to bend the entire prong, and is therefore a different thing from the Richardson die. The bill is dismissed.

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UPTON *et al.* v. WAYLAND *et al.*

(Circuit Court, S. D. New York. November 8, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

The validity of letters patent No. 348,969, for a lamp-wick raiser, issued September 14, 1886, to Leonard Henkle, not having been adjudicated or recognized by the public, a preliminary injunction to restrain their infringement will not be granted in a suit in which the patentable novelty of the invention is fairly contested.

2. SAME—PUBLIC ACQUIESCENCE.

The subject of said patent being one of nine patented improvements embodied in the "Rochester lamp," the use of such lamps by the public, with acquiescence in the exclusive right of the owners of the patents, is not a recognition of the validity of this particular patent.

In Equity. On motion for an injunction.

This is an action by Charles Upton and Edward Miller & Co. against Chandler N. Wayland and Thomas B. Kent for alleged infringement of letters patent No. 348,969, for a lamp-wick raiser, issued September 14, 1886, to Leonard Henkle, and reissue No. 17,090, dated February 8, 1887.

*C. E. Mitchell* and *H. M. Brigham*, for complainants.

*Edwin H. Brown* and *Joshua Pusey*, for defendants.

WALLACE, J. An examination of the deposition and exhibits used upon the motion for a preliminary injunction does not disclose anything

in the facts of the case to except it from the application of the ordinary rule by which such an injunction is not granted upon a patent of recent date, which has not been adjudicated when the patentable novelty of the improvement described in it is fairly contested, and there has been no well-defined or significant recognition of the validity of the patent by the public. The "wick-raiser" which is the subject of the patent is one of nine patented improvements embodied in the "Rochester lamp." These lamps have been extensively dealt in by jobbers, and used by the public with acquiescence in the exclusive right of the owners of the patents, but this is not cogent evidence of recognition of the novelty, or value of the wick-raiser, or the validity of the patent therefor. *Non constat* that recognition is not due to the other patented improvements. The motion is denied.

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CLOW v. BAKER *et al.*

(Circuit Court, S. D. Iowa. November 13, 1888.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—DEPOSITIONS IN INTERFERENCE PROCEEDING.

Depositions taken for the applicant for a patent in interference proceedings pending in the patent-office may, upon a proper showing of inability to retake them, be read upon the hearing of a bill by the successful applicant to declare invalid a patent issued to the contestant, though one of the defendants, assignee of part of contestant's rights, received his assignment before the interference proceedings were had, and was not a party thereto.

2. SAME.

But where the only reasons urged in support of the motion to allow such depositions to be so read are an indefinite allegation of complainant's poverty, and that the witnesses are so scattered that to retake their depositions will be expensive, and from an inspection of the depositions it appears that a large part of the testimony was complainant's own, and that the greater number of the witnesses resided in the district in which the bill is pending when their depositions were taken before, and their present residence is not shown, the motion will be denied.

In Equity. On motion to use depositions.

Bill by H. A. Clow against George C. Baker, the Baker Wire Company, and others, to declare invalid a patent issued to defendant Baker.

*Cole, McVey & Clark*, for complainant.

*Cummins & Wright*, for defendants.

SIRAS, J. The bill in the present cause is filed for the purpose of procuring a decree declaring invalid a patent issued to George C. Baker for a wire-barbing machine, on the ground that the complainant is the prior inventor of the same, and entitled to the benefits thereof, under letters patent issued to complainant. It appears that in March, 1885, when the application of complainant for a patent was pending before the patent-office, an interference was declared with patent No. 295,513, issued to George C. Baker, and a hearing thereof in the usual form was had be-

fore the commissioner at Washington. The testimony of a large number of witnesses was taken by depositions, and used upon that hearing, and the motion is now made for leave to read these depositions or certified copies thereof on the trial of the cause in this court, on the grounds that the parties and issue are substantially the same; that the witnesses are scattered in different states; that to retake the testimony would cause complainant great expense; and that he is without means to defray the cost and expense that would be caused thereby. When good reason for it exists, depositions taken in one suit may be read in evidence in another suit, where there is identity of parties, of the issue involved, and full opportunity was afforded to the parties for a thorough examination and cross-examination of the witnesses. 3 Greenl. Ev. § 326; *Shaul v. Brown*, 28 Iowa, 37; *Searle v. Richardson*, 67 Iowa, 172, 25 N. W. Rep. 113. In *Rutherford v. Geddes*, 4 Wall. 220, which was a proceeding in admiralty, the district court admitted certain depositions taken in another case involving the same collision, but not against the same party, and on appeal the circuit court reversed the case for this error, placing the ruling upon the grounds that it was not shown that any of the witnesses were dead, or that there was any impediment to their examination in the second case, and that to authorize the reading of the depositions in the second cause it must be shown that the first suit was between the same parties, or their privies; that the right to use the same must be reciprocal, or neither party can exercise it; that the subject-matter of litigation is the same; and that the parties had full opportunity for cross-examining the witnesses when the depositions were taken. The supreme court, upon appeal, held that the depositions were properly held inadmissible by the circuit court, "being taken without notice to defendants in another suit, to which defendants were not parties, and in which they had no right or opportunity to cross-examine the witnesses. Nor were the defendants in any manner privies to either party in the former suit in which the depositions were taken." The principle applicable to the question is the same as that underlying the provisions for the perpetuating testimony, *i. e.*, that unless testimony thus taken is allowed to be read, the party offering it will be deprived of the benefit of the testimony of the given witnesses by reason of their death or their absence, or some other fact which shows that it is beyond the power of the party to procure the testimony of the witness in the usual manner. To prevent the failure of justice that might result, it is permissible for the court, when cause is shown therefor, to permit the depositions taken in one cause to be read on the trial of another, if it appears that the parties to the latter cause were parties to or privies with the parties to the former suit; that the issue or issues upon which the testimony was taken are substantially the same; and that full opportunity for a thorough examination or cross-examination was afforded both parties when the testimony was taken.

Several objections are urged against the granting the motion in the present cause, the first of which is that the hearing before the commissioner of patents was not the trial of another cause, within the true mean-



ing of the rule in question; that the hearing was only for the purpose of informing the officers of the patent-office as to the facts for their guidance in determining whether a patent should issue to complainant; and that the decision in the interference proceedings was not conclusive as an adjudication upon the rights of the parties. The privilege of using testimony taken in another cause is not dependent upon the question of the kind of judgment or decision rendered in that cause, for it does not depend upon the fact whether any judgment was reached thereon. The point is not as to the adjudication actually had, or its effect, but whether, in another judicial proceeding involving the same issues, and between the same parties or their privies, testimony was taken which is material in the present cause, and which may be lost to the party unless the testimony formerly given is allowed to be used in the present trial. The proceedings had before the patent-office were judicial in their nature, and section 4905 of the Revised Statutes of the United States expressly provides for the taking of depositions to be used on such hearing, in the same manner that they may be taken for use in the courts of the United States. This objection is therefore untenable.

It is also urged that the issue in the two proceedings is not the same, in that the question before the patent-office was whether a patent should be issued to complainant, whereas the question in the present cause is whether the patent issued to the defendant Baker shall be adjudged invalid. The relief sought in the two proceedings differs in the particular named, but the real issue upon which the granting or refusing the relief sought in each proceeding depends, is the same, *i. e.*, is the machine described in claim 1 of the Clow patent identical with that described in claim 6 of the Baker patent, and, if so, who was the first inventor thereof? It is also claimed that there is not the requisite identity of parties to the two proceedings, for the reason that the interference proceedings were between Henry A. Clow, the complainant, and George C. Baker alone, whereas the present suit is against George C. Baker, the patentee, and also the Baker Wire Company and others, who hold interests as assignees in the Baker patent, part of which assignments, at least, were made before the institution of the interference proceedings. Recognizing the fact that there does not exist an absolute right, under all circumstances, to the use of depositions or testimony taken upon the same issue in another cause between the same parties or their privies, but that it is a privilege which may be granted by the court when the circumstances are such as to justify it in the furtherance of justice, the question of the privy of parties cannot, it seems to me, be settled solely with reference to the time when the rights of the assignees were acquired. The question is not the same as that presented when it is sought to bind a third party by a judgment or decree touching property in which the third party has acquired rights, and where usually the third party is held bound by the adjudication, if he acquired his rights from a party to the suit after the commencement of the action. Regard must be had in each case to the particular facts, and if it should appear in a given instance that, after the initiation of the suit or proceedings, the defend-

ant had parted with his interest in the subject of controversy, so that, when the testimony was taken, he was indifferent to the result, and did not cross-examine the witnesses, nor seek to elicit the full facts, evidence thus taken should not be admitted in a subsequent proceeding against the party who had acquired his interest after the former proceeding had been commenced. Testimony thus obtained, though not formally, would be practically *ex parte*, because, when taken, there was not a party having an actual adversary interest, and therefore interested in eliciting the full facts from the witness. On the other hand, if it appears that in an interference proceeding before the patent-office the patentee is duly notified; that he appears therein, having an interest to be protected; and that he fully examines or cross-examines the witnesses,—then, certainly, those who acquire interests after such proceedings are had, are in privity with the patentee; so that, if the facts justify the use of the testimony against the patentee in the second suit, they would likewise justify its use against parties who acquired their interests in the patent after the initiation of the interference proceedings against the patentee. Whether this is likewise true as against those who acquired their interest before the initiation of the interference proceedings is a more difficult question to answer.

On the one side it is said that the conclusion reached cannot bind such assignee, because he is not a party to the proceeding, yet, practically, it affects such assignee in the same way that it does the patentee. The point to be determined in the interference proceeding is whether a patent shall be issued to the claimant, and in this question the patentee holding the supposed interfering patent and his assignee are alike interested. If the patent-office holds that the claimant is not entitled to a patent, or that he is entitled thereto, the result of such decision affects the assignee as well as the original patentee, and in the same way. Is not the true inquiry this: Were the interests of the assignee so represented in the proceedings before the patent-office as to insure such an examination of the particular witness or witnesses, whose testimony then given is now sought to be used, as was necessary to bring out all the knowledge of the witnesses touching the material facts pertinent to the issue or issues that are common to the two proceedings? If, as already said, it should appear that after an interference was declared between a claimant, A., and a patent issued to B., that the latter had sold his entire interest in the patent, so that it was no longer an object to him to defeat the issuance of another patent, which might conflict with that issued to himself, and consequently B. failed to cross-examine the witnesses, or to thoroughly draw out the facts, then, although the assignee would stand in privity with B., the patentee, yet testimony thus obtained ought not to be used against the assignee, because it lacks the safeguard afforded by the scrutiny usually exercised by one whose interests may be adversely affected thereby. On the other hand, if it appears that when the interference proceedings were had the patentee still retained an interest in his patent, although part thereof had been previously transferred to another, and that in fact the proceedings were adversary, and that the

witnesses were thoroughly examined and cross-examined, or full opportunity therefor was given, and it is made to appear that some one or more of the witnesses whose testimony was then fully and fairly taken, cannot be produced as witnesses in the second suit, to which the patentee and the assignee are parties, what good reason exists for refusing to allow the testimony thus taken and preserved from being used as against the assignee, when it would be admissible against the patentee? In either case it would be offered for the purpose of aiding the court in arriving at the truth in regard to some given question of fact. And it would seem that the relation existing between the original patentee and the assignee of an interest therein was certainly as close as that between the patentee and an assignee who takes his interest after the interference proceeding is commenced or disposed of.

In the present case, therefore, if the showing made would justify the granting an order allowing the use of the depositions taken in the interference proceedings on the present trial as against the patentee and the assignees whose rights accrued after those proceedings were commenced, it is difficult to see why the same order should not be made as against the assignee, whose rights accrued before such proceedings were instituted. To the motion, as made, is attached a printed copy of the depositions taken in the interference proceedings, and the motion is for leave to use certified copies of the entire series. An examination of the printed copy shows that a large part of this testimony consists of that of the complainant himself, and the majority of the witnesses were, when their testimony was taken, residents of Iowa. The motion simply states generally that the witnesses are scattered in different parts of the United States, and that the complainant is poor, and wholly without pecuniary means, and unable to go through the expense of retaking the depositions. This showing is insufficient to justify the court in granting the motion as it now stands. The statement as to the pecuniary means of the complainant is general, and is rather the statement of a conclusion than of the facts. It is not shown where the several witnesses now are, and the court cannot determine which of them is outside the district, or beyond reach of a subpoena or commission. What possible reason exists for allowing the use of the testimony of the complainant himself, save only the suggestion that complainant cannot afford the means to retake the same? And, as already said, the statement on this point in the motion is not sufficiently specific, in that it is not shown what property the complainant has, nor what his sources of income are. In other words, it is not shown in regard to any one or more of the witnesses that they are dead, or beyond reach of a subpoena or commission, nor are any facts shown which enable the court to see that the complainant cannot procure the testimony of any given witness by reason of the cost thereof exceeding the means of the complainant, even if that fact would justify the granting of the order. Motion is therefore overruled.

BONANNO v. THE BOSKENNA BAY. GRAZIANO v. SAME. MIRTO v. SAME.  
WESTERVELT v. SAME. SAITTA v. SAME. MERCADANTE v. SAME.  
SGOBEL *et al.* v. SAME. FOTI v. SAME.

(District Court, S. D. New York. November 24, 1888.)

1. SHIPPING—CARRIAGE OF GOODS—GREEN FRUIT—FROST—DELIVERY—NOTICE.  
Previous rulings in *The Boskenna Bay*, 22 Fed. Rep. 662, followed.

2. SAME—BILL OF LADING—STIPULATION.

The provision of the bill of lading that the ship may discharge fruit when she is ready, and that the goods shall thereafter be at the consignee's risk, is a reasonable stipulation, and valid, so far as to permit the discharge of so much green fruit as can be removed by the consignee during the day out of danger from frost at night, providing the consignee is given timely notice of the discharge and opportunity to take care of his goods; not otherwise.

3. SAME.

On further hearing in behalf of the above libelants, upon satisfactory proof that five of them had such timely notice, *held*, ship not liable for damage to their goods by frost during the night following the discharge; as to the three others, no such proof appearing, the ship was held liable.

In Admiralty. Libels to recover damages to fruit through the alleged improper discharge from the steam-ship *Boskenna Bay*, on the 21st of March, 1883, in frosty weather.

*Ullo, Ruebsamen & Hubbe*, for Bonanno *et al.*

*Franklin & Clifford* and *A. H. Bartlett*, for Mirto *et al.*

*E. B. Convers*, for claimants.

BROWN, J. After the decision in favor of the libelant in the case of *The Boskenna Bay*, 22 Fed. Rep. 662, (December 12, 1884,) the eight libelants above named, who were also consignees of fruit upon the same voyage, filed, between March 24 and 28, 1885, the above libels to recover for the damages to their fruit, alleged to have been caused by frost through the improper discharge of their goods at the same time as Rolfe's. Considerable testimony has been taken, in addition to that given in *The Boskenna Bay*. The principal facts are the same. The bills of lading, as in that case, provide, among other things, as follows:

"Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein; and in default thereof the master or agent of the ship, and the collector of above port, are hereby authorized to enter the said goods at the custom-house, and land, warehouse, or place them in lighters, without notice to, and at the risk and expense of, the said consignee of the goods after they leave the deck of the ship."

I adhere to the views of the law as expressed in *The Boskenna Bay*, and in the subsequent case of *The Surrey*, 26 Fed. Rep. 791, 795, 796, and the cases there cited.

Upon the testimony in the present case, I find that the 21st of March, the day fixed for the discharge of green fruit, was not fit for discharging green fruit with a view to allowing it to remain upon this covered pier overnight, and that it was negligence in the ship to discharge the cargo on that day without providing for its safety herself, or by sufficient notice to the consignees to enable them to take necessary care of it before night. In *The Boskenna Bay* no express notice to the consignees was proved, and no care of the fruit was taken by the ship. The most important contention upon the present trial is that the consignees had timely notice of the discharge on the 21st, and are therefore concluded by the bill of lading. The testimony is contradictory; the libelants denying notice, or their presence at the dock on the morning of the 21st. Notwithstanding certain discrepancies in the claimants' witnesses, and their mistakes as to some particulars, I do not feel warranted in rejecting such an accumulation of proof as is produced to show that the principal consignees were present. These were Graziano, Bonanno, and Mercadante. Half a dozen witnesses, some disinterested, are positive about Bonanno and Graziano; a less number as to Mercadante, Westervelt, and Day. The employees, also, of Bonanno, Day, and Westervelt are identified as present. Several of these witnesses state particulars from which it is difficult to suppose that they could have honestly mistaken the 21st for the 22d. Finding, as I feel bound to do, that the libelants above named were present during the forenoon of the 21st of March, at the time when the discharge was determined on, or while it was going on, it is immaterial how they received notice of the intended discharge on that day,—whether through the advertisement testified to in the *Boskenna Bay Case*, or by the express notices, which some of the witnesses testify to on this trial. There is no proof of the delivery of express notice except to Bonanno and Graziano, which is testified to by Southwell, certainly a most credible witness. The libelants, who were thus aware that the discharge was to be made on the 21st, were bound, under the specific terms of the bill of lading, to take care of their goods, if they were unwilling that they should remain on the covered dock overnight. They made no attempt to remove them, or to provide for their care. The necessary inference is that they preferred to take the risk of their remaining under that shed overnight, rather than be at the trouble of removing them to a warmer place. There was opportunity to remove the goods, had they chosen not to take that risk. Having this opportunity, the bill of lading devolved that risk on them, and not on the ship; and I cannot hold the bill of lading in this particular so unreasonable as to be invalid. *The Santee*, 2 Ben. 519; *The Kate*, 12 Fed. Rep. 881; *Steam Co. v. Switzer*, 17 Fed. Rep. 695, affirmed, 22 Fed. Rep. 560. There is nothing in the circumstances that seems to me incompatible with the finding that the libelants referred to were present during the forenoon of the first day of discharge, although most of them may have been, and doubtless were, present also at the Mediterranean pier, where the *Dorset* was discharging at the same time. The two places are less than an hour apart. Besides the accumulation of direct testimony as to their presence, there are various circumstances which make

it probable that they came to the pier of the Boskenna Bay, as alleged, upon some previous knowledge of the intended discharge, and expecting it to take place, although I do not find any written notice positively proved as an independent fact,—no copy of any such notice being produced.

In the cases of the principal libelants, moreover, whose claims are from \$5,000 to \$6,000 each, it is scarcely probable that there would have been a delay of two years in filing the libels had the discharge on the 21st been effected wholly without their knowledge in time to take care of their goods. In the cases of Day and Westervelt it appears that on the trial of *The Boskenna Bay* they testified that their goods were not damaged, to their knowledge. On the present trial this is explained as referring to damage recognized by the custom-house, such as rot and inherent vice. To support this explanation they were permitted to exhibit their letters to their consignors, although not strictly legal evidence. These letters refer to the fruit as "somewhat damaged by frost," but they do not state any claim made, nor expectation of recoupment for such damage. The explanation of their former testimony is not sufficient. There was no reference to custom-house damage in the *Boskenna Bay Case*, or in the questions which the witnesses answered on that trial. The only damage in question was damage by frost alone. The circumstances, as they appear on the present trial, furnish a much more probable explanation, namely, that though their goods may have been somewhat damaged by frost, no claim against the ship was contemplated, for the reason that they had knowledge of the discharge, and practically acquiesced in it; or, at all events, took no further care for their goods, such as the bill of lading required of them. The libels, therefore, of Bonanno, Graziano, Mercadante, Sgobel and Day, and Westervelt, must be dismissed. The other libelants I do not find either identified as present on the 21st, or notified of the intended discharge. As to them, therefore, the risk of the ship remained, and they are entitled to such damages as they can prove to have come to their goods from frost. Several witnesses testified that, where part of a cargo is damaged by frost, the auction prices of the whole cargo are injuriously affected. I cannot recognize this as a legal basis of recovery as respects boxes not actually frost-bitten. If allowed, it would sanction the selling of a whole cargo as damaged goods because a part was affected. In the case of *The Marinin S.*, 28 Fed. Rep. 664, 668, affirmed 32 Fed. Rep. 918, it was held that, where the good and the damaged were easily separable, a division should be made. An order of reference to compute the damages may be taken in the cases of Saitta, Mirto, and Foti, with costs. The other libels are dismissed, with costs.

## THE BERGENSEREN.

KAINER *et al.* v. THE BERGENSEREN *et al.*

(District Court, S. D. New York. November 23, 1888.)

## SHIPPING—CARRIAGE OF GOODS—PERILS OF THE SEA.

Provisions stowed in a water-ballast tank were found damaged in several feet of water, which had made its way into the tank either by some improper opening of the water-pipe that led to the tank, or else through an empty rivet-hole in the bulk-head communicating with the fire-room. The passage was stormy; but, it being found that the accumulation of water in the fire-room arose mainly from the inexperience and mistake of the second engineer in charge, held that, even if the water in the tank came through the rivet-hole, as the defendants contended, the ship was liable, both for the latent defect of the rivet-hole, having reference to its relation to the stowage of cargo, and for the inexperience and mistake of the second engineer; neither being sea perils within the exceptions of the bill of lading.

## In Admiralty.

The above libel was filed by five consignees of cargo on board the steamer Bergenseren on a voyage from New York to Port de Paix, claiming about \$6,000 damages to their goods. The goods consisted of beef, pork, lard, butter, etc., known as "wet cargo," and were stowed in the water-ballast tank, a compartment nearly amid-ships, and separated from the fire-room by an iron bulk-head. The floor of the tank rested upon the ship's ribs, and was 17 inches lower than the floor of the fire-room on the opposite side of the bulk-head. The vessel left New York October 28, 1887, and arrived at Port de Paix, November 3d. She encountered, according to the log, a heavy south-west gale on October 30th, and a heavy north-east sea, causing the vessel to roll heavily. This continued during the 31st of October and 1st of November, moderating on the 2d. On discharging the cargo, about three feet of water was found in the ballast tank, and much of the cargo stowed there was damaged and broken. How the water got into the ballast tank was not ascertained there; and, upon the vessel's return to New York, there was discovered, about eight inches below the floor of the tank, an empty rivet-hole, five-eighths of an inch in diameter, running through the lower part of the iron bulk-head that divided the tank from the fire-room. The hole was down between the ribs, and about eight inches below the floor of the tank. During the voyage the water had risen two inches above the floor of the fire-room, and thirty-four inches above the bottom of the ship. The claimants contend that the water in the tank came from the fire-room, through the rivet-hole; that the rivet in the hole was loosened and fell out during the heavy weather; and that the water in the fire-room came from the seas shipped in the gale; both being perils of the seas, as they claim, for which the ship was not answerable.

*Butler, Stillman & Hubbard* and *Wm. Mynderse*, for libelants.

*Whitehead, Parker & Dexter*, for claimants.

BROWN, J., (*after stating the facts as above.*) The evidence is not sufficient to determine with certainty how the water got into the tank. If it came from the fire-room, through the rivet-hole, it could not have risen more than about 17 inches; while the ship's protest, made at Port de Paix, describes the tank as "filled with sea water," (an exaggeration, doubtless;) and the subsequent protest made in New York says that, while discharging cargo, "about 3 feet of water was found in the ballast tank." The first engineer testifies, moreover, that before arrival at Port de Paix the water in the fire-room had been all pumped out; and that there was then no water there except between the ship's ribs. If the water entered the tank through the rivet-hole, it should have been discharged by the same aperture, as the fire-room was pumped out before reaching Port de Paix. The only answer to this is the possibility that its egress may have got choked up. The libelant contends, in view of this circumstance, that the more probable cause is that the cock by which the ballast tank was supplied with water had been more or less opened by accident, negligence, or mistake. This cock was in the engine department, below the water-line. It ran through the sides of the ship, and was turned by a crank. A pipe led thence through the iron bulk-head down beneath the floor of the ballast tank into a small box, known as the "rose-box," between the ribs of the ship, where it ended. This box was perforated with holes, to make it serve as a strainer, and was fastened by angle-irons on the outside, riveted into the bulk-head. It was one of these rivet-holes that was afterwards found empty. Water coming through the pipe and rose-box would make its way up through the floor of the tank, which was not water-tight, nor designed to be so. The second engineer testifies that at Port de Paix he examined the pipes or valves leading to the water tank, and that, so far as he knew, they were all closed. The first engineer says that at Port de Paix they were closed, "but whether they had been opened, or whether they had been leaking, it was not easy to tell." The engineer's log says the cock may have sprung a leak, or might have been opened by somebody. Assuming, however, that the water entered through the empty rivet-hole, it is impossible not to treat this as a latent defect, considering that the cargo was stowed so low, and upon a floor not water-tight, where, in case of water coming into the engine compartment, it was likely to run into the tank, and injure the goods stowed there. The subsequent examination showed no evidences of straining; nor is there any testimony that the weather was extraordinary. The first protest stated that "nothing unusual occurred;" and the master, in his subsequent testimony, says that "the stoppage of the machinery was the only thing extraordinary." I do not find any legal principle upon which the risk of such a defective riveting should be thrown upon the goods, and not upon the ship. *Work v. Leathers*, 97 U. S. 379; *The Edwin I. Morrison*, 27 Fed. Rep. 136, 141, and cases there cited; *The Rover*, 33 Fed. Rep. 515. Nor is the evidence sufficient to show that the water in the fire-room is attributable to "perils of the seas." On the 28th, according to the engineer's log, the engine was stopped for 5½ hours, to pack the steam gauge, which had sprung a leak; on the following day, for 1½ hours,



in order to fasten the loosened seat of the feed-pump; on the 30th the pumps became foul, and the valves turned around; on the 29th the ship was rolling heavily, but no water, as the engineer says, was taken in from above. It rose two inches above the floor, as he says, "in consequence of the inexperience of the second engineer," who did not turn off the feed-cocks, as he should have done, when the engine stopped. On the 30th, or subsequently, some water came in from above through the open sky-lights; but it is plain from the engineer's testimony that this was not the principal cause of the accumulation of water below. Even if the repacking of the steam-gauge and repair of the pumps could be held to have been made necessary by sea perils, there is no reason to suppose that with reasonable care and skill those repairs need to have been attended by any such accumulation of water. The engineer's testimony clearly shows, as it seems to me, that this accumulation was caused through the mistake and inexperience of the second engineer, who before that trip had been only a fireman. He says that he had not been fully instructed. To bring the case within the excuse of sea perils, the ship was bound to show that this accumulation of water could not have been avoided by the use of reasonable skill and diligence. This is not made out, and the vessel must therefore, on both grounds, be held to the responsibility that the law casts upon her. Decree for the libelants, with costs.

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*HILLS et al. v. MACKILL et al.*

(District Court, S. D. New York. November 24, 1888.)

1. SHIPPING—CARRIAGE OF GOODS—NEGLIGENT STOWAGE.

It is the ship's duty to take all the precautions that experience shows to be necessary to avoid injuries to cargo liable to arise on the voyage. If the best customary means are not employed, it is at her risk.

2. SAME—MOVABLE BULK-HEADS—COAL DUST.

On a voyage from Messina, filberts in bags were stowed against a movable wooden bulk-head separating the compartment from the coal bunkers, through which an extraordinary amount of coal dust penetrated, and injured the nuts. The bulk-head was covered by Chinese matting, which is often used for such purposes; but canvas is equally used, and is better, because tighter. *Held*, that coal dust is not a sea peril, and that the ship was liable for the damage, for not using canvas as the best protection, as well as for putting the bags next to the bulk-head, instead of other cargo less liable to be injured.

3. SAME—DUTY OF CONSIGNEE—OVERHAULING DAMAGED CARGO.

Consignees are not bound to overhaul and repair damaged goods for the ship's benefit, rather than sell them at auction as damaged goods, where the ship's agents have opportunity to do the same work.

*In Admiralty.*

Libel by John Hills and others against Robert Mackill and others for damages arising from injury to cargo of the steam-ship *Ettrickdale*.

*Scudder & Carter* and *Geo. A. Black*, for libelants.

*E. B. Convers*, for respondents.

BROWN, J. The above libel *in personam* was filed to recover for damages to 278 bags of filberts, injured by coal dust on a voyage of the steam-ship Ettrickdale from Messina to New York. The bags were stowed in the lower hold, compartment No. 2, and against the bulk-head that separated that compartment from the coal bunkers. The other bulk-heads of the steam-ship were of iron, and fixed. This one was made movable, for the purpose of enlarging or contracting the size of the coal bunkers, and was therefore constructed of wood. Between-decks, the planks of which it was made were 2½ inches thick; in the lower hold they were 3 inches thick. They were placed perpendicularly, and tongued and grooved together. Before the cargo was loaded, Chinese matting was nailed upon the cargo side of the bulk-head, the ends of the mats lapping, and being fastened by means of laths. On delivery at New York, the 278 bags were found so black with coal dust, which had also penetrated inside and among the nuts, that they were not merchantable, except as damaged goods. A part of the bags were overhauled, and made merchantable by the libelants; but, on learning that the respondents would not admit their liability for this damage, the libelants refused to take further pains about the rest, and they were sold at auction as damaged, on notice to the respondents.

The respondents contest their liability for the damage on the ground that the bags were stowed in the usual manner, and that there was no negligence on their part; that the bulk-head was well constructed, and of the kind in ordinary use in similar steam-ships, and protected on the inside by matting, in the customary way. Some testimony was given by the libelants to the effect that after arrival in New York there was an opening between the planks of the bulk-head wide enough to insert the fingers. Upon other testimony in the case, however, I am not satisfied of the correctness of this testimony. The master states that the seams of the bulk-head were caulked at Messina. Other witnesses state that on arrival at New York the oakum had worked out in part, and was seen hanging from the cracks. The vessel experienced very heavy weather during her voyage in the month of December, and the respondents contend that this was the only cause of the unusual amount of dust that worked through from the coal bunkers. On a voyage not long previous the ship had carried a cargo of coal, but it was claimed that the compartments were subsequently thoroughly washed. This ship was a common carrier. There is no dispute that the goods were received by her in good order. She was bound by her contract, as well as by the law, to deliver them in like good order, unless she proves the damage to be within some of the recognized legal exceptions to her liability. There is no exception in the bill of lading applicable to the case other than the general exception of "sea perils." Damage from coal dust is not, at least directly, a damage from sea perils. If a ship is sea-worthy at the start, and performs her whole duty in properly stowing and protecting the goods against the dangers likely to be incurred on the voyage, subsequent damage arising from unusual rolling or pitching in extraordinary weather is, doubtless, damage arising from a peril of the sea. So, where a fixed

custom permits the stowage of different kinds of goods together, damage that arises from their injuring each other during extraordinary weather is held one of the perils of navigation assumed by the shipper, and within the ordinary exception of the bill of lading, if they are well stowed; otherwise not. In this case the customary use of movable wooden bulk-heads in steam-ships of this character is sufficiently proved. So far the ship was not unfit for the voyage. That some coal dust is ordinarily liable to work through the bulk-head is well known. *The Thomas Melville*, 31 Fed. Rep. 486, 488. It was proved that, to prevent the working of coal dust into the adjoining compartments, matting was in some cases used; in other cases, canvas; and that the latter is best, because tightest. There was no definite custom in this respect. In stowing cargo against the bulk-head, through which coal dust was likely to find its way, it was the duty of the ship to take all the precautions that experience had shown to be necessary to avoid injury; having reference to the kind of bulk-head she had, and to its condition at that time. If the best-known means were not adopted, it was at her risk, and not at the risk of the goods. It was the ship-owner who had charge of the loading, and who was to determine which parts of the cargo, if any, should be placed near that bulk-head. If the coal dust was liable to penetrate the bags of filberts, they should have been stowed further away from the bulk-head; or else adequate protection should have been used by canvas coverings, such as are often used to protect other kinds of cargo, or the bulk-head itself covered with tight canvas. *The Marinin S.*, 28 Fed. Rep. 664, 32 Fed. Rep. 918. The owner of the goods has no control over such matters. Under the law that imposes on the ship, as carrier, the duty of safe delivery, the ship takes all such risks, unless she can show the use of all reasonable skill and good judgment, or compliance with so definite a usage in the stowage and protection of the goods against injury, and such use of the well-known and best means to that end, as legally import an assent of the shipper to transportation in this manner. *Baxter v. Leland*, 1 Blatchf. 526; *The Sabioncello*, 7 Ben. 357; *The Maggie M.*, 30 Fed. Rep. 692. The evidence does not show such care, either as regards the choice of goods to be put next the bulk-head, or as to their protection against dust; and the ship is not, therefore, legally excused. The amount of coal dust that came through was extraordinary. It covered, more or less, all the cargo that was stowed in that compartment, though the rest may not have been damaged by it. There is room for doubt whether the master is not mistaken as to the caulking of the bulk-head at Messina, and whether, at the time he testified, he had not confounded that with the caulking at New York, which was entered in the log, while the log does not show any caulking at Messina. Upon the question of fact, considering the amount of damage done by the coal dust, I should find it difficult to believe that the bulk-head was made as tight as usage requires, either by caulking, or canvas, or matting.

As respects the bags sold at auction, the respondents had full notice, and, so far as appears, could have overhauled them themselves, or have procured this work to be done by others, had they chosen to do so. They

had no right, I think, to demand that the libelants should do this work, rather than have the goods sold at auction. The analogy drawn from the repair of vessels damaged by collision is not, I think, applicable. So far as I know, it has never been applied to damaged goods; and the circumstances, as respects the facilities of sale, and the means of obtaining the proximate value of the damaged articles, are wholly different. Unless there is some dispute, therefore, as to the result of the auction sale, or some unfairness is charged in regard to it, the libelants may take a decree for the amount claimed, with interest and costs. If there is dispute on these points, a reference may be taken to ascertain the damages.

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HEYE v. NORTH GERMAN LLOYD.

(*Circuit Court, S. D. New York. November 14, 1888.*)

**SHIPPING—GENERAL AVERAGE—BAGGAGE.**

A passenger's baggage, stowed in the baggage compartment of a steamship, and damaged by water in an attempt to extinguish a fire which threatened the safety of the vessel, is a subject of average contribution.

In Admiralty. Libel for damages. On appeal from district court, 33 Fed. Rep. 60.

Libel for damages to the contents of libelant's trunks, caused by fire on board respondent's steamer Ems. Decree for libelant, and an order of reference directed to ascertain the amount if not agreed on. Respondent appeals.

*W. G. Choate*, for appellant.

*R. D. Benedict*, for appellee.

WALLACE, J. The only question which has been argued upon this appeal is whether passengers' effects are a subject of average contribution when sacrificed under the conditions of necessity and common peril constituting a general average loss. The counsel for the appellant insists that they are not to be contributed for, but cites no authority directly to the point; and there seems to be no decided case in the courts of this country or England in which the question has been determined or considered. His argument is that passengers' effects do not contribute in a general average loss, and therefore should not be contributed for, because the principle of general average contribution is reciprocity of burden and benefit. But all the commentators without exception assert or assume as unquestionable, that passengers' effects are to be paid for in case of sacrifice. Even the English text writers do not question this. Thus it is stated in 1 Maude & P. Shipp. 434, 435:

"But although these [the wearing apparel, luggage, jewels, or other property of this description belonging to the passengers, on board for use, but not for traffic] do not contribute, it is apprehended that if ammunition, pas-

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sengers' baggage, or other goods which are exempt are sacrificed for the general good, they must be paid for as other goods by general contribution."

See, also, Macl. Shipp. 634. Among our own text writers Mr. Phillips adverts to the question by quoting the language of Emerigon:

"The trunks of a passenger, thrown overboard for the general safety, must be contributed for; and why, if they are preserved, should they be exempted from contribution?"

He also quotes Benecke:

"Passengers ought to contribute for their trunks and luggage, because, if cast overboard, their value is allowed for." 2 Phil. Ins. § 1394.

There seems to be no American case in which the question has been considered whether passengers' effects contribute in general average to the payment of the loss. The argument that if they do not contribute they ought not to be contributed for is a legitimate one, and has commonly been invoked by the commentators to show that passengers' effects should contribute to the loss because they are contributed for. The doctrine that they do not contribute by the law of England is supported by the authority of Lord TENTERDEN and Chancellor Kent. But the former, after remarking upon the wisdom and equity of the rule that all are to contribute toward a loss sustained by some for the benefit of all, observes:

"The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law that has been followed by more variations in practice." Abb. Shipp. 474.

Chancellor Kent repeats this observation, and adds:

"And the rules of contribution in different counties, and before different tribunals, are so discordant, and many of the distinctions are so subtle and so artificial, that it becomes extremely difficult to reduce them to the shape of a connected and orderly system." 3 Kent, Comm. 235.

The court below, in deciding that such effects are to be contributed for, considered the question whether they also contribute, and concluded that they do. The opinion of the district judge is such a complete exposition of the whole subject upon authority and reason that any further discussion of the questions involved is wholly unnecessary, and would be superfluous. It is proper, however, to add to his citations, showing the views of the great admiralty authorities from the earliest ages that the effects of passengers, not in daily use or attached to the person, are to contribute in general average, some others which have been found by the counsel for the libellant. In Brown's Civil Law, vol. 2, p. 201, (published in 1802,) the law is stated as follows:

"All persons for whose benefit the act was done, the freighter, the master, the owner, the sailors, the passengers, must contribute. \* \* \* All things in the ship, and the bodies of the men, [unless servants] must bear a proportionable share in the contribution. Doubts were formerly held whether money and jewels contributed, but they are now certainly included in the general rule."

In Jac. Sea Laws, translated by Wm. Frick, (published in 1818,) it is said:

"The trunks and effects of passengers are included in the adjustment of general average. The case does not often occur; but when it does, the question arises by what standard shall they be estimated. Cleirac, in his commentary upon the *Rolle of Oléron*, says: 'The passengers are required to have produced to the master previous proofs of the contents, or obtain indemnity only for the value of the empty trunk.'"

In *Bedarride's Commentaire*, vol. 5, the distinguished author, after quoting *Emerigon* and *Pothier* to the effect that passengers' baggage must contribute, says, (section 1848:)

"The Code having only repeated the words of the ordonnance of 1681 we can, under it, accept as settled the principles taught by *Emerigon* and *Pothier*. Till now the question has not been raised. What has led to this result is that ordinarily the value of the passenger's baggage would not compensate for the delays or the expense of a settlement in general average, or the delays which would entail on navigation."

The decree of the district court is affirmed, with costs of this court.

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### THE SERAPIS.

*LA SCALA et al. v. THE SERAPIS. LA SCALA et al. v. McINTYRE et al.*

(District Court, E. D. New York. July 27, 1888.)

#### 1. SHIPPING—CHARTER-PARTY—AGENT'S COMMISSION.

Where a ship's charter provided that the steamer was to be consigned to charterer's agents at ports of loading, paying one commission of two and a half per cent. to charterer's order at the first loading port, and to be reported at the custom-house by the said agents on customary terms, *held*, the agents were not entitled to a commission at a port of discharge.

#### 2. ADMIRALTY—PRACTICE—MOTION TO DISMISS LIBEL—HEARING—EVIDENCE.

Where a motion to dismiss a libel is heard without objection, and the charter-party is presented to the court and commented on by counsel, no question being raised as to its terms, and is also referred to in the answers to the interrogatories, libelants are not entitled to have the question determined according to the allegations of the libel, irrespective of the provisions of the charter-party.

In Admiralty. Two libels filed by *Diego La Scala* and *Filippo Modica*, one against the steam-ship *Serapis*, her tackle, and the other against *John J. McIntyre* and others.

*Chas. Stewart Davison*, for libelants.

*E. B. Convers*, for claimants.

**BENEDICT, J.** The question so earnestly discussed on behalf of the libelants in these two cases, whether, where a charter of a ship contains a provision that the ship shall be addressed to a broker to be named by the charterer, such addressee can maintain an action in his own name against the ship or her owner to recover damages for the failure on the part of the ship-owner to comply with this clause in the charter, cannot

be decided in these cases, for the reason that the charter-party in this case contains no provision for the consignment of the ship at any port except the port of loading. The libelants' claim is for a failure to allow them to do the ship's inward business at the port of New York, which was a port of discharge and not of loading. The language of the charter is as follows:

"The steamer to be consigned to charterer's agents at ports of loading, paying one commission of two and a half per cent. to charterer's order at the first loading port, and to be reported at the custom-house by the said agents on customary terms."

This language imports no obligation on the part of the ship to the charterer's agent at the port of New York, because the port of New York was not a port of loading, but a port of discharge; and its import is too obvious to permit it to be varied by parol testimony.

As to the point made in behalf of the libelants that the charter is not before the court, it is sufficient to say that the present motion is a motion to dismiss the libels. The motions were heard without objection, and the charter-party was presented to the court and commented on by the counsel; no question being raised as to its terms. It is, moreover, referred to in the answers to the interrogatories. It is not now open to the libelants to demand that the question be determined according to the allegations of the libel, and not according to the written contract, on which the libelants' claim must rest.

There are some other causes of action set forth in the libels to which little importance seems to be attached. The principal question is the one already stated, and, as that cannot be raised under the charter-party in question here, the libels may as well be dismissed at this time. If, however, counsel desire an examination and decision upon the other causes of action, and will request such a decision, those questions will be examined and passed on, otherwise the motion to dismiss the libels will be granted.

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### THE THOMAS MELVILLE.

*WINDMULLER et al. v. THE THOMAS MELVILLE et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

#### 4. SHIPPING—CARRIAGE OF GOODS—INJURIES TO CARGO—PLEADING AND PROOF.

Upon a libel for damage alleging "that by reason of the neglect and failure of the said master \* \* \* to properly stow the said merchandise, and of the improper, unsafe, and unseaworthy condition of the said steamer, and by want of proper care of the said master, \* \* \* and by reason of the improper and insufficient dunnage of the merchandise, and the unsafe and leaky condition of the deck of said steamer, on said voyage, the said merchandise was damaged," no recovery can be had for damage by coal-dust not resulting from improper stowage.

## 2. ADMIRALTY—APPEAL—REVIEW.

Where the evidence is conflicting, and no new evidence is introduced, the circuit court will not, on appeal of a libel for damage, review the finding of the district court.

In Admiralty. Libel for damages. On appeal from district court, 31 Fed. Rep. 486.

Libel by Windmuller and others against the Thomas Melville, James Turpie, Son & Co., claimants, for damage done to a cargo of prunes shipped in October, 1883, on board the Thomas Melville, at Trieste, in casks, boxes, barrels, and kegs, to be delivered at New York. The greater part of the damage was done by sea-water, which leaked through the decks; but there was also a claim of damage from coal-dust, which penetrated some of the boxes. The libels were dismissed by the district court, and the libelants appeal.

*Franklin A. Wilcox*, for libelants.

*E. B. Convers*, for claimants.

LACOMBE, J. 1. The court below, upon conflicting evidence, has found that the ship was seaworthy, and her decks not insufficient for the voyage when she left Trieste; that she experienced very tempestuous weather, and that the leaks in her decks, which caused the sea-water damage complained of, were produced by a peril of the seas, and not by the ship's own fault. These are questions of fact. No additional evidence on this branch of the case is presented here, and the finding of the district judge will not be disturbed.

2. The same considerations apply to his decision as to damage claimed from insufficient dunnage and improper stowage. It was formed upon conflicting testimony, and no new evidence is introduced here.

3. The only remaining claim is for damage from coal-dust. Much evidence upon that branch of the case was introduced in this court. The amended libel setting up this damage as a separate cause of action having been stricken from the files, (*The Thomas Melville*, 34 Fed. Rep. 350,) the claim can be sustained only upon the theory that the district judge erred in holding that coal-dust damage was not properly pleaded in the original libel. The averments upon which libelants rely are these: "That by reason of the neglect and failure of the said master and the said owners of the said steamer, and the officers thereof, to properly stow the said merchandise, and of the improper, unsafe, and unseaworthy condition of the said steamer, and by the want of proper care of the said master and owners and officers of said steamer, and by reason of the improper and insufficient dunnage of the said merchandise, and the unsafe and leaky condition of the deck of said steamer on said voyage, the said merchandise was damaged," etc. This is not a case where claimants, having gone to trial under general averments in a libel without objecting, or without asking for a specification of particulars, are not allowed to object to proof of special damage fairly within the general allegations. Here the pleader has specifically enumerated bad stowage, unseaworthy condition, insufficient dunnage, and leaky decks as causes of damage. Having



undertaken to set forth specifically his separate grounds of claim, he must enumerate them all, or else confine his proof to those which he has declared upon.

4. As to packages of prunes damaged by dust from being stowed in the coal-bunkers, it might be claimed that damages would be recoverable under the averment of bad stowage. Here, however, the proof is insufficient. Only a part of the whole cargo of prunes, (consigned to others as well as to libellant) was in the bunkers, and there is no evidence to show that libellants' casks were the ones stowed there. The decree of the district court is affirmed.

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SCHWERIN v. NORTH PAC. C. R. Co.

(District Court, N. D. California. October 22, 1888.)

SHIPPING—CARRIAGE OF PASSENGERS—NUMBER—PENALTY—FERRY-BOAT.

Rev. St. U. S. §§ 4464-4466, respecting the number of passengers that may lawfully be carried by a passenger steamer, have no application to a ferry-boat, though temporarily employed as an excursion boat.

At Law. On demurrer to complaint.

Action by H. W. Schwerin against the North Pacific Coast Railroad Company to recover the penalty prescribed by section 4465, Rev. St. U. S., for carrying on its steamer passengers in excess of the number stated in the certificate of inspection.

Milton E. Babb, for complainant.

Page & Eells, for defendant.

HOFFMAN, J. The complaint in this case is filed by an informer seeking to recover certain penalties imposed by sections 4464, 4465, Rev. St. U. S., for violations of their provisions. The violations complained of are alleged to have been committed by the steamer Tamalpais, a regularly licensed ferry-boat, plying between this port and Sausalito. She was, however, frequently employed as an "excursion boat," and on such occasions procured from the inspectors a permit specifying the number of passengers she was authorized to carry, the number and kind of life-saving apparatus, etc., to be carried, and the route and distance for such excursions. These permits were issued, it is presumed, under the supposed authority of section 4466. It is contended that on one of these excursions she carried more passengers than was allowed by the permit. Sections 4464 and 4465 are as follows:

"Section 4464. The inspectors shall state in every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodations for, and can carry with prudence and safety.

"Sec. 4465. It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection;

and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of the passage money and ten dollars for each passenger beyond the number allowed."

By section 4469 this penalty is declared to be a lien upon the vessel. It is evident that these sections have no application to ferry-boats, when employed as such; and, in fact, the certificate issued to a boat of that class contains no statement of the number of passengers she is entitled to carry. But it is contended that the steamer Tamalpais, by forsaking her ferry-route, and engaging in the carrying of passengers "on excursions," ceased *pro hac vice* to be a ferry-boat, and became subject to the provisions of law intended to secure the safety of passengers taken on board "steamers carrying passengers." That they ought to be subjected to those provisions cannot be doubted. But there is much difficulty in applying the provisions of the sections I have quoted to ferry-boats which, on occasions more or less rare, are used in carrying passengers on excursions, but which ordinarily and habitually are employed only as ferry-boats. The provisions with regard to passenger steamers engaging in excursions are contained in section 4466, and are as follows:

"If any passenger steamer engages in excursions, the inspectors shall issue to such steamer a special permit, in writing, for the occasion in which shall be stated the additional number of passengers that may be carried, and the number and kind of life-saving appliances that shall be provided for the safety of such additional passengers; and they shall also, in their discretion limit the route and distance for such excursions."

It will be noted that this section does not (except by implication) forbid the carrying of passengers on excursions in excess of the number allowed by the certificate of inspection *plus* the number of additional passengers allowed by the "special permit in writing." Nor does the section impose, as does the preceding section, any penalty or forfeiture for a violation of its provisions. Section 4469 declares the penalties imposed by section 4465 (which forbids the carrying of a greater number of passengers than is stated in the certificate of inspection) to be a lien on the vessel, but it makes no mention of any penalties or liabilities incurred by carrying a greater number of additional passengers than that allowed in the special permit for excursions. Sections 4464, 4465, and 4466, by their terms, or by necessary construction, apply exclusively to "steamers carrying passengers," or passenger steamers "other than ferry-boats;" and the certificates of inspection issued to these vessels are required to state the number of passengers such steamer can safely carry. Section 4465 declares the penalty incurred by taking on board more passengers than is stated in the certificates of inspection. When engaged in excursions, the "passenger steamers" may obtain a special permit for the excursion, in which shall be stated the additional number of passengers that may be carried on the excursion, etc. Additional to what? Plainly additional to, or in excess of, the number stated in the certificate of inspection. But the certificates of inspection issued to ferry-boats do not, and are not required to, state any number of passengers they are entitled to carry. How, then, if engaged in excursions, can they be said

to have carried any greater number of passengers than is stated in their certificates of inspection, or, if a permit has been obtained, any number of passengers greater than the number mentioned in the permit as additional to the number stated in the certificate of inspection? It is plain, I think, that these sections cannot be applied to ferry-boats carrying on excursions a greater number of passengers than that authorized by their permits. A law authorizing permits to be issued to ferry-boats, and perhaps tug-boats and freight-boats, engaged on excursions, specifying the number of passengers they are entitled carry, and imposing penalties for its violation, might be desirable and salutary. But I am unable to see how the section of the Revised Statutes under which this action is brought can be made to reach the case. It is said that a ferry-boat, licensed only as such, when engaged on excursions, becomes *pro hac vice* a passenger boat. If this be so, the ferry-boat so engaged may possibly be considered as employed without having a license in force. Section 4324 provides that "no license granted to any vessel shall be considered in force \* \* \* for carrying on any other business or employment than that for which she is specially licensed." But this point it is unnecessary to consider, as this suit is not brought for any such violation of law, but for the penalty imposed by section 4465 of the Revised Statutes. The demurrer is sustained.

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### THE ERIN.<sup>1</sup>

#### THE STEAM-SHIP SAMANA v. THE ERIN.

(District Court, E. D. New York. October 15, 1888.)

#### SALVAGE—DISABLED STEAMER—DANGEROUS CURRENT—TOWAGE—VALUES—AWARD.

The steam-ship E., when about 50 miles north of the east end of the island of Cuba, lost her propeller key, and was thus deprived of motive power. The weather was fine, and the vessel was in the track of ships, but there was not wind enough to enable her, by her sails, to stem a current which there sets towards the rocky coast at the rate of one to two and a half knots an hour. A signal of distress, set by the E., was observed by the steam-ship S., which altered her course, and bore down to the E., and the masters of the two vessels entered into an agreement in writing that the E. should be towed into port, and the compensation left to the agents of the vessels, either at New York or Boston. The S. thereupon put out a hawser to the E., and with some difficulty towed her safely to her destination, a distance of 240 miles. The S. was not damaged in any way by the towage, but was delayed one day in her arrival at her destination. Her value was \$50,000. The E., with her stores was worth \$26,000. The claimants of the E. offered \$1,000 as compensation for the service, claiming that it was simple towage. *Held*, that the service was a salvage service, and \$4,000 a proper salvage award.

In Admiralty. Libel for salvage.

*Wheeler, Cortis & Godkin*, for libellant.

*Whitehead, Parker & Dexter*, for claimants.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

BENEDICT, J. This is an action for salvage. The circumstances are as follows: On the 1st day of July, 1888, the steam-ship Erin, bound on a voyage from Baltimore to Port Antonio, Jamaica, when about 50 miles north of Cape Maysi, which is the eastern end of the island of Cuba, at half past 7 in the morning, lost the key of her propeller, and was thus deprived of motive power. The weather at the time was fine, sea smooth, and the wind very light from eastwardly. The current at that point sets to the S. S. W. at the rate of from one to two and a half knots an hour towards the coast of Cuba, which, according to the testimony, is there a rocky coast, offering no anchorage, and with which the captain of the Erin was unfamiliar. The steamer was schooner rigged, able to spread but little canvas, and, owing to the light breeze and insufficient sail power, she could make no progress. A signal of distress was displayed, which, a few hours later, was observed by the steam-ship Samana, also bound to Port Antonio. The Samana thereupon altered her course about a point to the westward, bore down to the Erin, and hove to, close by. The captain of the Samana launched a boat, and went on board the Erin, and there the following agreement was made between the two masters:

"This is an agreement between the captain and representative of the British steamer Erin, of Glasgow, fallen in with, disabled, (with signals of distress,) in about latitude 21.20 N.; longitude 74.15 W., by British steamer Samana, of Liverpool, to tow said disabled steamer Erin to Port Antonio, Jamaica. We, the representatives of the above-mentioned steamers and their charterers, agree to leave the amount to be paid for towing the above-mentioned disabled steamer Erin to Port Antonio, Jamaica, to the agents of the above-mentioned steamers or their legal representatives, either in New York or Boston."

Thereafter a three and a half inch steel hawser was passed from the Erin to the Samana, and at about noon the Samana proceeded on her course to Port Antonio, with the Erin in tow. During the night a heavy sea arose, and both vessels rolled considerably, the Erin steering very badly. This continued during the next day, and about half past 2 in the afternoon the steel hawser parted about midway between the two vessels. The Samana then steamed around the Erin, endeavoring to pass her a line, but, owing to the heavy sea running, was unable to do so, and finally a boat was launched from the Erin, and a new 8-inch Manilla hawser belonging to the Samana was made fast on board the Erin, and the vessels once more proceeded towards Port Antonio, where they arrived about 8 o'clock in the evening of the same day. The Erin had been towed a distance of about 240 miles by the Samana, whereby her arrival at her destination was delayed one day. Port Baracoa was 60 miles from the place where the Erin was taken in tow, Guantanamo was 147 miles, and Santiago, where there was a dock, was 187 miles away. These ports were passed on the way to Port Antonio, no doubt because the master of the Samana was anxious to reach Port Antonio as soon as possible, where a cargo of fruit was awaiting his arrival. No damage was sustained by the Samana in the performance of this service. The value of the Erin, with her stores, was \$26,000. She was light, and had no passengers. The Samana was a new ship, worth \$50,000. The claimant offers the sum

of \$1,000. This the owners of the Samana deem insufficient compensation for the services rendered.

That a salvage service was performed by the Samana cannot be denied. The Erin was helpless, at a point less than a hundred miles north-east of a dangerous coast, towards which she was driving at the rate of thirty or forty miles a day. If not fallen in with by some vessel, her destruction was extremely probable; but her chance of being fallen in with by other vessels was great, for she was in the channel where many steamships pass. This circumstance, while it goes to decrease the peril, does not destroy it. The Erin was in a position of peril, and was rescued therefrom by the voluntary exertions of the Samana. It has been contended on the part of the claimants that the agreement signed by the masters makes the case one of simple towage. I do not so understand the agreement. The service expected of the Samana was, of course, a towing service; but the towing was to be rendered under circumstances which rendered the service salvage, and the Samana is entitled to a salvage reward. In support of the offer made by the Erin, I have been referred to a calculation of the percentages that have been allowed by various courts in cases of salvage service more or less similar to those rendered in the present case, and it has been contended that a similar percentage upon the value of the Erin would not amount to more than the thousand dollars offered by the Erin. But no fixed rule for determining the amount of salvage awards can be based on a comparison of percentages. Where the value is large, the percentage may for that reason be less. Where the value saved is small, the percentage must be higher, in order to give adequate reward. In this case the assistance required was willingly and promptly furnished. It was sufficient, but it was an easy service. Most of the actual labor performed was performed by the crew of the Erin. The Samana did not deviate from her voyage, although it would have been to the interest of the Erin to have been taken to Baracoa or Santiago, because there was a dry-dock. Taking all the circumstances of this case into consideration, I am of the opinion that an award of \$4,000 would be just.

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THE CARONDELET.<sup>1</sup>

L'HOMMEDIEU v. THE CARONDELET.

(*District Court, E. D. New York. November 13, 1888.*)

SALVAGE—STEAM-SHIP AT WHARF—BURNING LIGHTER—TOWAGE INTO STREAM—TENDER.

A steamer was lying at a wharf, with steam up, when a lighter near by caught fire. A tug, at the request of the master of the steamer, took her into the stream, and held her there until the burning lighter had been removed, when she took her back to the wharf; the whole service occupying an hour and a

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

half. Fifty dollars was tendered by the steamer as compensation for the service. *Held* that, while the service was a salvage service, the peril of the steamer had been so small that \$50 was a sufficient compensation; that libelant should therefore have a decree for the \$50 paid into court, and costs up to that time, less the costs incurred since the tender.

In Admiralty. Libel for salvage.

Libel by Samuel L'Hommedieu, owner of the steam-tug Ceres, against the steam-ship Carondelet.

*Wing, Shoudy & Putnam*, for libellant.

*Butler, Stillman & Hubbard*, for claimants.

BENEDICT, J. This is an action to recover salvage for services rendered by the steam-tug Ceres to the steam-ship Carondelet, under the following circumstances: On the 22d day of September, 1887, the steam-ship Carondelet was lying at the end of pier 20 in the East river, fast by lines to pier 20 and pier 19, substantially ready for sea. At about 1 o'clock P. M. of that day a lighter named the "Samuel Baker," lying on the side of pier 20, loaded with cotton, caught fire. The Carondelet at once threw off all her lines, and the tug Ceres, having at the time come to the bows of the steam-ship for the purpose of going into the slip to tow out the lighter, was requested by the master of the Carondelet to take a line from the steamer, and tow her into the river. Accordingly the Ceres took a line from the Carondelet, and towed her into the middle of the river, and there held her until the burning lighter had been removed, when she took her back to her place at pier 20. The time occupied in this service was from one and a half to two hours, all told. It involved no risk of any kind, or extra labor on the part of those on board the tug. The libelants insist that the service was important, and requires a liberal reward. The claimants have made a tender of \$50 as a sufficient award, and have paid that sum into court with costs. The ordinary price for towage by this tug was \$10 an hour. No doubt the service was a salvage service; it was a voluntary service rendered to a vessel in peril, and was successful. The amount of the salvage compensation must, however, be largely affected by the extent of the peril to which the steam-ship was exposed at the time when she was towed away from the pier by the tug. This peril is reduced to the minimum by the proofs in the case, which show that at the time when the Ceres took hold of the steamer, the steamer had steam up, and could herself have moved away by her own power in abundant time to avoid being set on fire by the burning barge. This is the controlling fact in the case, about which there is little dispute in the testimony, and it reduces the peril of the steamer to such an extent as to render the offer of \$50 made by the claimants, in my opinion, a sufficient salvage compensation for the services rendered. The libelant may have a decree for \$50 paid into court, and the costs up to that time, less the costs incurred since the tender.

# NEW HAVEN STEAM-BOAT CO. v. THE MAYOR, etc.<sup>1</sup>

(District Court, S. D. New York. October 3, 1888.)

## 1. COLLISION—MEASURE OF DAMAGES—SURVEY AND SUPERINTENDENCE.

The cost of surveying the injuries done to a vessel by collision, and of superintending the repairs, when necessary to the economical prosecution of the work, is allowable as an item of the collision damages. A superintendence on behalf of the libelant and a separate superintendence in the interests of the insurer are, however, unnecessary, and the charge for but one will be allowed.

## 2. SAME—DEMURRAGE—SPARE BOAT—AMENDMENT OF LIBEL.

A ship-owner is entitled to demurrage for the period during which his boat, injured by collision, is being repaired, though a spare boat, belonging to the same owner, is used as a substitute during the detention. Amendment of libel to increase claim for demurrage denied, when the facts were known, and the claim as pleaded had been twice before verified on oath, and the amendment was not asked till after trial and apportionment of damages.

## 3. SAME—WAGES OF CREW.

The wages of crew, necessarily kept on the injured vessel while she is repairing, are also part of the damage.

In Admiralty. On exceptions to commissioner's report.

*Wilcox, Adams & Macklin*, for libelant.

*Joseph H. Mosher*, for respondent.

**BROWN, J.** 1. *Survey and Superintendence.* In making up the damages by collision, the cost of surveying the injured vessel, and of superintending the repairs, is allowed when the survey and superintendence are reasonably necessary to the economical prosecution of the work. To that extent such charges are incurred in the interest of all concerned. If unnecessary, the charge is not allowed. *The Golden Rule*, 20 Fed. Rep. 198. From the nature of the injuries to the *Continental*, it is plain that a preliminary examination and survey were necessary before commencing those repairs, and a proper charge therefor should be allowed. *Sawyer v. Oakman*, 7 Blatchf. 290, 306; *The City of Chester*, 34 Fed. Rep. 430. This survey, however, did not include specific details of the work to be done. The repairs were made by day's work. The libelant had a superintendent who attended to the work daily in its behalf, and its insurers sent other men, who also superintended the work in their interest, and acted in conjunction with the libelant's superintendent. The libelant paid the charges of the insurer's superintendents. The respondent objects to that item, on the ground that they acted in the interest of the insurers, and for their satisfaction only, and were not necessary to the work. It is often to the interest of the ship-owner, in repairing collision damages, to conjoin with it other work, or to do the repairs in some other mode than in the manner most economical, having reference to the collision injury alone; and in many cases it is a matter of skilled judgment, not easy to determine, just how far the work should extend, or in what way it should be done, to make good the injury, and no more. Constant

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

experience in the adjustment of collision damages shows the practical difficulties that often arise in these ways. The interest of the ship-owner is often opposed to that of his insurer, and of the wrong-doer, who is bound to indemnify both; while the interests of the two latter, in securing an economical repair of the specific injuries, and no more, are identical. An independent superintendence in their interest will often save many times its cost. No prudent person, knowing that he must pay the damages, would fail to take such a precaution, if in his power. The insurers are in a position to enforce this precaution, and to exact payment for the service by the ship-owner. This service is, as a rule, so beneficial, and often practically so necessary, to economy in repairs, that when paid for by the ship-owner, as in this case, there is no equity in disallowing it. It should be treated as an expense practically necessary to the most economical repair of the vessel, of which the wrong-doer has enjoyed the full benefit in the diminished cost of the repairs. There is no evidence, however, to show that more than one survey or one independent superintendent was necessary. Therefore I allow the full charge for the one, and disallow the charge for the other. *The Venus*, 17 Fed. Rep. 925; *The Olive Baker*, (July 10, 1888,) MS.<sup>1</sup>

2. *Demurrage*. The *Continental* being disabled by collision from continuing her trips, the *Elm City*, belonging to the same company, was substituted in her place. The latter was a "sister-boat" to the *Continental*, of the same size, but much older, slower, and of less value. She was kept by the libelants as a spare boat, for the purpose, in part, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excursions, and upon special charters. Demurrage at \$250 per day is allowed by the commissioner for 15 days, while the *Continental* was undergoing repairs. The respondent contends

<sup>1</sup> *WILLIAMS et al. v. THE OLIVE BAKER.*

(*District Court, S. D. New York. July 10, 1888.*)

*Owen & Gray*, for libelants.

*Carpenter & Mosher*, for claimants.

BROWN, J. The fact that after the decision holding the libelant's vessel in fault, as well as the claimant's, the damages claimed on the reference before the commissioner are from two to three times the amount stated in the libel, naturally raises suspicion as to the good faith of some of the items presented on the reference. This suspicion is to some extent confirmed by the failure of any specific proof to connect the items with the injury, or to show just how they were necessary, or even used. I am not satisfied, under these circumstances, with mere general statements that they were all necessary. There is, indeed, no such proof of fraud as existed in the case of *The Sampson*, 4 Blatchf. 28, 30; but more satisfactory proof ought to be furnished to admit items that do not seem necessary. I deduct \$71.31 in addition to that disallowed by the commissioner; \$5 saved in towage; \$15 for survey, since no use was made of it in doing the repairs, (*Sawyer v. Oakham*, 7 Blatchf. 290, 306;) and allow 13 days' demurrage, at the rate of \$30 per day only, which, for a continuous period, without expense to the owner, is in reality a liberal allowance for the "use" of the vessel alone. I greatly doubt that the vessel was worth even that. The services rendered to the schooner after the disaster were more than were necessary for her safety, so far as the evidence shows. If they were an expense reasonably incurred in consequence of the collision, then they should come in with the other damages, and be equally divided. The referee's ruling is sustained on this point. The result is that the amount reported must be reduced \$211.65, leaving \$1,155.52 due to the libelant, with interest from June 20, 1888, and with one-half the costs. The claimant's exceptions are overruled.



that this claim should have been wholly disallowed, on the ground that the running of the Elm City in the place of the Continental in reality cost the owners nothing, and that they consequently sustained no actual damage in this respect. *The Clarence*, 3 W. Rob. 283, 286; *The Potomac*, 105 U. S. 630, 632. The principles laid down in the cases of *The Cayuga*, 7 Blatchf. 385, 14 Wall. 270, and *The Favorita*, 8 Blatchf. 539, 18 Wall. 603, although these cases differ in some particulars from the present case, are, it seems to me, controlling. The owners were entitled to procure another boat to take the place of the Continental, while she was disabled through the collision. It is immaterial to the respondents whether the substitute was hired from other persons at market rates, or supplied by the libelants themselves. If the latter chose, as a matter of policy, to be at the expense of maintaining a "spare boat" for emergencies, the liability to accidents like the present was one of the causes and inducements to this outlay, as the evidence of the superintendent shows. They are entitled, therefore, to charge for the use of their own boat at the market value of its use, for the time being, precisely as if they had hired her from other owners.

The evidence before the commissioner was principally of estimates as to the value of the Continental, varying from \$300 to \$500 per day. As the evidence showed that the Elm City fully performed the Continental's work, and that there was no loss in the libelant's business, the market value of the Elm City per day, as the vessel that made good the loss of the use of the Continental, would be more exactly the measure of the libelant's actual and legal damage. *The Cayuga*, 7 Blatchf. 390; *The Rhode Island*, 2 Blatchf. 113, 115. The testimony on the libelant's part, as to the value of the Elm City, makes it \$250 per day; the additional \$25 spoken of by the witnesses having reference, as I understand, to the extra premium of insurance beyond New Haven, and therefore not affecting this case. The respondent contends, however, that only \$200 per day should in any event be allowed. This was the amount stated in the sworn claim presented to the comptroller, in accordance with the state statute, and verified by the libelant's superintendent. It was also the amount stated under oath by the libelant's treasurer, when personally examined before the comptroller in reference to the claim made; and only \$200 is claimed in the libel, where, under the verification of the treasurer, that sum is again stated to be "a reasonable charge for demurrage." In the proceedings before the commissioner, after the decision of the cause, notice was given that application would be made to amend the libel by increasing the claim for demurrage to \$300 per day. It is suggested that the amount of demurrage specified in the libel, and in the previous claims, was a *pro forma* statement only. I cannot see any reasonable ground for that contention. In the statements made to the comptroller the amount of the claim was the most material part of it. Amendments to the pleadings are, doubtless, to be allowed liberally, when errors have been made inadvertently, as sometimes necessarily happens when the pleadings have been drawn under imperfect knowledge of the facts, and when no special prejudice from

the amendment would arise to the opposite party. In the present case the value of the use of the Elm City in October, 1886, was better known to the libelant's officers than to any other person. They had perfect knowledge of all the facts before the claim was presented. The statements of it at \$200 per day, made, three times under oath, are the best evidence that this sum was fixed upon with deliberation; and there can be no doubt that, up to the decision of the cause, \$200 a day was regarded by the libelants as a fair compensation for their loss by the detention of the Continental. Such statements of the libelants are not only competent legal evidence, as against themselves, but of persuasive force. I do not think it would be desirable in practice, or conducive to the due administration of justice, to permit, under such circumstances, an amendment of the libel claiming increased damages first applied for after an apportionment of the damages had been ordered; nor does the subsequent testimony, without further explanation than has been given, seem to me likely to furnish so fair a determination of the libelant's actual damage as their original statement of it, three times deliberately made under oath. I must deny the amendment applied for, and allow only the original amount claimed for demurrage, with interest.

3. *Wages of Crew.* I think the proofs sufficiently show payment of \$270.33 for wages of the crew of the Continental while she was repairing. A part of the crew left, or were discharged. There is no clear evidence whether the rest who were paid were or were not the same seamen who ran on the Elm City when she took the Continental's place. If they were the same, then this charge cannot be allowed, since no extra wages were paid. It seems scarcely probable that after the Elm City ceased running, before this collision, and while she was kept as a "spare boat," unemployed, she should have had a crew kept idle and under pay. Naturally the Continental's crew, or so many of them as were necessary, would have been transferred to the Elm City. The wages of the Continental's men who could not be transferred, and who were actually and necessarily kept on the Continental, and under pay, during her repair, if there were any such, would be a proper item of damage. The libelant may take further evidence on this point, if desired, in case the facts are not agreed on; otherwise I cannot allow this item, through want of evidence of any such extra expense. The other exceptions are overruled.

## THE OSWEGO.

DEYO *et al.* v. THE OSWEGO *et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

## COLLISION—EVIDENCE—SUFFICIENCY.

A hole was stove in the side of libelants' canal-boat, when she was laid along-side of the bulkhead, East river. The libelants, without offering direct evidence, contended that the hole was caused by a blow from the Oswego while backing in, by a stroke from her fenders while both boats were lying along-side. Several other theories were within the possibilities. Three witnesses testified with great positiveness that the Oswego did not touch the canal-boat, nor even come near enough to her to admit of using the rope fender which one witness had in his hand. *Held*, that the finding of the district court would not be disturbed, and the libel should be dismissed.

In Admiralty. On appeal from district court.

Libel for collision, by Ezra S. Deyo and others against the floating elevator Oswego and others. Decree for claimant, and libelants appeal.

*J. F. Mosher*, for appellants.

*Wm. W. Goodrich*, for appellee.

LACOMBE, J. The libelants' canal-boat, Capt. Dan Bromley, was sound when she was laid along-side of the bulkhead between Thirty-Sixth and Thirty-Seventh streets, East river. Subsequently, and apparently on the morning of February 25, 1886, a hole was stove in her side, causing her to leak badly, and greatly damaging her cargo. The libelants contend that this was done by the Oswego, but offer no direct evidence in support of their claim. What made the hole, and how it was made, is left to be determined by a balancing of several possibilities. That it was caused by a blow from the Oswego while backing in, by a stroke from her fenders, while both boats were lying along-side, by the floating piece of wood, or the cakes of ice to whose presence some of the witnesses testify, by a sunken pile or a projecting timber before the Bromley was hauled off from the bulkhead, are all within the possibilities. Were it not for the evidence of Walgren, Lawless, and O'Brien, the first of these theories would seem to be the most plausible. They testify, however, with great positiveness that the Oswego did not touch the Bromley, nor even come near enough to her to admit of using the rope fender which O'Brien had in hand. The district judge, who saw and heard these witnesses, has credited their testimony, and there is nothing in the case which should induce this court, which has neither seen nor heard them, from rejecting their evidence. This testimony effectually negatives the theory set out in the libel that the hole was caused by the Oswego striking the canal-boat a violent blow on the starboard side. To undertake to decide from the evidence which, if any, of the other suggested accidents caused the damage is, mere guess-work. The claimants are entitled to a decree dismissing the libel, with costs of this court.

PRESTON v. FIRE-EXTINGUISHER MANUF'G CO. *et al.**(Circuit Court, N. D. Illinois. November 5, 1888.)*

## COURTS—FEDERAL COURTS—VENUE—ACTIONS AGAINST CORPORATIONS.

Under act Cong. March 3, 1887, as modified and explained by act August 13, 1888, requiring an action in the federal courts to be brought in the district of which defendant is a resident, a New York corporation, having its principal office in that state, and doing business in Illinois, cannot be sued in the federal courts in Illinois.

In Equity. On plea to the jurisdiction of the court.

Bill by E. B. Preston against the Fire-Extinguisher Manufacturing Company and others to enjoin the infringement of complainant's patent.

*Munday, Everts & Adcock*, for complainant.

*Banning & Banning & Payson*, for defendants.

BLODGETT, J. These cases are now before me upon a plea filed in each cause to the jurisdiction of the court. The plea sets up by way of challenge to the jurisdiction of the court the fact that this defendant, the Fire-Extinguisher Manufacturing Company, at the time of the filing of the bill of complaint, was a corporation duly organized and existing under and by virtue of the laws of the state of New York; that it has its principal office, and keeps its books of account, in that city; and that no stockholder, officer, or director resides in this district or state; that said company was not prior to nor at the date of the filing of the bill of complaint an inhabitant of the Northern district of Illinois, or of the state of Illinois. In the case of *Manufacturing Co. v. Manufacturing Co.*, 34 Fed. Rep. 818, before me in March last, I had occasion to examine this question, and there came to the conclusion that, under the act of March 3, 1887,—and the same holds good in regard to the act as explained and modified by the act of August 13, 1888,—a non-resident corporation cannot be sued in this district; that is, a corporation not a resident of this district cannot be sued here merely by service upon an agent or officer. The opinion in that case has been published, and counsel are familiar with it, so it is hardly necessary to quote from it. It is enough to say that the act of 1887 requires suit to be brought in the district whereof the defendant is an inhabitant, but drops the provision in prior statutes upon the subject, that he may also be sued in any district where he may be found at the time of the serving of the process. I have re-examined that question in the light of suggestions made by counsel for complainant, and still adhere to the conclusion there announced, that a corporation created and existing solely under the laws of another state, and having its principal office and place of business in another state and district, cannot be said to be an inhabitant of this district, and be sued here, even although such corporation may do business in this district through agents, except possibly in cases where the jurisdiction depends solely on citizenship. The agents can undoubtedly be sued here, if the case is such as to make them personally liable, or when an injunction is sought against

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them. The statute of the state of Illinois (section 26, c. 32, Rev. St. Ill.,) which provides that foreign corporations shall be subject to all the liabilities, restrictions, and duties that are or may be imposed upon domestic corporations, I do not think helps the complainant in this case, as it has nothing to do with the question of jurisdiction, or of the tribunal in which suit shall be brought. It simply makes foreign corporations subject to the same liabilities as home corporations. It does not reach the question as to what tribunal you are to go into. The bill charges defendant with the infringement of a patent owned by complainant, and it was stated on argument as to the sufficiency of this plea that defendant has a factory in this district, and manufactures the infringing machines here, and nowhere else, as a reason why defendant may be sued here. It is very plain that if an individual, an inhabitant of another state, owned and carried on this factory, conducting its business through his agents and employes, he could not be sued in this district under the present law; and I see no reason why the same rule is not applicable to corporations of other states. In other words, it seems to me a corporation can, by state comity, carry on business in a state outside of that by which it was created without becoming an inhabitant of such outside state. The plea in each case is held sufficient.

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**METROPOLITAN NAT. BANK v. ST. LOUIS DISPATCH CO. et al.**

(Circuit Court, E. D. Missouri, E. D. November 21, 1888.)

**1. CHATTEL MORTGAGE—GOOD-WILL—FORECLOSURE.**

A mortgage of the "machinery, type, presses, cases, furniture, paper, forms, and tools" of a newspaper company, together with the "good-will" of its business, cannot be foreclosed as to the good-will after all the tangible property covered by the mortgage has been alienated, worn out, or destroyed, and the corporation has become consolidated with another newspaper corporation.

**2. SAME—GOOD-WILL—SALE OF SAME.**

The good-will of a business is property that may be mortgaged or sold in connection with the business; but it cannot be sold, by judicial decree or otherwise, unless it be in connection with a sale of the business on which it depends, and of which it is a mere incident.

**3. SAME—LIEN—CONSOLIDATION.**

Where a newspaper, whose good-will has been mortgaged, is consolidated with another paper, and the name of the paper is changed, and a new corporation is formed to publish it, the lien, of the mortgage does not attach to the good-will of the consolidated paper, though the new corporation occupied for some years the old place of business, and paid interest for 10 months on the mortgage debt.

**4. SAME—ASSOCIATED PRESS—MEMBERSHIP.**

Inasmuch as it appeared that membership in the Western Associated Press can only be sold to publishers of newspapers, and that a transfer of such membership would not entitle the transferee to the privileges of a member unless voluntarily accorded him by the association, *held*, that a bill would not be entertained to foreclose a mortgage on a certificate of membership or share of stock in such association unless the association was made a party defendant.

**In Equity. On demurrer.**

Bill by the Metropolitan National Bank of New York, against the St. Louis Dispatch Company, the Dispatch Publishing Company, and Henry L. Sutton, trustee, to foreclose a mortgage.

*John M. Dickson*, for complainant.

*Dyer, Lee & Ellis and Chas. & C. E. Gibson*, for defendants.

THAYER, J. This is a suit to foreclose a mortgage. The facts stated in the bill may be summarized as follows: On June 1, 1877, the St. Louis Dispatch Company was engaged in publishing a daily newspaper called the "St. Louis Dispatch," and on that day, being in need of money, it conveyed its "machinery, type, presses, cases, furniture, paper, forms, and tools, together with the good-will of the St. Louis Dispatch Company, and its franchises of every kind and description, rights, privileges, and property, including its interest in the Western Associated Press, and any and all shares by it owned in the Western Associated Press," to Henry L. Sutton, as trustee, to secure the payment of its note for \$15,000, that day executed in favor of F. J. Bowman, and made payable two and one-half years after date, with interest at 9 per cent. per annum. At the same time it assigned and delivered to Sutton the certificate for one share of stock which it owned in the Western Associated Press. Subsequently the same property, together with much other property, was conveyed to a trustee in another and second mortgage or deed of trust, to secure a further loan made to the St. Louis Dispatch Company. Under this second mortgage a foreclosure sale took place about a year prior to the maturity of the first mortgage. The sale so made was made subject to the lien of the first mortgage. The purchaser under the second mortgage took possession of all of the property covered by the first and second mortgages then *in esse*, and immediately consolidated the St. Louis Dispatch with another evening paper, called the "Evening Post." A new corporation was formed under the name of the "Dispatch Publishing Company," to continue the publication of the consolidated paper, which was thereafter called "The Post-Dispatch." For some years after the consolidation, the Post-Dispatch was published in the same building formerly occupied by the St. Louis Dispatch Company. The new corporation also enjoyed for some time all the privileges which accrued from the old company's membership in the Western Associated Press, but eventually the Associated Press issued to it a certificate of membership, in lieu of that issued to the old company, although the old certificate was, and still is, in the hands of the trustee in the first mortgage, to whom it was pledged. The new corporation (the Dispatch Publishing Company) also paid the interest that accrued on the Bowman note for some ten months after the consolidation of the two newspapers. It refused to pay the note, however, when the same matured on December 1, 1879. Thereupon the trustee in the first mortgage demanded of the Dispatch Publishing Company all the property covered by the first mortgage, including the good-will of the St. Louis Dispatch Company, but the demand was not complied with. The bill avers that at the date of such demand, to-wit, on December 1, 1879, the Dispatch Publishing Company "had alienated,

destroyed, or gradually used up, all the machinery, type, presses, and property of a perishable nature, of the said St. Louis Dispatch Company." There are many other allegations in the bill, which is very prolix, but the foregoing are the principal averments by which the sufficiency of the pleading must be tested. The relief prayed for is that the court will order a sale of the good-will of the business described in the mortgage of June 1, 1877, and the other property therein described, or the property that has since been substituted therefor, including the membership in the Associated Press. Complainant is now the owner of the Bowman note.

1. The first fact to be noted is that, when the first mortgage matured, all the tangible property covered by that mortgage had been alienated, worn out, or destroyed, and was no longer in the possession of the purchaser under the second mortgage. Whatever tangible property (machinery, type, presses, etc.) was then in the hands of the Dispatch Publishing Company, had been acquired by it subsequent to the purchase under the second mortgage, and the property so acquired was clearly not embraced by the terms of the first mortgage. The bill shows that at the present time there is no property in the hands of the defendants on which a decree foreclosing the first mortgage can operate, unless it is the good-will of the St. Louis Dispatch Company, and the membership in the Associated Press. Now, while the good-will of a business is property that may be sold or mortgaged, yet it is property of a very peculiar and exceptional character. It is intangible property which, in the nature of things, can have no existence apart from a business of some sort that has been established and carried on at a particular place; and it cannot be sold by judicial decree or otherwise unless it be in connection with a sale of the business on which it depends. Story, Partn. § 99; *Robertson v. Quiddington*, 28 Beav. 529; 3 Pom. Eq. Jur. § 1355, and notes; Smith, Merc. Law, 188, and cases cited. As the bill does not show that there is any established business (or any tangible property for that matter) which the court can order to be sold for the satisfaction of complainant's mortgage, it seems clear that it cannot decree a sale of the good-will in question.

2. It is claimed by complainant's counsel that the lien of the mortgage of June 1, 1877, extends to the entire business and property of the Dispatch Publishing Company, including its good-will, and that the court should so decree, and enter an order of sale accordingly. This contention is based on the ground that the Dispatch Publishing Company acquired the place of business of the St. Louis Dispatch Company, and certain property, with the good-will attached thereto, subject to the lien of the first mortgage, and that it subsequently paid interest for 10 months on the note secured by the first mortgage, and eventually consolidated the property and good-will so acquired with the good-will and property of another newspaper. I regard this position as untenable. The acts referred to, neither singly nor collectively, operated to extend the mortgage lien over property not originally covered by the mortgage. If any of the acts above recited amounted to an assumption of the mortgage debt by the purchaser under the second mortgage, (as to which no opinion is ex-

pressed,) the remedy is at law on such promise, and not by bill to foreclose the mortgage. So far as the tangible property covered by the first mortgage is concerned, (that is to say, machinery, type, presses, etc.,) the bill does not show that it was wrongfully commingled with other after-acquired property, either by the mortgagor or purchaser under the second mortgage, so as to become undistinguishable. The allegation is that it was alienated, or gradually worn out by use, before the first mortgage matured. There is no occasion, therefore, to invoke the rule that governs in case of a wrongful admixture of property. The bill does show that the St. Louis Dispatch was consolidated with the Evening Post seven and one-half years before this bill was filed, and that the good-will of the former paper was either destroyed or was converted to the use of the new company. But it by no means follows that the effect of such act was to make the first mortgage a lien on all the property thereafter acquired and now owned by the new concern, the Dispatch Publishing Company. If the consolidation was wrongful in so far as it affected the good-will of the St. Louis Dispatch Company, (as to which no opinion is expressed,) it could only have the effect of rendering the wrong-doer liable for the value of the good-will at the time of its destruction or conversion. Assuming that the purchaser under the second mortgage wrongfully appropriated or destroyed the good-will of the St. Louis Dispatch Company, and that a remedy once existed for such wrong, the question would then arise, whether the remedy for the wrong is at law or in equity. It is not necessary to express an opinion on the latter question, for, if a bill to obtain a decree against the Dispatch Publishing Company for the value of the good-will in question could at one time have been maintained, based on the ground that it had wrongfully appropriated or destroyed the good-will, it seems clear that the right to maintain such bill is now barred by laches, inasmuch as more than seven years had elapsed after the wrong was committed before the bill was filed. An action at law to recover the value of personal property wrongfully converted or destroyed must be brought within five years, under the limitation act in this state; and, by analogy with the rule which prevails at law, a proceeding in equity, based on similar grounds, should be held barred by the same period, even if it is possible to maintain such a proceeding in equity.

3. Sufficient reasons also exist in my opinion for refusing to order a sale of the share of stock or membership in the Western Associated Press, which was hypothecated to secure the Bowman note. It is evident that the stock in question is not property of an ordinary character, such as may be transferred at will by the owner. The bill shows that it is only vendible to persons or corporations who are engaged in publishing a newspaper or other periodical, and that no other persons or corporations are eligible to membership in the association. It furthermore appears that the stock issued by the association is of the nature of a certificate of membership therein, and that it merely entitles the holder, if he happens to be the proprietor of a newspaper, to receive intelligence which the association is engaged in collecting for the benefit of its members. It is very



doubtful whether stock of that description can be pledged or mortgaged by the holder as security for a debt, without the consent of the corporation by whom it is issued. From the statements contained in the bill with respect to the character and functions of the organization known as the "Western Associated Press," it appears to me clear that a purchaser at a foreclosure sale of the share or stock or membership now in question, even if the court should order such a sale, would not acquire the privileges of membership in the association, unless it should see fit to accord him such privileges. Consent on the part of the corporation to the admission of a member appears to be essential to constitute a person a member. But whether the St. Louis Dispatch Company could or could not of its own motion pledge its membership to secure the payment of a debt, it is obvious that the Associated Press is interested in the determination of that question, especially in view of the fact that it has long since admitted another corporation to membership in place of the St. Louis Dispatch Company, and the question ought not to be determined in a proceeding like the present, to which the association is not a party. Neither would it be proper to order a sale of the interest of the pledgeor in the certificate of stock in question, unless it appears that some valuable property right or privilege would pass by such sale, which the association would be bound to recognize. From any point of view that may be taken, no relief, in my opinion, can be granted consistently with the averments of the amended bill, and the demurrer thereto is accordingly sustained.

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POWELL v. OREGONIAN RY. Co.

(Circuit Court, D. Oregon. December 3, 1898.)

CORPORATIONS—STOCKHOLDERS—LIABILITIES—LANDLORD AND TENANT—WASTE.

A corporation, being the lessee of property, permitted waste thereon, for which the lessor, in an action for damages, recovered a judgment for \$5 300, and, the corporation being insolvent, brought suit against a stockholder thereof, on whose stock more than that amount was then unpaid, to enforce the payment of the judgment. *Held* that, whether the original claim of the plaintiff for damages was or was not an "indebtedness" of the corporation within the scope of section 3, art. 11, of the constitution of the state, which declares that a stockholder of a corporation "shall be liable for the indebtedness" of the same to the amount unpaid on his stock, the judgment obtained thereon is such an "indebtedness;" and any stockholder of the corporation is liable therefor to the plaintiff therein to the amount unpaid on his stock.

(Syllabus by the Court.)

In Equity. On demurrer to bill.

Suit to enforce the debt of a corporation against a stockholder.

A. L. Frazer, for plaintiff.

Earl C. Bronaugh, for defendant.

DEADY, J. This suit is brought by the plaintiff, a citizen of Oregon, against the defendant, a British corporation having its principal office in

Dundee, Scotland, to enforce the payment of a judgment heretofore obtained by him against the Dayton, Sheridan & Grand Round Railway Company, to-wit, on April 8, 1887, for the sum of \$5,300.

It is alleged in the bill that the Dayton, Sheridan & Grand Round Railway Company is a corporation formed under the laws of Oregon, with a capital stock of 2,000 shares, of the par value of \$100 each; that Joseph Gaston, under the name of J. Gaston & Co., subscribed 1,000 shares of such stock, while all the other subscriptions to the same only amounted to 50½ shares, which were paid in full; that in 1880 Gaston sold and transferred his stock, without having paid anything thereon, to Ellis G. Hughes, who on February 27, 1884, sold and transferred the same to the defendant, who now is, and ever since has been, the owner of the same; that no part of Gaston's subscription was ever paid by any one, except the sum of \$61,000, paid by the defendant, in pursuance of a decree given against it by the supreme court of the state, on January 14, 1884, in the suit of *Branson v. Railway Co.*, [2 Pac. Rep. 86,] and that there is still due and unpaid on the same the sum of \$39,000.

That on January 29, 1887, the plaintiff commenced an action in the circuit court of the state for the county of Yamhill, against the Dayton, Sheridan & Grand Round Railway Company, to recover damages for an injury to plaintiff's property, while leased to said company, and obtained a judgment therein for the sum of \$5,300, and at the same time served a notice on the defendant herein, as the successor in interest of the Dayton, Sheridan & Grand Round Railway Company, to defend the said action, and that the plaintiff would look to the defendant for the payment of any judgment he might recover therein; that the defendant, by its attorneys, did make a defense to said action, and on September 12, 1887, caused an appeal to be taken from the judgment therein to the supreme court, where the same was affirmed, with costs, amounting to \$77.20, [16 Pac. Rep. 863;] that since July 1, 1883, the Dayton, Sheridan & Grand Round Railway Company has been and now is wholly insolvent, and has no property within the state subject to execution; and that the defendant, being the owner, as aforesaid, of the stock of said company, on which the sum of \$39,000 is due and unpaid, is liable to the plaintiff, as a creditor of the company, for the amount of said judgment against the same.

The prayer of the bill is that the defendant be compelled to pay into court on the unpaid stock of the Dayton, Sheridan & Grand Round Railway Company a sum sufficient to satisfy its indebtedness to the plaintiff, or that the latter have a decree against the defendant for the amount of the judgment against the company, with interest.

The defendant demurs to the bill, for that the plaintiff, on the case stated in the bill, is not entitled to any relief against it.

On the argument the only point made in support of the demurrer was that the claim of the plaintiff, having arisen out of a tort, is not such an "indebtedness" as a stockholder is liable for.

The constitution of Oregon (article 11, § 2) provides that "corporations may be formed under general laws;" and (Id. § 3) enacts:

"The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

Section 14 of the corporation act (Comp. 1887, § 3230) provides:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but, if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

At common law, the members or stockholders of a corporation are not individually liable for the debts of the same, (Thomp. Liab. Stockh. §§ 1, 4;) but the capital stock of a corporation is considered a trust fund for the payment of its debts (Id. § 10;) and an unpaid subscription to the stock of a corporation is a part of such capital stock (Id. § 11.)

From this it appears that the rule prescribed in the constitution of the state, concerning the liability of stockholders, is neither more nor less than that of the common law. Under either the stockholder is liable for the indebtedness of the corporation to the extent of his unpaid subscription or stock, "and no more."

Several cases have been cited on the argument of counsel for the respective parties, but none of them are altogether in point.

In *Foundery v. Hovey*, 21 Pick. 417, the statute made the stockholder liable for the existing debts of the corporation, if the latter failed to publish annually the amount paid in of its capital stock and existing debts; and the question in the case was whether a claim for unliquidated damages, arising out of a breach of a contract to manufacture certain articles, was a "debt" within the statute. And although the statute was in effect a penal one, the court held that "all such claims for damages were intended to be included in the term 'debts.'" Id. 454, 455.

In *Carver v. Manufacturing Co.*, 2 Story, 432, a statute that made a member of any manufacturing corporation individually liable for all "debts contracted" during his membership was held to be remedial in its character, and the phrase "debt contracted," as used therein, to include a claim for unliquidated damages growing out of a tort,—the infringement of a patent.

But in both these cases the question only arose incidentally on the exclusion on account of interest of a witness, and in the former one it appears to have been decided without any consideration.

In *Haynes v. Brown*, 36 N. H. 545, under a statute which made the stockholders in a corporation liable for "all debts and contracts" thereof while it omitted to file for record a certificate of the amount of its capital stock, "it was held that the right to recover against the stockholder was not limited to liquidated claims, but included an open account for work and labor.

In *Insurance Co. v. Meeker*, 37 N. J. Law, 282, it was held that under a statute giving an action in favor of a "creditor" against the heirs and

devises of a "debtor," the former might maintain an action against the heir for unliquidated damages arising out of a breach of covenant.

A statute of Missouri provides that every corporation shall give notice annually in a newspaper "of all the existing debts of the corporation," and a failure to do so makes each stockholder liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given.

In *Cable v. McCune*, 26 Mo. 371, it was held, in a suit brought under the statute, against a stockholder, to enforce the payment of a judgment obtained against the corporation for damages caused by its negligence in docking a steam-boat, that the stockholder was not liable. The ground of the decision is that the statute is penal, and therefore the word "debt" ought to be taken in "that limited and definite sense to which long-established usage has restricted it;" and that the use of the word "contracted," with reference to the "debt" which a stockholder may become liable to pay, indicates clearly that it was the intention of the legislature to limit such liability to debts arising out of contract and not a wrong.

A statute of New York made each stockholder of the Buffalo Hydraulic Association holden to the amount of his stock, "for the payment of debts contracted by the corporation;" and any person having any demand against said corporation "might sue any stockholder, and recover the same, provided no stockholder should be obliged to pay more in the whole than the amount of his stock at the time the debt accrued.

In *Heacock v. Sherman*, 14 Wend. 58, it was held, in an action against a stockholder of this corporation, that the term "debt," as used in this act, was limited to claims arising out of contract, and did not include one for damages, arising out of the wrong of the corporation. It was admitted that the word "demand," standing by itself, was comprehensive enough to include the claim. But it was said that the liability of the stockholder was first fixed and limited to the "debts" of the corporation, and the word "demand" was not used for the purpose of enlarging this liability, but in a clause only intended to further the remedy; and that the subsequent phrase, "the debt accrued," used in limiting the amount of the stockholder's liability, clearly qualifies the enlarged sense of the word "demand," and shows that it was used by the legislature "to denote a demand arising on contract."

A statute of Michigan provides that every stockholder of a corporation shall be individually liable for all labor performed for the corporation, and for all debts of the same, to an amount equal to his stock when "such debt was contracted and suit commenced thereon."

In *Bohn v. Brown*, 27 Mich. 503, it was held, in a suit brought under this act against a stockholder in a railway corporation to enforce the payment of a judgment obtained against said corporation for damages caused by its negligence in carrying a passenger, that the stockholder was not liable, for the reason that such damages are not a "debt" within the meaning of the statute, and that the putting the claim for them into a judgment against the corporation did not change their character in this respect.

The statute (Comp. 1887, § 3230) does not undertake to declare or define what debts or claims a stockholder in an Oregon corporation shall be liable for; nor does it appear that the legislature, under the constitution, has the power to do so.

It is admitted by the demurrer that the defendant has been a stockholder in the corporation against whom the judgment in question was given since February 27, 1884. Its liability as such stockholder must then depend on the proper construction of the term "indebtedness," as used in the section of the constitution above quoted.

The provision in the constitution on the liability of stockholders is neither remedial nor penal. It gives no new right to the creditor, nor does it impose any extraordinary liability or penalty on the stockholder. It is therefore not to be construed liberally or loosely with a view of making the remedy adequate to the redress of some pre-existing hardship or wrong, nor strictly because of its penal character.

According to Worcester, "indebtedness" means "the state of being indebted." The indebtedness of a corporation is, then, the sum of its debts. And so it will be convenient to consider the constitutional provision as if it read, "shall be liable for the debts of said corporation."

"The legal acceptance of debt is a sum of money due by certain and express agreement; as by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specified, and does not depend on any subsequent valuation to settle it." 3 Bl. Comm. 154. And where the agreement to pay is implied by law, the sum to be paid is also a debt. Blackstone (bk. 3, p. 158) says: "Every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. \* \* \* Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." This includes a judgment for a particular sum of money.

In *Gray v. Bennett*, 3 Metc. 526, it is said that "the word 'debt' is of large import, including not only debts of record, or judgments and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise."

In *Crouch v. Gridley*, 6 Hill, 250, it was held that a discharge in bankruptcy from all the "debts" owed by the bankrupt at the filing of his petition, did not discharge him from a claim for damages for a tort which was in suit at the filing of the petition, but had not then ripened into judgment.

In *Kellogg v. Schuyler*, 2 Denio, 73, it was held that a claim for damages for a trespass was not a "debt" within the bankrupt act, and therefore was not affected by the bankrupt's discharge, although the claim was in suit at the time, and a verdict had been found for the plaintiff. In disposing of the case, the court, in speaking of the claim, said: "Until judgment is rendered there is no debt which is reached by the discharge."

In *Zimmer v. Schleehauf*, 115 Mass. 52, it was held that a claim for

damages for slander and malicious prosecution was not a "debt" or "liability contracted" by the bankrupt, and was therefore not affected by a discharge of the bankrupt under the act of 1867. The claim for damages was in suit when the proceeding in bankruptcy was commenced, and there had been a verdict for the plaintiff on which a judgment was given thereafter, but before the discharge. In delivering the opinion of the court Chief Justice GRAY said: "A claim for damages in an action of tort does not become a debt by verdict before judgment." See, also, as to what is a debt, Burrill's Law Dict.; Rap. & L. Law Dict.; Whart. Leg. Max.

The nature of the plaintiff's property and the damage to it, for which the judgment was obtained, is not stated in the bill; but it was understood on the argument that the property was a warehouse at Dayton, on the Yamhill river, which the lessee negligently permitted to be washed away during a season of high water. In other words, the claim was unliquidated damages, alleged to have been caused by a permissive waste.

Such a claim is not a "debt" in any ordinary sense of the word. Nor do I see any good reason why the term "indebtedness," as used in the constitution, with reference to corporations, should be construed to include such a claim. But it is not necessary now to decide that question, and it may be left to the determination of the supreme court of the state, whose office it is to expound the constitution thereof.

When this claim for unliquidated damages became, by the action of the parties under the direction and the limitation of the law, a judgment against the corporation for a definite sum of money, it became, in my opinion, an "indebtedness" of such corporation; and any person then or since, being a stockholder thereof, at once became liable to the plaintiff for such debt to the amount unpaid on his stock.

A claim for unliquidated damages may become a "debt" against a corporation otherwise than by judgment. For instance, the corporation may have compromised with the plaintiff, and given him its note for a portion of this claim in satisfaction thereof, or, being satisfied of the justice of the claim, or the impolicy of contesting it, may have given its note for a full amount thereof. In this way the claim would become a "debt" of the corporation, within the strictest definition of the term, and the liability of the stockholder would commence.

The effect of allowing the plaintiff to take a judgment on this claim, or of his obtaining one notwithstanding a defense thereto by the corporation, is the same, in this respect, as a voluntary liquidation thereof. What was once a mere claim for an undetermined amount, becomes in either case a "debt,"—a legal obligation to pay a definite sum of money.

Assuming that there is neither fraud nor collusion in the premises, whatever indebtedness a corporation may lawfully contract or incur, the stockholder, to the amount of his stock, is bound to pay. Such is the obligation which the law, under these circumstances, raises in favor of the creditor of the corporation and against a stockholder thereof.

On the facts stated in the bill the plaintiff is entitled to the relief sought. The demurrer is overruled.

In arriving at this conclusion no consideration has been given to the allegations in the bill, concerning the notice to the defendant of the action against the Dayton, Sheridan & Grand Round Railway Company, and the defense made to the same by its attorneys.

BOTTOMLY v. SPENCER *et al.*

(Circuit Court, S. D. Illinois. November 28, 1888.)

1. DOWER—RELEASE—ACKNOWLEDGMENT.

A sealed agreement entered into between a husband and wife in 1868, whereby the latter, for a valuable consideration, agreed to release all claim which she then had or might thereafter have in her husband's property, but which was not acknowledged before a proper officer, as required by statute in Illinois, is not effectual as a release of dower in lands in that state, as the law then stood.

2. SAME—EQUITABLE JOINTURE.

Neither will such agreement bar dower by "equitable jointure," as such jointure must be made before marriage.

3. SAME—VOID RELEASE—RETURN OF CONSIDERATION.

The husband having deserted his wife and children, without showing sufficient cause therefor, 35 years before his death, the wife will not be compelled to return the consideration (less than \$500) received by her for her agreement, before dower is assigned.

In Equity. Bill for dower.

Bill filed by Judith Bottomly against Sarah Raymond Spencer and others.

*W. J. Fairman* and *Sanders & Bowers*, for complainant.

*Rinaker & Rinaker*, for defendants.

ALLEN, J. On the 27th day of November, 1884, the complainant filed her bill in this court for dower, alleging her residence to be at Bradford, in the county of York, England; and that on the 25th day of November, 1832, at that place, she was lawfully married to Miles Bottomly, who lived with her as husband until the year 1845, when he left England for the United States, and settled in Macoupin county, Ill., where he continued to reside until his death, which occurred the 5th day of August, 1880; that the said Miles Bottomly, after reaching and settling in Macoupin county, Ill., assumed, and afterwards up to his death was known by the name of William Spencer; that he was at the time of his death seized of valuable real estate in this district, (describing it,) and that he died testate. The personal representatives and legatees under the will are made parties defendant, and the bill prays for the assignment of dower in the described real estate to complainant, and for other relief. The separate answer of Sarah Raymond Spencer is filed, in which the respondent denies all the material allegations in the bill, and insists that she was lawfully married to William Spencer in Macoupin county, Ill., on the 6th day of February, 1855, and lived with him as his lawful

wife from that date to his death, and that as the fruits of this marriage there had been born to her and the said William Spencer seven children, to-wit, Mary Ann, William Henry, Joseph Franklin, Thomas H., John Wesley, Samuel I., and Daisy M. Spencer, all of whom are legatees in the will, and assisted respondent and their deceased father in accumulating the estate of which he died seized. Mary Ann Spencer also answers the bill in denial simply of the truth of its substantial allegations. A great deal of testimony was taken in England and this country, but it presents no conflict with reference to any material fact in the case, establishing beyond any question that the complainant and Miles Bottomly were married in the county of York, England, in 1832; that they lived together as husband and wife till about the year 1845, there having been born to them seven children; that some time in the last-mentioned year Miles Bottomly, without any known cause, abandoned the complainant, his wife, and their seven children, and came to the United States, locating in Macoupin county, Ill., where, assuming the name of William Spencer, he in 1855 married Sarah Raymond, the executrix, and lived with her, and held her out to the world as his wife, up to the time of his death, which took place in 1880. As a result of the second marriage seven children were born in this country, each being named among the legatees under Spencer's will. Under the proof no blame attaches to the defendant Sarah Raymond Spencer, mother of the second set of children. She evidently supposed Miles Bottomly, whom she knew only by the name of William Spencer, capable of contracting the marriage relation, and ever afterwards, till her supposed husband's death, demeaned herself in a wifely manner.

The case presents, then, but questions of law. Miles Bottomly, at the time of the performance of the marriage ceremony, intended to make Sarah Raymond his wife, was the lawful husband of the complainant, and therefore incapable of becoming the husband of another woman. In neither of the answers to the bill is there any contention that the former marriage had been dissolved, or that complainant had released her dower, or was in any manner barred from insisting upon its assignment. In the testimony, however, is to be found a writing, which bears the signature of the complainant and William Spencer, and is as follows:

"Whereas, there is matter of dispute between Judith Bottomly and William Spencer concerning the arrangement and settlement of certain claims and demands heretofore made and now insisted upon by said Judy against the property and estate of said William Spencer, and whereas it is the desire of said Judy and the said William Spencer now to make a final and full settlement of said dispute, and to have all of said demands and claims finally and fully settled, paid off, and discharged, and to have the property and estate of said William Spencer to be from this day hence forth and forever freed, discharged, and released of and from any and all claim, right, title, or interest of the said Judy, her heirs, executors and administrators, of, in, and to or against the property or estate of every name, nature, and description of the said William Spencer; now, therefore, this agreement this day made and entered into by and between the said Judy Bottomly, of Bradford, in Yorkshire, England, party of the first part, and the said William Spencer, of the state of Illinois, party of the second part, witnesseth, that the said party of the first part, for



and in consideration of the sum of one hundred English gold sovereigns, the receipt whereof is hereby acknowledged, doth hereby release and discharge the said William Spencer of and from all claims or demands of every name nature or description which I now have, or have any right, or title, or ground, or supposed right, title, or ground to make, or which I might hereafter make upon the said William Spencer; and I further hereby agree to and do hereby release all of the property, real, personal, or mixed, which the said William Spencer now has or may hereafter acquire, of and from any, all, and every claim, demand, interest, or title which I now have or claim to have, or which I do or might assert against his said estate, and hereby forever release all of the said property of said William Spencer of and from all claim for myself, my heirs, executors and administrators; and the said William Spencer, for and in consideration of said agreements and release hereinabove made by said Judy Bottomly, do hereby give and pay to said Judy the said sum of one hundred English gold sovereigns, and do hereby agree to, and do by these presents for myself, my heirs, executors and administrators, release all claim, right, or title, or interest which I now have of, in, or to any of the property which now belongs to or is possessed by the said Judy Bottomly. In witness whereof the said parties of the first and second parts have hereunto set their hands and seals this 9th day of June, A. D. 1868.

"Witness: C. JOHNSON, 'X'

"H. M. PETTINGILL.

"Witness: W. G. SCARRITT."

JUDY BOTTOMLY. [Seal.]

WILLIAM SPENCER. [Seal.]

While this paper is dated June 9, 1868, the proof is clear that the name of William Spencer was signed to it about two days before his death, in 1880. In the brief submitted by counsel for defendants it is contended that complainant is estopped by the above contract or instrument from claiming dower in the real estate of her deceased husband; that, while she had not released her dower in any of the methods or according to the forms prescribed by the statute, yet that such a condition of things exist in this case as to warrant a court of equity to refuse complainant the relief sought, and decree that she be barred of dower by what is known as "equitable jointure;" and cite *McGee v. McGee*, 91 Ill. 548, in support of this view. The authorities referred to do not sustain the position. While a jointure in equity does not require all the particularities of a jointure at law, still it is fundamental that it be made before marriage. *Bac. Abr. Dower and Jointure*, "G.;" 2 *Bouv. Inst.* 253. The instrument quoted, made by complainant June 9, 1868, is ineffectual as a release of dower, even admitting that it was intended as such, and that William Spencer so accepted it and appended his signature thereto on the day it bears date. The supreme court of Illinois, in *Bute v. Kneale*, 109 Ill. 653, upon this point say:

"It is clear that until 1869 a married woman could not dispose of or bar her right to any interest she might have in land, including the right of dower, whether inchoate or otherwise, by merely joining with her husband in a deed, unless the deed was duly acknowledged by her before a proper officer, as shown by the officer's certificate, in the form required by the statute."

The claim is made by defendant's counsel that complainant should at least be compelled to return the 100 English gold sovereigns, with interest, before receiving dower. This view cannot be admitted. Miles Bottomly, afterwards William Spencer, has shown no sufficient cause for

deserting the complainant, his wife, and their seven young children, in England, 35 years before his death, leaving this wife to struggle for their support, and the money—less than \$500—mentioned in the contract before referred to was probably a scant contribution to those to whom he was under every obligation to care for and protect. If this was even a hard case, so far as defendants are concerned, it would furnish no sufficient reason for refusing complainant her legal rights under the well settled doctrine so repeatedly announced by the courts in this country. Under the bill, answers, and proofs a decree for dower as prayed for will pass, and commissioners be appointed to assign the same.

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**JESSUP *et al.* v. ILLINOIS CENT. R. Co. *et al.***

(*Circuit Court, N. D. Illinois.* November 26, 1888.)

**1. RAILROAD COMPANIES—LEASES—ACTION TO ENFORCE—PARTIES.**

A bill to enforce an alleged lease averred that the C. Co. leased its road to the D. Co. for 40 years; that the latter then leased its road for 20 years to defendant, which agreed to assume the lease of the C. Co.; that the 20-year lease has expired, and defendant refuses to pay the rent reserved on the lease of the C. Co. *Held* that, the object of the bill being to compel defendant to occupy the C. road for the balance of the 40 years, the D. Co. was a necessary party.

**2. SAME—CONSOLIDATION OF COMPANY.**

An averment in the bill that defendant has obtained control of the stock of the D. Co. does not show that the two companies have become merged into one, but simply that defendant has obtained a majority of the stock of the D. Co.

**3. COURTS—FEDERAL COURTS—JURISDICTION—SERVICE OF PROCESS.**

Under act Cong. March 3, 1887, as amended and modified by act August 13, 1888, requiring an action in the federal courts to be brought in the district of which defendant is a resident, the federal courts of Illinois cannot obtain jurisdiction of an Iowa corporation by service of process.

**4. PRACTICE IN CIVIL CASES—MOTION TO DISMISS—PARTIES—FAILURE TO SERVE.**

A co-defendant may move to dismiss, where complainants have not brought before the court a necessary party, named as a defendant in the bill.

**In Equity.** On motion to dismiss bill.

*T. Dewitt Cuyler* and *Lyman & Jackson*, for complainants.

*Francis O. Lyman*, for defendant Cedar Falls & Minnesota Railroad Company.

*John N. Jewett*, for defendant Illinois Central Railroad Company.

**BLODGETT, J.** This case is now before the court on a motion by the defendant the Illinois Central Railroad Company to dismiss on the ground that the Dubuque & Sioux City Railroad Company, an Iowa corporation, is made a party defendant in the case, but has not been served with process, and has not appeared; the moving party insisting that the Dubuque & Sioux City Railroad Company is, upon the issue made by the bill, so far interested in the subject-matter of the controversy as to make it an indispensable party to the suit, and without which the suit

ought not to proceed as against the other defendants. The bill upon its face makes the Dubuque & Sioux City Railroad Company, which is stated to be an Iowa corporation, created and organized under the laws of the state of Iowa, and having its principal office therein, and a citizen of Iowa, party defendant, and prays process and decree against it, but that company has not been served with process and has not appeared. The rule is elementary that, whenever the want of proper parties appears upon the face of the bill, it constitutes a good cause of demurrer. Story, Eq. Pl. § 541; 1 Daniel, Ch. Pr. 558. Here one defendant seeks to have the bill dismissed on motion, because the complainants have not brought before the court one of the defendants named in the bill; and this absent defendant, as the defendant making the motion insists, is a necessary party to the controversy. This principle seems to be fully sanctioned by the case of *Picquet v. Swan*, reported in 5 Mason, 561, the opinion being by Justice STORY. That was a case brought by Picquet against Swan and others in the circuit court of the district of Massachusetts. Swan was made a defendant, but was at that time residing in a foreign country, and did not appear after the lapse of one full term, and perhaps part of another; and, after some efforts had been made by the service of a copy of the bill upon him to get him before the court, the other defendants moved to dismiss because Swan was a necessary party to the proceeding, and had not been brought before the court. In disposing of the motion Judge STORY said:

"Upon the actual structure of the bill it is very clear that Swan is a necessary party, and that no relief can be had against the other defendants until the debt is established against him. The whole frame of the bill points to this conclusion; and the process and proceedings to compel Swan to come in all show that he is deemed an indispensable party, or, in the sense of a court of chancery, an active and not merely a passive party. \* \* \* The general principle is perfectly well settled that the defendant may have the bill of the plaintiff dismissed for non-prosecution, if the plaintiff does not proceed within a reasonable time. \* \* \* The present is a case where co-defendants, having answered, insist upon the right to dismiss the bill on account of the non-prosecution of the same against Swan. It would be an intolerable grievance, if co-defendants could not insist upon such a right; for it might otherwise happen that the cause could not be brought to a hearing against them alone, and thus they might be held in court for an indefinite period, perhaps during their whole lives, and very valuable property in their hands be incapable of any safe alienation. No court of justice, and least of all a court of equity, could be presumed to suffer its practice to become the instrument of such gross mischief. We accordingly find it very clearly established that a co-defendant possesses such a right."

The bill in this case alleges that, in the month of September, 1866, the Cedar Falls & Minnesota Railroad Company, a corporation of the state of Iowa, authorized to construct and operate a railroad from Cedar Falls in said state, along the Cedar valley to the south line of the the state of Minnesota, made a lease for the term of 40 years of its entire railroad and railroad property to the Dubuque & Sioux City Railroad Company, at a fixed rental of \$1,500 per year for each mile of road operated, with provisions for an increase of such rental in case the earnings per year

should exceed a certain sum; that in the month of September, 1867, said Dubuque & Sioux City Railroad Company leased its railroad and its equipment, and property pertaining to its road, to the Illinois Central Railroad Company for the term of 20 years from the 1st day of October, 1867, with the option to make such lease perpetual at any time during the said term of 20 years, and in said lease was the following clause in regard to the lease of September, 1866, of the Cedar Falls & Minnesota Railroad to the Dubuque & Sioux City Railroad Company: "It is further agreed that the party of the second part (the Illinois Central Railroad Company) shall assume the lease made by the party of the first part with the Cedar Falls & Minnesota Railroad Company." It is further alleged in the bill that the lease made in September, 1866, of the Cedar Falls & Minnesota Railroad to the Dubuque & Sioux City Railroad Company, was made in pursuance of a plan on the part of the Illinois Central Railroad Company by which the Dubuque & Sioux City Railroad Company was first to obtain control of the Cedar Falls & Minnesota Railroad, and then the Illinois Central Railroad Company was to take the lease of the Dubuque & Sioux City Railroad, so as to give the Illinois Central Railroad Company control of both these Iowa railroads, and that in furtherance of this plan the Cedar Falls & Minnesota Railroad Company made a mortgage of its railroad then constructed and thereafter to be constructed, and the franchises and property pertaining thereto, to the complainants in this suit as trustees, to secure the issue of bonds to the amount of \$1,407,000, to be negotiated by the Cedar Falls & Minnesota Railroad Company, and the proceeds used in the completion of its road; and by said mortgage the rentals secured by said lease of the Cedar Falls & Minnesota Railroad were pledged for the payment of the principal and interest of this issue of bonds. That said bonds were issued and sold upon the market on the faith of such pledge of the rentals of said road, with the knowledge and consent of the Illinois Central Railroad Company, and the proceeds of such bonds applied to the construction of said railroad; and that each of said bonds had at the time it was sold an indorsement upon the back thereof, made with the knowledge and approval of the Illinois Central Railroad Company, stating, in substance, that the lease of the Cedar Falls & Minnesota Railroad Company to the Dubuque & Sioux City Railroad Company had been assumed by the Illinois Central Railroad Company, and that the minimum rent of said lease was more than sufficient to meet the entire interest on said issue of bonds. The bill does not state in terms that the lease of the Dubuque & Sioux City Railroad Company has expired, nor does it state whether the Illinois Central Railroad Company has exercised its option to make the lease perpetual, but the court will take judicial notice of the lapse of time, and that the 20-years term created by the lease had expired at the time this bill was filed; and, as the bill contains no allegation that the lease has been extended or made perpetual, the court must assume that it has not been so extended, and that the lease is at an end as between the parties. The bill also charges that since about the 27th of September, 1887, the Illinois Central Railroad Company has refused to pay the rentals reserved

in the lease of the Cedar Falls & Minnesota road, and claims that the Dubuque & Sioux City Railroad Company is now the lessee of the Cedar Falls & Minnesota road; that the default has been made in the payment of the interest on said bonds; and that it has become the duty of complainants, as trustees under the mortgage, to enforce the payment of the rental, and foreclose said mortgage. The bill also sets out various other matters, such as that the Illinois Central Railroad Company has obtained the control of the stock of the Dubuque & Sioux City Railroad Company, and that the officers of the last-named company have been selected by the Illinois Central Company; that the Illinois Central Company has not so conducted the business of the Cedar Falls & Minnesota road as to make it profitable, and secure the increase of rental contemplated by the lease; but I do not see that these allegations are in any way material to the disposition of this motion. The bill prays a decree and finding by the court to the effect that the lease of the Cedar Falls & Minnesota Railroad is binding on the Illinois Central Railroad Company for the full term of 40 years from the date thereof, and that the Illinois Central Railroad Company is bound to continue to occupy and operate the Cedar Falls & Minnesota Railroad, and to pay rentals in pursuance of said lease, and to perform all the covenants and conditions to be performed by the lessee under said lease.

Upon this statement of the scope and nature of the bill and the relief asked the question arises, does this bill upon its face show the Dubuque & Sioux City Railroad Company to be a necessary party to this suit? What parties must be before the court in order to enable a court of equity to proceed, is stated in Story, Eq. Pl. § 72, as follows:

"It has been remarked that courts of equity adopt two leading principles for determining the proper parties to a suit. One of them is a principle admitted in all courts upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be finally decided in a court of justice unless he himself is present, or at least unless he has had a full opportunity to appear and vindicate his rights. The other is that, when a decision is made upon a particular subject-matter, the rights of all persons, whose interests are immediately connected with that decision, and affected by it, shall be provided for, as far as they reasonably may be. \* \* \* It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented."

Then, at section 138, he says:

"If the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive or direct than if the absent parties were before the court, that of itself will in many cases furnish a sufficient ground to enforce the rule of making the absent persons parties."

The doctrine as to who are indispensable parties is very clearly stated by the supreme court in *Barney v. Baltimore City*, 6 Wall. 284, as follows:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flex-

ible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but if this cannot be done it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction. This class cannot be better described than in the language of this court, in *Shields v. Barrow*, [17 How. 130,] in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' "

It is manifest that this suit involves a construction of the lease made by the Dubuque & Sioux City Railroad Company to the Illinois Central Railroad Company. It raises the question whether by that lease the Illinois Central Company assumed the lease of the Cedar Falls & Minnesota Railroad for 40 years from its date, and is bound to operate said Cedar Falls & Minnesota road, and pay rentals therefor, for the entire term, notwithstanding the expiration of the lease of the Dubuque & Sioux City road. By the showing of the bill the Illinois Central Railroad Company made no contract in regard to the matters in controversy directly with the Cedar Falls & Minnesota Company. The entire relation between the Illinois Central Railroad Company and the Cedar Falls & Minnesota Railroad Company is created by the lease of the Dubuque & Sioux City Railroad Company, and the clause in that lease assuming the lease of the Cedar Falls & Minnesota Railroad; and the important and natural question will be, in the light of the terms of the lease itself and of the surrounding circumstances, was it the intention of the parties to the lease of the Dubuque & Sioux City road that the assumption clause should bind the Illinois Central Company for the entire term of the lease of the Cedar Falls & Minnesota road, or was it their intention that the assumption clause should cease, and the Cedar Falls & Minnesota road be returned to the Dubuque & Sioux City Company at the expiration of the 20 years, if the lease was not extended, or was this assumption clause in the contract a provision within the control of the parties who made it, so that, even if by its terms the assumption was for the full term of the lease of the Cedar Falls & Minnesota Railroad, yet it was competent for the parties to rescind or change it, or, yet further, if the Illinois Central Company, by reason of the facts stated in the bill, shall be held, as towards the holders of these bonds, to be estopped from denying that the assumption of the lease was for the full term of 40 years, still the Dubuque & Sioux City Company is a necessary party to the bill, in order that it, too, may be decreed to

be bound by such estoppel? The bill shows that the lease of the Dubuque & Sioux City road, under which the relations with the Cedar Falls & Minnesota road existed, has expired by its own terms; and it also shows, at least inferentially, that the Cedar Falls & Minnesota road is now again in possession of the Dubuque & Sioux City Railroad Company, and that, by the understanding and conduct of the parties to the lease of the Dubuque & Sioux City Railroad, the Dubuque & Sioux City Railroad Company has resumed its possession and control of the Cedar Falls & Minnesota road. And the question arises, should this possession be divested, and the Illinois Central Railroad Company compelled to reoccupy and continue to operate the Cedar Falls & Minnesota road for 20 years more, without allowing the Dubuque & Sioux City Railroad Company to be heard in the premises? If the Dubuque & Sioux City Railroad Company is not heard, the Illinois Central Railroad Company may be placed in the position of being compelled by the decree of this court to operate the Cedar Falls & Minnesota road, and pay rent therefor, and the Dubuque & Sioux City Railroad Company not be concluded by such decree. The Illinois Central Railroad Company might therefore be placed under a decree which it might be impossible for it to perform, or, in the language already quoted from Story's Equity Pleadings, the Illinois Central Company, by such a decree as is asked, might be subjected to "undue inconvenience, or to danger of loss, or to future litigation," if the Dubuque & Sioux City Company is not brought into this case, so as to be bound by the decree. It sufficiently appears upon the face of this bill, as it seems to me, that the Dubuque & Sioux City Railroad Company has a direct interest in the event of this suit. This lease of the Cedar Falls & Minnesota road may be a valuable asset of the Dubuque & Sioux City Railroad Company, if not now, in the future; and when the Illinois Central Railroad Company should seek to re-enter and resume the operation of the Cedar Falls & Minnesota road, if a decree to that effect should be entered by this court, the Dubuque & Sioux City Railroad Company might resist such action, and compel the Illinois Central Railroad Company to resort to the courts to obtain such possession. Hence it seems to me that this is clearly a case where the suit cannot proceed to a final decree, as prayed for by the complainant, in justice to all the parties involved in the controversy, without having the Dubuque & Sioux City Railroad Company before the court. If such a decree as is asked for by the complainants is entered, certainly the Dubuque & Sioux City Railroad Company should be concluded thereby, so that the Illinois Central Railroad Company will have a clear right to perform the decree as against the Dubuque & Sioux City Railroad Company.

This suit was commenced the 1st of March, 1888. The defendant the Illinois Central Railroad Company filed its answer on the 9th of May last. The appearance of the Cedar Falls & Minnesota Railroad Company seems to have been entered, without service of process, on the 23d of March last, but no answer has been filed by that company. A replication, however, was filed to the answer of the Illinois Central Railroad Company, and the case is now at issue, so far as that company is con-

cerned. Under the act of March 3, 1887, in regard to the jurisdiction of the United States courts, and the amendatory and explanatory act of August 13, 1888, no jurisdiction of the Dubuque & Sioux City Railroad Company can be obtained in this district by the service of process. If the Dubuque & Sioux City Railroad Company voluntarily appears, it may, under the rulings of this circuit, waive its personal privilege, and make itself a party to this suit. In the case cited from 5 Mason, Mr. Justice STORY did not grant a peremptory order to dismiss, but entered a rule that the case should stand dismissed by a future date named, unless the defendant Swan should be brought in by such time. While I do not see, as at present advised, from the course of the argument upon this motion, any reason to expect that the complainants will be able to secure the voluntary appearance of the Dubuque & Sioux City Railroad Company in this case, I deem it but equitable that they should have a further opportunity to do so; and hence an order will be entered that this cause be dismissed, as a matter of course, on the first Monday in February next, unless the Dubuque & Sioux City Railroad Company shall have appeared and fully submitted to the jurisdiction of the court in this case by that day.

I have not, in passing upon this motion, considered any of the matters set up in the answer of the Illinois Central Railroad Company by way of defense to the matters alleged in the bill, but have passed upon the motion solely on the face of the bill itself. It was urged in argument very strenuously on the part of complainants from the showing of the bill that the Dubuque & Sioux City Railroad Company had become merged in the Illinois Central Railroad Company. It is true the bill charges that the Illinois Central Railroad Company has obtained control of the stock of the Dubuque & Sioux City Railroad Company. This allegation, upon the familiar rule that statements of this character will be taken most strongly against the pleader, only implies that the Illinois Central Railroad Company has obtained a majority of the stock of the Dubuque & Sioux City Railroad Company. It does not appear but that there is still a minority of the stockholders of the Dubuque & Sioux City Railroad Company who hold their stock and are interested in that company, but, even if the Illinois Central Railroad Company is the owner of the entire stock of the Dubuque & Sioux City Railroad Company, still, the Dubuque & Sioux City Railroad Company is a separate entity, exercising its rights and franchises under the laws of the state of Iowa, and is as essentially a necessary party to the case as if its stock were held by others than the Illinois Central Railroad Company. Upon this question I read an instructive extract from an opinion of the supreme court in *Car Co. v. Railroad Co.*, 115 U. S. 597, 6 Sup. Ct. Rep. 198

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not, in law, the control itself. Practically it may control the company, but the company alone controls its road. In a sense the stockholders of a corporation own its property, but they are not the managers of its business, or in



the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

This case and all the reasons of the court upon it seem to me to completely answer all the allegations of this bill as to the Illinois Central Company's control of the Dubuque & Sioux City Company, and by the light of this decision it is clear that the Dubuque & Sioux City road is a separate entity of itself, and as such is necessarily a party, so that the court may make its decree so as to bind all parties to be affected by it.

### HARDING v. VAUGHN *et al.*

(Circuit Court, S. D. Iowa, C. D. December 3, 1888.)

#### 1. TAXATION—REDEMPTION—INFANCY—BURDEN OF PROOF.

In a suit by a minor to redeem land from tax deed under Code Iowa, § 892, allowing a minor to redeem at any time within one year after attaining majority, the burden of proof is upon complainant to show that he owned the land at the date of the tax sale.

#### 2. SAME—PLEADING AND PROOF.

Where the bill alleges that complainant became the owner by purchase from his father and mother on or about a certain date, evidence tending to show that he acquired title by purchase from another person more than a year before the date pleaded, cannot be considered.

#### 3. SAME—EVIDENCE—SUFFICIENCY.

A deed to complainant from his father and mother, dated before the tax sale, but having an undated acknowledgment, and not recorded till long after the tax deed was given, is not sufficient proof of title in complainant at the time of the tax sale, in the absence of any proof as to when the deed was signed, or that it was ever delivered.

*In Equity.* On final hearing.

Bill of George F. Harding, a minor, by Adelaide M. Harding, his next friend, against Wesley Vaughn and J. D. Williams, to redeem land from tax sale.

*Charles L. Bailey and Cole, McVey & Clarke, for complainant.*

*Berryhill & Henry, for defendants.*

SHIRAS, J. On the 1st Monday in October, 1876, the E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 14, township 82 N., of range 33 W. of the Fifth P. M.

was duly sold for the delinquent taxes then due thereon by the treasurer of Carroll county, Iowa, and on the 27th of April, 1880, a proper treasurer's deed was executed to John D. Williams, the holder of the certificate of purchase; no redemption having been then made from such sale. On the 11th of September, 1883, said Williams, by warranty deed, conveyed the premises to Wesley Vaughn for a valuable consideration, who has since then been in possession of the land. At the April term, 1885, of the district court of Carroll county George F. Harding, by his next friend, filed a petition to redeem said premises from such tax sale and deed under the provisions of section 893 of the Code of Iowa, it being averred in said petition that said Harding was then a minor; that he was the owner in fee-simple of said realty at the date of the tax sale, having become the owner thereof by purchase on or about the 14th day of December, 1874; and that he was therefore entitled to redeem said premises by the express provisions of section 892 of the Code of Iowa. At the same term of said Carroll county court, an amendment to the petition was filed, in which it was averred that George F. Harding became the owner of the land on or about the 1st day of January, 1876, by a deed bearing that date, executed by his father and mother. Subsequently the case was removed into this court, and thereupon the pleadings were reformed, and the complainant averred in his bill "that he became the owner of said real estate by purchase on the 1st day of January, 1876, by conveyance made on that day to him by George F. Harding, Sr., and Adelaide M. Harding, the father and mother of your orator, as will appear by copy of deed annexed hereto, and made part hereof." That the statute of Iowa confers upon a minor the right to redeem his property from tax sale at any time within one year after reaching his majority is not questioned, nor that this right of redemption exists only as to property which belonged to the minor at the date of the tax sale. *Burton v. Hentzger*, 18 Iowa, 348. The question in dispute in the present case is whether the complainant has shown by sufficient evidence that he was in fact the owner of the premises at the date of the tax sale in October, 1876.

It appears from the evidence in the case that the father of the complainant bears the same name, *i. e.*, George F. Harding; that on the 14th of December, 1874, Charles M. Harris and wife conveyed the land by warranty deed to George F. Harding; and thus it might become a question whether the grantee in the deed was the father or the son. Upon the oral argument of the case it was stated by the court that the evidence of the father tended to show that the original purchase from Harris was on behalf of the son, and the execution of the deed dated January 1, 1876, and signed by the father and mother was merely to clear up the ambiguity arising from the fact that the father and son bear the same name; and that this evidence, being uncontradicted, would justify the conclusion that the son became the owner of the property in 1874 by purchase from Harris. Further consideration of the evidence, however, shows that this conclusion is not sustained under the facts appearing upon the record. In the bill upon which complainant relies for relief, it is

expressly averred that complainant became the owner by purchase on or about January 1, 1876, by a deed executed by the father and mother to him. This statement upon the record is of course evidence of the highest character against the party pleading it, and the defendants have the right to rely upon the issue as thus made by the complainant himself. It must therefore be held to be true that up to the date named the complainant was not the owner of the property. Did he become the owner thereof on or about January 1, 1876, or at any time before the date of the tax sale in October, 1876? The deed signed by the father and mother of complainant bears date January 1, 1876. When was it executed and delivered? The acknowledgment thereto is signed by a notary, but the blanks for the date are not filled out; so it cannot be known from the face of the deed when it was acknowledged. The notary whose name is attached to the acknowledgment is dead, and the deed was not placed upon record until 1882, more than six years after its date. The deed itself, therefore, throws no light upon the question of the time of its delivery. The testimony of the father was taken, but no information is given us thereby as to the mode or time of the delivery of the deed; nor does he testify that the deed was signed on the day it bears date. The facts disclosed on the record and in the evidence bring the case squarely within the ruling of the supreme court of Iowa in *Walker v. Sargent*, 47 Iowa, 448, in which the plaintiff, who was a minor at the date of the tax sale, sought to redeem land from a tax sale, and as evidence of his title relied upon a deed from his father, dated April 29, 1861. The court held that "in this case the deed, being without acknowledgment, may have been executed after the land was sold for taxes. The plaintiff's father, the grantor of the property, was introduced as a witness. He testifies that he executed a deed to Henry Winston Walker for the land, together with other lands, dated April 29, 1861; but he does not testify that the deed was ever delivered to plaintiff, or to his grandfather and guardian. \* \* \* If the deed was in fact delivered at the time it bears date, or even before the tax sale in question, how easily that fact could have been proved by the plaintiff's father and grandfather. The silence of the father, although a witness, both as to the time of execution and the delivery of the deed, tends strongly to create the impression that it was executed long after the time it bears date, for the purpose of showing title at the time of sale in a minor, who, under our statute, (section 892, Code,) may redeem within one year after attaining his majority. If the simple production from the custody of the guardian of a minor, who is a near relative, of an unacknowledged conveyance makes out a *prima facie* case of ownership in the minor, entitling him to redeem from a tax sale after attaining his majority there is an end of all security for purchasers at tax sales. It is apparent that such a construction would open wide the door to fraud, through which many would eagerly pass." In the case now under consideration the burden is upon complainant of showing that he was the actual owner of the premises at the date of the tax sale in October, 1876. As already stated, he avers in his bill that he became the owner of the realty in January, 1876, by deed exe-

cuted by his father and mother. The burden is upon him of showing the time of the execution and delivery of this deed, for until the delivery thereof the title did not vest in him. The original deed is lost, and a copy from the record is produced. The acknowledgment thereto is not dated, and it was not filed for record until April 20, 1885. There is not any testimony even tending to show when it was delivered, unless the recording thereof be deemed to be evidence of delivery; and, if weight be given to that, it would not help complainant, as that would show the delivery to have taken place in 1882. The grantors in the deed, who are the father and mother of the complainant, do not testify that the deed ever was delivered, nor that it was actually signed on the date it bears date. Under these circumstances, it must be held that complainant has failed to prove that he was the owner of the premises in dispute at the date of the sale thereof for taxes, and consequently he has failed to establish a right to redeem. The bill must therefore be dismissed on the merits, and it is so ordered.

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McLAUGHLIN v. McALLISTER.

(Circuit Court, W. D. Missouri, St. Joseph Division. December 3, 1888.

CONTRACTS—ACTIONS ON—PLEADING—CONDITIONS PRECEDENT.

A contract for the exchange of lands provided that each party should furnish complete abstracts, showing good and perfect titles. "In case either party cannot furnish abstracts, this contract is void." *Held*, that a petition, in an action for damages for non-performance, which failed to aver that defendant could furnish such abstract, was demurrable.

At Law. On demurrer to petition.

Crosby, Rusk & Craig and H. S. Kelly, for plaintiff.

B. R. Vineyard and Woodson & Woodson, for defendant.

PHILIPS, J. This case stands on demurrer to the following petition, after describing the citizenship of the parties:

"Plaintiff states that on the 9th day of March, 1888, plaintiff and defendant entered into a contract in words and figures following, to-wit:

"KANSAS CITY, MO.

"This contract of sale, made this 9th day of March, A. D. 1888, by J. W. McAllister, of St. Joseph, Mo., and M. H. McLaughlin, of Kansas City, Mo., witnesseth, that the said party of the first part has sold to the said party of the second part, for and in consideration of the sum of twenty-three thousand and fifty-five dollars (\$23,055.00) all of the real estate, consisting as follows: Survey or sections 45, 47, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, and 73, certificates number 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, and 758, situated in block number 213, in Presidio county, (now called Brewster,) Texas, all issued to the Texas and St. Louis Railway Co.; said tract consisting of 8,960 acres of land. The said second party, in payment of above-described property, has sold to said first party, for and in consideration of the sum of \$26,340.00, all of lots number 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21,

22, and nine feet off from north part of lot number five, all in block number 22, and lot number one in block number six, lot number five in block number one, (1,) all in Independence Heights addition to the city of Independence, Jackson county, Mo., as the same are marked and designated on the recorded plat thereof in the office of the recorder of deeds for said county at said city of Independence; the said lots consisting of 878 front feet, and are sold subject to a mortgage incumbrance now existing thereon in the aggregate amount of three thousand and eighty dollars, this being the proportional amount embraced in a certain deed of trust, executed by Charles W. Freeman and wife, dated the 27th day of April, A. D. 1887, in favor of J. C. Carpenter, due in one, two, and three years, with release clause, which said sum, with interest at 8 per cent. from the 27th April, 1887, the party of the first part assumes and agrees to pay as part purchase money herein. (Each party agrees to furnish a complete abstract of properties, with certificates as to judgments in the various courts, showing good and sufficient titles thereto, and to be free and clear in every respect, except as above stated, to complete the transfer of proper deeds for same as soon as the titles thereto are satisfactory, and within fifteen days from date, unless longer time should be required to furnish abstracts, in which case as soon thereafter as possible. In case either party cannot furnish abstracts, this contract is void.)

"In witness whereof the said parties have hereunto affixed their signatures in duplicate the day and date above first mentioned.

"J. W. McALLISTER.

"M. H. McLAUGHLIN."

"Plaintiff states that he has done and performed all the conditions of said contract on his part to be performed, and that he did, within and at the time in said contract provided, furnish the abstract and certificates of judgments by him to be furnished, and did make, execute, and tender to said first party, the defendant herein, a good and sufficient warranty deed for the property to be conveyed by him to said first party, subject only to the incumbrance mentioned in said contract, and therein assumed by said first party. Plaintiff states further that defendant refused to accept said warranty deed, and to perform the terms and conditions of said contract on his part to be performed, and that he, the defendant, refused, has continued to refuse, and still refuses to perform said contract, and to convey said Texas lands to the plaintiff, although often requested so to do. Plaintiff states that, by reason of defendant's said refusal and failure to keep and perform said contract, the plaintiff has been damaged in the sum of twenty-three thousand dollars, for which he asks judgment and for costs."

The grounds of the demurrer are: (1) Because the petition does not state facts sufficient to constitute a cause of action; (2) because the petition shows that the contract sued on was to be void, provided defendant could not furnish plaintiff an abstract of title to the land mentioned in the contract, showing title to said land in defendant clear of all incumbrances; and the petition does not aver that defendant could furnish such abstract.

Looking at the contract in its entirety, it is manifest the parties contemplated the transfer of the respective parcels of land by mutual warranty deeds conveying a good title. In other words, it contemplated, for the proper execution of the contract, that each party must have a good title to the lands to be transferred by him, and that he would convey such title. This is the recognized rule of law. *Washington v. Ogden*, 1 Black, 450; *Wellman v. Dismukes*, 42 Mo. 101; *Thompson v. Craig*, 64 Mo.

312. This is at once obvious from the expressed stipulation in the contract:

"Each party agrees to furnish a complete abstract of properties, with certificates as to judgments in the various courts, showing good and sufficient titles thereto, and to be free and clear in every respect, except as above stated, to complete the transfer of proper deeds for same as soon as the titles thereto are satisfactory. \* \* \* In case either party cannot furnish abstracts, this contract is void."

The abstract named in the last clause is clearly to be referred to the preceding part of the paragraph, which defines it to be "a complete abstract of properties, with certificates as to the judgments in the various courts, showing good and sufficient title thereto, and to be free and clear in every respect, except as above stated." The contract is executory, and its consummation by mutual deeds of conveyance is made to depend upon the fact whether or not both parties had a good title to be conveyed by a deed of warranty, without liability to an action for breach of covenant. The abstracts to be furnished were to evidence the existence of the required title. In determining the true scope and office of the last clause in the foregoing paragraph we are to look to the whole section, and every part thereof. Among the recognized canons for the construction of statutes and contracts is the following:

When the expression is special or particular, but the reason general, the special shall be deemed general; and the reason and intention of the law-giver will often control the strict letter of the law, to avoid injustice, contradiction, or absurdity; and when the intention is ascertained from the whole instrument, it will prevail over the literal sense of the terms. *In re Bomino's Estate*, 83 Mo. 441; *loc. cit.*

Thus viewed, the common sense of the contract in question was that, if either party should not have such perfect title to the land agreed to be conveyed by him, the contract "is void" *ab initio*, and no liability could arise thereon. The last clause of the contract is in the nature of a proviso. It provides for a contingency, not to be created, but which, if it exists, should void the whole transaction or compact. Reduced to its actual substance, the undertaking on the part of the defendant was, if the plaintiff should be able to show by his abstract the required title in him, then the correlative obligation of the defendant arose to convey to plaintiff, provided the defendant could furnish such abstract, and not otherwise. If this be the correct construction of the import of the contract, it logically follows that the proviso is of the nature of a condition precedent, and, as such, the happening of the contingency, or the ability of the defendant to furnish such abstract, should be averred by the plaintiff as a fact constitutive of the cause of action. 1 Chit. Pl. (16th Ed.) 329, states the rule thus:

"When the consideration of the defendant's contract was executory, or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the non-performance."

See, also, *French v. Campbell*, 2 H. Bl. 178; *Bruen v. Ogden*, 18 N. J. Law, 126; *Pier v. Heinrichoffen*, 52 Mo. 336; *Josse v. Newman*, 38 Mo. 43, 44; *Dinsmore v. Livingston Co.*, 60 Mo. 244.

We do not controvert the rule that, when the plaintiff alleges a condition subsequent to his estate or right, he need not aver performance, but the breach must be shown by the defendant; and that matter in defeasance of the action, "and wherever there is a circumstance the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a 'proviso' or a 'condition subsequent,' it must in its nature be a matter of defense, and ought to be shown in pleading by the opposite party." 1 Chit. Pl. 246. But as said by Lord TENTERDEN in *Vavasour v. Ormrod*, 6 Barn. & C. 430:

"If an act of parliament, or a private instrument, contain in it, first, a general clause, and afterwards, a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause, which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception, and if he state it as containing an absolute, unconditional stipulation, without noticing the exception, it will be a variance."

Likewise is it a settled rule of pleading that if, in the same section of a statute which gives the right of action, the exception thereto is contained, and its negation is essential to a recovery, the petition must be so framed as to clearly show that the defendant is not within the exception. *Williams v. Hingham*, 4 Pick. 347; *Russell v. Railroad Co.*, 83 Mo. 511. The instrument of writing here, containing the general terms for a mutual transfer of lands, contains in its very body the conditions upon which the transfer is to be consummated, to-wit, that the parties shall be able to furnish certain abstracts of title showing certain facts, and, if either party is unable to do so, the contract "is void." As no liability was created on defendant's part, unless he had such title, and should fail to furnish the abstract thereof, and execute proper deed, it does seem to me that it is within the very spirit of the contract that the pleader should negative the fact which was to exempt the defendant; or, in other words, aver the facts to exist which created the obligation to execute the contract.

Here are two parties at Kansas City, Mo., negotiating respecting the exchange of large parcels of land situated in the state of Texas, and a number of lots situated in a platted addition to the city of Independence, Mo. The plaintiff is a citizen of the state of Ohio. As neither party was willing to conclude the sale without evidence of a perfect title, and, as reasonably to be inferred, neither party was willing to hazard the liability incident to the execution of a deed with covenants of title that might be broken the instant the deed was delivered, they expressly made the entire transaction to depend upon their ability to show a clear title; and, if they could not, the contract was void. Therefore it would logically follow that, when either party seeks to show a breach of the contract

by the other, he should show by his declaration that the contingency existed upon which the ability must arise. In reaching this conclusion I have not been unmindful of the recognized rule of pleading that a party is not required to anticipate, notice, and remove in his declaration every possible exception that may exist, and which the adversary might interpose as a defense; nor the other rule, that a fact more especially within the possession and knowledge of the defendant ought, generally, to be brought forward by him; and, as an incident of this suggestion, that the position assumed by the demurrer would throw upon the plaintiff the burden, in the first instance, of showing the defendant had such title as the contract called for. It is a sufficient answer to say that, when the undertaking of the party sought to be charged is by the contract made to depend upon a condition precedent, no matter how improbable or unreasonable the condition, nor whether it is to be performed by the plaintiff or some other party over whose action the plaintiff has no control, and no power to coerce, the defendant has the right to stand by the letter of his bond; and as to anything more or less, of substance, he can answer, *In hoc foedere non veni*. Nor is it exact to say that the plaintiff is thus required to prove a negative. He is simply required to aver, in effect, that defendant agreed to convey to him certain lands on condition that he could show by abstract a good title thereto. He had failed and refused, etc., to perform. It is an affirmative fact alleged; and the proof respecting title to real estate is largely accessible to all.

In *Bruen v. Ogden*, *supra*, the contract in suit contained various stipulations; among them, that defendant should proceed to Texas as soon as convenient, and select lands on which to locate a grant; that he would procure from the government a deed or title for the lands when located; that he would pay plaintiff for one-half of the original grant in nine months; and that, if from any cause the government of Texas should prevent the location of said grant, or the passing of said title, the defendant would purchase of plaintiff said grant, and pay him \$6,000 for the same. The averments of the petition were that defendant did not pay the said \$3,000; that he did not proceed to Texas and select the grant; and that he did not procure a deed to be made to the same; by means whereof he became liable to pay plaintiff the said sum of \$6,000. It will be observed that the petition did not aver that the government of Texas did prevent a location of the grant and passing the deed of title. The court held this provision of the contract to be a condition precedent, and said: "To make out any cause of action it must be averred and shown that said government did prevent said location, etc., in the words of the condition, or according to their legal effect;" and that the want of such averment was fatal to the action. It might with as much propriety there as here have been objected that whether or not the state of Texas prevented the location and transfer of title was a matter more peculiarly within the knowledge of the defendant, as it was within the contemplation of the contract that the duty of proceeding to Texas, and examining into these facts, and securing the location, should devolve on the defendant, and therefore he should know the facts, and be able read-



ily to show them. But the letter of the contract made his liability depend upon the fact of such prevention by the Texas government, and it should be averred and proved by the plaintiff.

It is not necessary, in determining this demurrer, to discuss what character of defect in the defendant's title would excuse him from performance, nor what effort, if any, he should have made to cure any defect. That matter would be more properly considered and determined at the trial on the merits. Nor does the court feel called upon here to consider the suggestion made by counsel for plaintiff, that plaintiff might be willing to accept such title as the defendant might have in satisfaction of the bond. No such question is presented by the pleading. On the face of the petition it is bad; and the demurrer is sustained, with leave to plaintiff, on payment of the costs of this demurrer, to file an amended petition within 30 days from the filing of this opinion herein, and leave to defendant to plead thereto on or before the 1st day of February next.

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McCONNELL *v.* SIMPSON *et al.*

(Circuit Court, D. Nebraska. November 30, 1888.)

COUNTIES—WARRANTS—NEGOTIABILITY—TREASURER—OFFICIAL BOND—MALFEASANCE.

Where a county treasurer, who by law was forbidden to buy or sell, or in any manner deal in county warrants, upon payment of a county warrant neglects to cancel it, but marks it, "Not paid, for want of funds," and puts it into circulation, a subsequent holder, though he purchased it for value and in good faith, cannot maintain an action against the sureties on the official bond of the treasurer for alleged malfeasance in office.

At Law. On demurrer to petition.

Action by Samuel P. McConnell against Duke W. Simpson, Thomas B. Stevenson, Monroe L. Hayward, James W. Eaton, William B. Hargus, Jacob Siehl, Rufus F. McComas, Josiah Rogers, and Robert P. Draper on the bond of Duke W. Simpson, as county treasurer of Otoe county, Neb.

*Warran & Ransom*, for plaintiff.

*Stevenson & Hayward*, for defendants.

DUNDY, J. Defendant Simpson was at one time county treasurer of Otoe county, one of the counties in this state. All of the other defendants were sureties on his official bond. Simpson is charged with malfeasance in office, in consequence of which, it is alleged, the plaintiff was injured to the amount of about \$3,900, and the plaintiff seeks to hold the other defendants responsible for such alleged malfeasance. Before this action was commenced the plaintiff had sued Simpson alone in this court, and had recovered a judgment against him for the said sum. Simpson was described as treasurer of Otoe county in that suit, and the wrongs complained of were attributed to him in his official capacity.

No defense was made by Simpson, he being in the penitentiary of this state at the time; having been convicted of embezzling the public funds, and judgment went against him by default. None of the other defendants, so far as the record shows, ever appeared or knew of that suit. It was made to appear in the other suit that Simpson, while he was the treasurer of Otoe county, sold, or in some way put in circulation, several county warrants, which formed the basis of that suit. That the warrants finally came into the hands of this plaintiff, who claimed to be the *bona fide* holder of the same; but, before the said Simpson was sued, the plaintiff had brought suit against Otoe county, on the identical warrants, and he was defeated in that action, for the reason that Otoe county had redeemed the warrants with its own money, by paying the amount to the lawful holder and owner thereof. Simpson was at the time the treasurer of the county, and received the warrants from the holder at the time of the redemption; but he neglected to cancel the same, as the law required him to do, but, instead of doing that, he indorsed on the warrants, "Presented for payment, and not paid, for want of funds." Some time after this was done, he sold or transferred, or in some way put on the market, either by himself or through his confederates, a large number of warrants, of which the ones in question were a part, most of which had been redeemed with the public money, and by himself as county treasurer. These warrants partake of the character of negotiable paper to some extent, but not for all purposes. Title to the same vests in the purchaser by mere delivery, they being payable to bearer. But the county was not deprived of the right or opportunity to make any proper or valid defense to the suit based on such warrants, any more than it would have been had the suit been brought by the original payee. Briefly stated, this is the condition of things out of which this litigation grows: The county commissioners of Otoe county issued several warrants on its treasurer, payable to ——— or bearer. The warrants were duly delivered to the payee therein named, who was the rightful holder and owner thereof. He presented the same to Simpson, the treasurer, for payment, and they were redeemed by him with the public money. He neglected to cancel the same, as he ought to have done, but instead thereof marked on them, "Not paid, for want of funds." He afterwards let them go out of his office, to find their way onto the market, and eventually into the hands of this plaintiff. Suit was brought against the county on the warrants, and the plaintiff was defeated in his effort to compel the county to pay the warrants the second time. Then Simpson was sued for his misdemeanors in office, and a judgment was obtained against him for the amount claimed in this suit.

At the time Simpson was such county treasurer, and long before, the laws of this state prohibited the county treasurer from buying or selling, or in any way dealing in, county warrants, and made it a penal offense to do so. He was perfectly well aware of that, as subsequent proceedings have fully demonstrated. Whoever procured the warrants from him must have had abundant opportunity to know, and reason to believe, that fraudulent practices were being indulged in by both parties to the

transaction. The purchaser, if such there ever was, must have known that he had no right to the warrants issued to another, especially when found in the hands of the treasurer, whose duty it was to pay them, and who was forbidden by law to sell them. There was no honesty or good faith in the transaction. There could have been none. It was *malum prohibitum*. It was about as bad as anything in that line could be; and the person or persons, whoever he or they may be, who received the warrants, stand in but little, if any, better light than Simpson himself. Does the present holder, though a *bona fide* purchaser, stand in a more favorable light, so far as the law is concerned, than the person who first took the warrants from Simpson, after they had been paid? It is submitted that he does not, because no person could purchase and hold them divested of the original taint resting on them. The county, and the sureties as well, can make the defense here relied on, which is most effective. The numerous transfers of the warrants sued on did not impart to them any additional value. The right to make any defense thereto remains intact; and, as the person who took the warrants from the treasurer was *particeps criminis*, neither he nor those claiming under him have any standing in court.

Numerous other questions are raised by the demurrer, but it is unnecessary to consider them. The demurrer must be sustained.

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ROBINSON *et al.* v. HINTRAGER.

(Circuit Court, N. D. Iowa, E. D. December 6, 1888.)

PARTNERSHIP—SURVIVING PARTNERS—ACTIONS—PARTIES—JOINDER.

Under Code Iowa, §§ 2543-2545, requiring actions to be brought in the name of the real party in interest, except that an executor or administrator, guardian, trustee of an express trust, a party in whose name a contract is made for another's benefit, or a person expressly authorized by statute may sue without joining the interested party, and providing that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined, unless otherwise provided, an administratrix of a deceased partner should not be joined with the survivor in an action against the firm's debtor on an account stated, before settlement of the partnership and distribution of the assets, as, while she has an interest in the proceeds, she has none in the chose in action itself, the title to which, upon her intestate's death, passed to the survivor.

At Law. On motion to dismiss for misjoinder of plaintiffs.

Action on contract by Laura P. Robinson, administratrix of the goods and chattels of F. M. Robinson, and J. B. Powers, survivor of himself and said Robinson, lawyers, partners as Robinson & Powers, against William Hintrager, for legal services rendered by said firm to the defendant.

*Powers & Lacy*, for plaintiffs.

*D. W. Cram*, for defendant.

SHIRAS, J. This action is brought upon an account stated for legal services rendered for the benefit of defendant by the late firm of Robinson & Powers. The administratrix of F. M. Robinson, who died in 1885, is joined as a party plaintiff with J. B. Powers, the surviving partner, and the defendant now moves to dismiss the action as to the administratrix on the ground that she cannot be properly joined as a co-plaintiff with the surviving partner. The sections of the Code of Iowa applicable to the question are as follows:

"Sec. 2543. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section. Sec. 2544. An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the suit is prosecuted. Sec. 2545. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this Code."

On part of the plaintiffs it is claimed that the administratrix is interested in the subject of the action in such sense that she is a proper party to the action, within the true meaning of section 2545, just cited. Is this true? The administratrix of the estate of F. M. Robinson doubtless has an interest in the partnership affairs, and in the surplus left after the debts of the partnership are paid; but it does not follow that she has such an interest in the several items of property belonging to the partnership as will enable her to maintain an action thereon. The subject of the action against the defendant is the account stated, and, before the administratrix can be joined in an action to recover thereon, it must appear that she has an interest in this specific chose in action. If she has such an interest within the meaning of section 2545 of the Code, then the surviving partner could not maintain the action without her presence, if the defendant insisted thereon. Counsel for plaintiffs in argument claimed, that while the administratrix was not a necessary party plaintiff, she was a proper party, and it was optional with the surviving partner to make her a co-plaintiff or not. There are cases in which it is optional with the plaintiff to unite certain parties as defendants, and so also it may be optional with the plaintiff to determine whether two or more causes of action shall be united in one action; but it is not optional with the plaintiff to determine that, as to one cause of action only, one of several parties interested therein may sue thereon. The action being brought by only part of those interested, it is for the defendant to determine whether such action shall be maintained without the presence of the others who are interested. The defendant has the right to insist that there shall be but one action upon the one subject-matter of controversy, and that all interested adversely to him shall be made parties plaintiff. Thus in *McNamee v. Carpenter*, 56 Iowa, 276, 9 N. W. Rep. 218, the supreme court of Iowa held that, where a promissory note was owned jointly by two persons, one of whom died, an action thereon could not be maintained by the one party, even for his own share, and that the de-

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defendant had the right to insist upon the non-joinder of the administrator of the deceased party as a defense to the entire action. The subject-matter in controversy in this action is single and indivisible, and the defendant has the right to insist that all parties interested in such cause of action shall be made parties plaintiff; yet, would it be claimed that, if the action had been brought by the surviving partner alone, the defendant could by motion, demurrer, or otherwise have insisted that the administratrix of the deceased partner should be made a co-plaintiff? Clearly not. Yet, if she has an interest in the subject of the action within the meaning of section 2545, the defendant would have the right to insist that she be made a party plaintiff, in order that the rights of all interested might be determined in the one action. The very fact that the defendant cannot insist upon the presence of the administratrix as a co-plaintiff is because she has no such interest in the subject of the action as is contemplated by section 2545 of the Code, and, lacking that interest, she cannot be properly joined as a co-plaintiff with the surviving partner in this action.

Should the plaintiff Powers for any reason dismiss the action so far as he is concerned, what would be the issue remaining between the administratrix and the defendant, and what judgment could be entered thereon? If the defendant should prove that the services had not been rendered, or that the same had been fully paid for, and a judgment for these reasons should be entered in favor of defendant, of what avail would it be as against another action brought by the surviving partner to recover the whole account? On the other hand, should the evidence show that the services charged for had been rendered, and the account remained unpaid, what judgment could be rendered in favor of the administratrix? Certainly not for the whole amount due; yet, if not, how could the court in this action determine what portion thereof belonged to the administratrix? It is not necessary to elaborate these suggestions to show that the administratrix has no separate or distinct interest in the subject of the controversy, and that the action could not proceed without the presence of the surviving partner as a plaintiff. If, however, the administratrix and the surviving partner unite in the action, what right in or control over the cause of action or any part of it is possessed by the administratrix? The usual rule is that an admission made by a party to the record, being a party in interest, is admissible in evidence against him. Should defendant upon the trial offer evidence to prove that the administratrix, since her appointment as such, had admitted that the amount charged was exorbitant, or that no account had ever been stated or settled, or that the same had been paid, would such admission be admissible as against the surviving partner? Should evidence be offered to prove that since the suit had been brought the administratrix had received payment in full of the account sued on, would such fact defeat the right of recovery of the surviving partner? If judgment should be entered in favor of the plaintiffs, as now made on the record, could the administratrix settle or compromise the judgment or any part of it, and thereby defeat the right of the surviving partner to collect the whole of the judg-

ment, and use the same in payment of the debts of the partnership? Unless it be held that the sections of the Code hereinbefore cited are intended not only to define who are proper parties to actions, but also to radically change the law regarding the settlement of partnerships, and the rights and duties of surviving partners, it follows from the considerations suggested that the administratrix of the deceased partner cannot by admissions made, nor by releases executed, nor by any action on her part, defeat the paramount right of the surviving partner to collect the assets of the partnership. If, then, the administratrix has no such interest in the subject of the action that she can maintain an independent suit thereon; and no such interest as that, when the surviving partner sues alone, the defendant is entitled to insist on her being joined as a co-plaintiff; and no such interest as authorizes her to compromise or settle the claim in whole or in part; and no such interest as entitles the defendant to rely upon or offer in evidence any admission or release executed by her,—how can it be fairly said that she has such an interest in the subject of the action as entitles her to join in the suit against the defendant?

Counsel for plaintiff cite in argument several sections of Pomeroy on Remedies, which it is claimed support the right of joinder in the present action. Such is not the true reading thereof. Section 198 is applicable to cases wherein there are joint obligees or promisees, and one of them dies. In such case the interest of the deceased passes to his legal representatives, and at the common law it was held that a joint action could not be maintained by the surviving promisees and the representative of the deceased party, but each must sue separately for the interest held by each. In this section the author shows that the change made by the statute was to enable the parties in interest, although the interest of the administratrix was equitable and that of the others was legal, to unite in one action. This is only a statement of the rule announced by the supreme court of Iowa in *McNamee v. Carpenter*, already cited. Section 199 shows the further modification produced by the statute to be that—

“If the persons have any interest whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit or arising from the stipulations of the agreement, the language applies without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal.”

This language, broad as it is, still recognizes the test to be that each party joined as a plaintiff must have an interest in the subject-matter of the action. It is also urged that the plaintiffs are deemed to be tenants in common of the partnership assets, and as such may be joined in this action; and in support of this position is cited the case of *Sage v. Woodin*, 66 N. Y. 578, in which it is said:

“The death of Charles E. Case operated as a dissolution of the firm of Case, Woodin & Conger, and the administrators of his estate, upon their appointment, became tenants in common with the survivors of the partnership property, subject to the right of the surviving partners to its possession and management, for the purpose of closing up the partnership affairs. 1 Pars. Partn. 440. The representatives of Case, as his successors in interest, were entitled

to an accounting with the surviving partners, and to receive his share of the surplus assets."

The question under consideration in this cause before the court of appeals was not whether such an interest vested in the administrator in each item of property belonging to the firm as would enable the administrator to join in an action therefor, but simply that the interest vested in the administrator was subject to the right of the surviving partners to the possession and management of the assets, for the winding up of the partnership affairs. Here, it seems to me, is the error in the reasoning relied upon by plaintiffs' counsel. They seem to overlook the fact that the chose in action forming the subject of the action is part of the assets of a partnership whose existence has been terminated by the death of one of the partners. The account sued on belonged to the firm, and, upon its dissolution by the death of one of the partners, the surviving partner became, so to speak, the administrator or legal representative of the firm or partnership, with full power, right, and authority to collect all the assets, pay the debts, and wind up the business of the partnership; being, of course, accountable to the estate of the deceased partner for the share in the surplus assets belonging to the estate. The administratrix of the deceased partner, upon her appointment, did not become possessed of an interest or title, either legal or equitable, in and to the several choses in action forming the assets of the partnership, in such sense that she could maintain an action to recover the whole or any named part thereof. These assets pass to the surviving partner, as the representative of the partnership, and the administratrix has no such interest therein as entitles her to join with the surviving partner in a suit to recover the same. That this is the correct conclusion seems to me to be fairly held by the supreme court of Iowa in *Brown v. Allen*, 35 Iowa, 306, in which it is said:

"As the surviving partner is the trustee of a resulting trust, as such he has the right to close up the affairs of the partnership; and, until the affairs of the partnership are wound up, the representatives of the deceased have no such interest in the partnership property as would make them necessary parties with the surviving partner in an action for an injury to the property of the partnership. The interest, if any, of the heir or administrator in the partnership effects, can only be ascertained when the affairs of the partnership are closed up, \* \* \* so that, in an action by the surviving partner for an injury to the property of the partnership, the personal representative cannot be said to be a real party in interest with the survivor."

Regard must also be had to the position of the surviving partner in this: that his right to maintain an action in his own name does not spring out of an absolute ownership of the assets of the firm. The right to maintain the action in his own name grows out of the fact that the law casts upon him the duty of collecting the assets of the partnership, and applying them, first, to the payment of the debts, and then distributing the surplus among the parties entitled thereto. The firm or partnership has a legal existence other and different from that of the individuals composing it. Upon its termination by the death of one of its members, the law casts upon the survivor the duty and obligation of collecting the assets and paying the debts of the firm, and then distributing the sur-

plus. This is a duty the surviving partner owes to the creditors and others interested. It is not a duty which it is optional with the surviving partner to assume or not at his pleasure. He is derelict in the performance of his duty if he does not undertake it. In effect, the surviving partner becomes the administrator of the estate of the defunct firm, and as such the law charges him with the payment of the debts and the duty of collecting the assets; and, to enable him to perform this duty, he is clothed with the power of collecting, in his own name, as surviving partner, the debts due the firm. Not only is such duty imposed upon the surviving partner in the interest of creditors and of the representatives of the deceased partner, but it is also for the convenience and protection of the debtors of the firm. By the concentration of the right and duty to collect the assets of the firm in the person of the surviving partner, it is made clear to the debtors with whom they should deal in settling and paying the debts due from them. If, however, it should now be held that the administrator of a deceased partner has such an interest in the several choses in action belonging to the firm that he is entitled to join as plaintiff with the surviving partner in an action based thereon, then it is difficult to avoid the conclusion that the debtor would be compelled to ascertain, at his peril, what interest was held by the administrator, and make payment to him of that amount. That this would create difficulties and uncertainties is apparent, and no reason exists for creating them by the recognition of the right claimed by plaintiffs, to-wit, that of uniting the administratrix of the deceased partner as a co-plaintiff with the surviving partner in a suit to recover a chose in action forming part of the partnership assets. Of course, when a settlement of the partnership affairs has been had, and the surplus assets have been distributed, so that it has been settled what interest belongs to the estate of the deceased partner, and what to the surviving partner, there we have a case of joint ownership of the chose in action, the respective interests of the joint owners being now fixed and defined; and in such case suit should be brought in the name of the joint owners. The judgment can define the interest or shares owned by the parties respectively, and the defendant, knowing the rights of each, can settle with each without risk. The record in this cause fails to show that such settlement and distribution has been made, and the right to join the administratrix and surviving partner is claimed upon the broad ground that, before such settlement and distribution, the administratrix has such an interest in the specific choses in action belonging to the partnership that she is entitled to join in the action for the recovery thereof. This claim is not sustainable, either upon the principle regulating the settlement of partnership estates or upon the authority of the adjudged cases; and, consequently, it must be held that there is a misjoinder of parties plaintiff, and the motion to dismiss, as to the administratrix, must be sustained, with leave to continue the action in the name of the surviving partner.



UNITED STATES v. OLIVER *et al.*

(Circuit Court, W. D. Louisiana. October, 1888.)

POST-OFFICE—MAIL CONTRACTOR—LIABILITY ON BOND—JUDGMENT—RES ADJUDICATA.

The government having assessed against and charged a mail contractor a certain sum in an account against him for his failures in carrying the mails, and having recovered judgment for that sum against him and his sureties, cannot recover in this suit, against the same defendants, on the mail contractor's bond; because the amount of the former judgment did cover, and was intended to cover, the whole sum due the government on account of the mail carrier's failures.

(Syllabus by the Court.)

At Law. Action on official bond.

M. S. Jones, U. S. Atty. for the United States.

Robert Ray, for defendants.

BOARMAN, J. The defendant Oliver became a successful bidder for a certain mail contract in Louisiana. The government sues to recover against defendants on their obligation, evidenced by the bond which Oliver was required to furnish to the postal department at the time he forwarded his proposal to carry the mail. The bond now sued on shows two conditions and warranties—*First*, that Oliver shall in due season enter into a contract agreement with the government in accordance with his proposal; *second*, that, having entered into the said required agreement, "he shall perform said service according to his contract, \* \* \* and in case of failure he and his sureties shall be liable for the amount of said bond as liquidated damages, recoverable in an action for debt on the said bond." Defendant having fully complied with the first warranty named in the bond, he was required by the rules of the postal department to give another or additional bond, such as is usually entered into by successful bidders for carrying the mails. This bond is given to secure the payment by the contractor of such penalties and forfeitures as may be lawfully assessed or charged to him for his failure to carry the mails, or perform the service required of him under his contract. In the bond now sued on recitals appear which point out and show to all parties concerned what failures on the part of the contractor would be charged for, and how much in any given case would be charged against him by the government. On the trial of this suit it was admitted that Oliver was delinquent, and rightfully charged in the government's account against him, \$——, and that the government, in a suit, recently tried in this court, obtained a judgment against him and these same sureties for the sum charged in that account for Oliver's failures. Notwithstanding the government has a judgment—the one just mentioned—against these defendants, it is contended that Oliver and his sureties are liable in this action for the amount of the first bond,—the one which he had signed and sent on to the department with his bid for carrying the mail, and in which it is agreed that, in case of the con-

tractor's failure to faithfully perform the services undertaken by him, the sum of \$1,200, the amount of this bond, should be taken by the parties as the amount of liquidated damages. The government having obtained judgment for a sum which covers and represents all the claims set up in the account against Oliver for his failures in performing the service which he had contracted to perform, now asks, in addition to this amount,—an amount which was intended to repair all the damages suffered by the public in the failures of Oliver to carry the mails,—for a judgment for \$1,200, the sum named in the bond as liquidated damages. The law and principles of jurisprudence cited by counsel for the government from the Louisiana courts do not impress me with the belief that it entered into the mind of either party to the bond now sued on, or that the law presumes it was within the mutual understandings of the several parties thereto, that any sum beyond an amount sufficient to repair the damages to the public by reason of Oliver's failures to carry the mails and perform the duties required of him according to the conditions of the mail contract into which he and these sureties, subsequently to the execution of this bond, entered, should or would be demanded by the government. Such an amount, at the instance of the government, was charged against Oliver for his delinquencies, and there is now a judgment against him and these same sureties for that amount. The first warranty in the bond now sued on was complied with. I think the second condition therein became inoperative, and as if not written, between the parties, when the mail contract and bond were subsequently entered into by the same persons. The judgment recently obtained in this court, I think, represents all that can be recovered against Oliver and his sureties. Judgment for defendants.

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UNITED STATES v. JONES *et al.*

(Circuit Court, W. D. Louisiana. October, 1888.)

POST-OFFICE — POSTMASTER — LARCENY FROM MAILS — LIABILITY ON OFFICIAL BOND.

A postmaster placed in the mail-bag, at his office, a sum of money belonging to the government, to be carried through the mail to the postal depository. While the carrier was on his way to deliver the mail-bag to a steamboat, the postmaster intercepted and robbed him of the bag and contents. His sureties were held liable on the postmaster's bond for the sum claimed by the government.

(*Syllabus by the Court.*)

At Law. Action to recover on official bond.

*M. S. Jones*, U. S. Atty., *John T. Ludeling*, *W. G. Wyly*, and *C. J. & J. S. Boatner*, for defendants.

*BOAEMAN, J.*, (*orally charging jury.*) The defendant *R. L. Jones* was postmaster at Lake Providence in 1885. The government now sues to

recover against him, and the sureties on his official bond; the defendants deny any liability. The evidence, not disputed in this case, is sufficient, upon all the essential matters, to enable you to reach a correct verdict. The substantial facts are as follows: Jones had from time to time failed to turn over moneys belonging to the government, until his delinquencies, on ———, 1885, amounted to \$4,200. On the night of ———, Stewart, the man employed by the government to transport the mail-bags from the post-office at Lake Providence to the steam-boats in the river, was robbed, and the mail-bag and contents were taken away from him. Jones, the postmaster, and two others, were indicted for robbing Stewart of the mail. Jones was tried, and convicted of robbery, in this court, and he is now in the penitentiary. On his trial he became a witness for himself. Counsel for defendants in the case now before us were permitted on the part of the sureties, to show what Jones said on his trial. They show to you that Jones said he, as postmaster, in the line of his official duty, put the amount for which the government now sues the sureties in the mail-bag, and turned the bag and contents over to Stewart, the mail-carrier. The jury convicted Jones of the robbery, and the fact that he did rob Stewart of the mail-bag into which he had, but a little while before, put the government's money, must be taken, by reason of the verdict against him, as conclusively proved. Now, then, the case shown by the evidence is as follows: A postmaster, who has in his official capacity a sum of money belonging to the government, puts it in a mail-bag to be carried, by one of the several agents employed to carry the mails, to the government depository, and, within a short while after he has turned over the money to the mail-carrier, he intercepts him, and by force takes the mail-bag from him and converts the money to his own use. Under such a statement of facts, the liability of the principal in this suit will not be seriously denied. To test the liability of the sureties on Jones' bond, let us see what the government required of Jones, and what the sureties warranted he would do for the government. His employer charged him with certain duties and trusts. Among other things, he was trusted with sums of money which it was his duty to forward to the government's depository. His sureties guarantied that he would in good faith discharge all the duties incumbent on him, and faithfully take care of all the trusts attached to him as an official. Does the statement of admitted facts show that Jones, in relation to the funds which belonged to the government, faithfully complied with all the guaranties of his sureties? To assist the government in safely conveying, through the mails, the public money which from time to time comes into the postmaster's hands, constituted an essential element of the duties and trusts confided to Jones. His sureties warranted that he would in good faith do everything which was expressed, or reasonably implied, in the conditions of the bond. They warranted that he would faithfully discharge all the trusts implied in the nature of his agency. Now, they contend that Jones, having, as postmaster, put the money for which they are now sued into the mail-bag, and turned it over to the mail-carrier, discharged all of the official duties and trusts imposed on him as

postmaster, and that the act of robbing the mail was perpetrated by Jones as an individual, for whose criminal act they are not liable under the terms of the bond. Faith is an attribute of the mind. The quality and extent of Jones' faith can be judged only by his acts. In forwarding money through the mails, an honest purpose, and honest acts of both of his hands, were pledged to his employer. The facts, not disputed in the case, show that he put the government money into the custody of the mail-carrier with an official hand; and with the other, a criminal hand, he forcibly took it from the carrier, and converted it to his own use, before it could reach the depository to whom it was his duty to forward the money. By putting the money in the mail-bag he performed an official duty; but it cannot be said that he faithfully discharged all the duties and trusts imposed on him by law in relation to that money. If he had robbed a mail-carrier, to whom some other postmaster had confided the government's money, it may be that the sureties of Jones would not have been liable for the amount taken by him. The department was greatly at fault in allowing the postmaster, at a village office, to accumulate so much money in his hands, and to remain for so long a time—a year or more—delinquent in his settlement. This may affect the moral right of the government to hold the sureties liable under the circumstances, but it cannot impair the legal rights of the government. Under the admitted facts, you will have to find that Jones did not discharge the trusts imposed in him in such a manner as to satisfy or comply with the warranties of his sureties, and you must find for the plaintiff.

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*In re SWEET.*

(*District Court, N. D. New York. December 6, 1888.*)

**BANKRUPTCY — PROTECTION OF BANKRUPT — STAY OF EXECUTION — LACHES.**

Under Rev. St. U. S. § 5106, providing that suits against a bankrupt shall be stayed pending his application for discharge, "provided there is no unreasonable delay on the part of the bankrupt," such a stay will not be granted when the application for discharge has been pending without action by the bankrupt for more than eight years.

**In Bankruptcy.**

Motion to stay proceedings on a judgment against the bankrupt pending his application for discharge. Rev. St. U. S. 5106, provides that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit therefor against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge."

Tracy C. Becker, for the motion.

W. E. Willey, contra.

COXE, J. On the 31st of August, 1878, David W. Sweet filed his petition in bankruptcy, and on the same day was duly adjudicated a bankrupt. On the 12th of April, 1880, he filed a petition for a discharge. Since that date no proceedings of any kind have been taken. On the 28th of January, 1879, John M. Hammond recovered a judgment in the supreme court of the state against the bankrupt. On the 11th of February thereafter this judgment, which was *ex contractu*, was proved against the bankrupt's estate. On the 4th of October, 1888, application was made for leave to issue execution on this judgment. The application was granted by the state court, and a levy was made. The present motion is to restrain the proceedings under this levy until the question of the bankrupt's right to a discharge is determined. The motion is opposed by the judgment creditor upon the ground that the bankrupt has been guilty of inexcusable laches. I am constrained to hold that this objection is well taken, and that, under the provisions of section 5106 of the Revised Statutes, there has been "unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." Ten years have elapsed since the adjudication, and eight and a half years since the petition for a discharge was filed. Since then the proceedings have remained in a profound and unbroken slumber, with no effort to revive them on the part of the bankrupt or any other person. No reason is given, and no excuse is offered, for this extraordinary delay. After an extended examination I can find no precedent for a stay in such circumstances. Indeed, the authorities seem to be well-nigh unanimous, in all cases where the objection has been duly taken, that a much shorter delay than appears in the case at bar is fatal to the discharge. *In re Harrison*, 22 Fed. Rep. 528; *In re Kelly*, 3 Fed. Rep. 219; *In re Wolfe*, 10 Fed. Rep. 383; *Greenwald v. Appell*, 17 Fed. Rep. 140; *Dingee v. Becker*, 9 N. B. R. 508. *In Harrison's Case, supra*, it was held that, "where six years have been allowed to elapse by the attorney of a bankrupt without obtaining his discharge, such negligence will be imputed to the bankrupt, and he will be held responsible for such delay, and, on motion of his creditors, the proceedings may be dismissed." It follows that the motion must be denied.

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HALE & KILBURN MANUF'G Co. v. HARTFORD WOVEN WIRE MATTRESS Co.

(Circuit Court, D. Connecticut. December 4, 1888.)

PATENTS FOR INVENTIONS—NOVELTY—SPRINGS FOR CAR-SEATS.

The first claim of letters patent No. 179,400, issued July 4, 1876, to Zenas Cobb, for an improvement in spring-seats, which describes an upholstered spring-seat, having spring sections adapted to be separately inserted or removed from below the frame, without disturbing the upholstering, is void for want of novelty, in view of the familiar method of constructing spring-seats

for beds, and the method of removal shown in the Kneppler patent of July 27, 1869. It describes simply the use in a car-seat of the separate spring sections of the bed-seat.

In Equity.

*Charles Howson and Benjamin F. Thurston*, for plaintiff.

*Charles E. Perkins*, for defendant.

SHIPMAN, J. This is a bill in equity founded upon the alleged infringement of letters patent No. 179,400, dated July 4, 1876, to Zenas Cobb, for an improvement in spring-seats. The patentee described, in his specification, his invention as follows:

"My invention has for its object to improve the construction of upholstered spring-seats for cars and other purposes, and to this end it consists, first, in arranging the spring of a seat in sections, which are separately adapted for application and removal from the under side of the upholstering through the bottom of the seat-frame, for the purpose of facilitating the construction of the seat, and preventing the upholstering from being disturbed or injured when it becomes necessary to repair the springs. It also consists in the method of constructing the spring sections; and it finally consists in stretching a strip of webbing from end to end of a spring section, over the tops of the springs, so as to form a curved elastic support, upon which the cushion or upholstering rests evenly at all points to prevent it from unequal wear."

The claims of the patent are as follows:

"(1) An upholstered or cushioned spring-seat, having its springs secured to the seat-frame in sections, which are separately adapted for application and removal from the frame without disturbing the upholstering, substantially as described. (2) The spring sections, consisting of the divided slat, E, having the raised end-pieces, j, the springs, C, clamped between the two divisions of the slat, and the webbing, H, stretched over the tops of the springs from one raised end-piece to the other, substantially as described. (3) The webbing, or other strip, H, combined with the springs of a seat-slat, and stretched from end to end of the latter over the springs, so as to compress them, and form an arc, or curved elastic surface, upon which the upholstering is uniformly supported, substantially as described, for the purpose specified. (4) The combination of the springs, C, webbing strip, H, clasps, D, I, and divided slat, E, substantially as described, for the purpose specified. (5) The combination of springs, C, webbing strip, H, clasps, D, I, and divided slat, E, with the seat-frame, A, and its upholstering or cushion, B, substantially as described, for the purpose specified."

The first claim only is said to have been infringed, and, if valid, it is infringed by the defendant corporation, by the manufacture and sale of car-seats under letters patent to Henry Roberts, dated December 31, 1881, May 1, and June 13, 1883. The question in the case is whether the first claim of the patent for an upholstered spring-seat, having spring sections, adapted to be separately inserted or removed from below the frame without disturbing the upholstering, one or more springs being supported in each separate slat, contains a patentable invention. Spring-seats for beds, composed of transverse slats, upon which were arranged coiled springs, which supported the mattress, and which were separately removed from above the frame, were in use before the date of the invention, and are shown in letters patent to James Blythe, dated May 19,

1863, and to F. C. Hagen, of June 29, 1869. A spring-bed bottom, which consisted of coiled springs fastened to three separately removable transverse slats, and which springs helped to support a woven-wire sheet, upon which the mattress was placed, is shown in letters patent to Alvis Kneppler, dated July 27, 1869. The specification says that the springs "are fastened to the cross-rails, e, of the frame, A, as shown." The defendants insist that the drawing shows that the cross-slats were fastened to the under side of the frame, and were removable from below. It is truly said by the plaintiff that this peculiarity is not mentioned in the specification, and it also says that the drawing is consistent with the fastening of the rails upon the upper side of the frame, and indicates nothing upon the subject. It seems to me evident from the drawing that the cross-rails were fastened to the under side of the bed-frame, and that the springs were removed from below the frame. This belief is confirmed by the fact that the woven-wire sheet is firmly fastened upon the top of the frame, though capable of removal, and the natural way of introducing coiled springs into the structure would seem to be from under the frame. In view of the familiar method of constructing spring-seats for beds, which consisted of spring cross-sections, which are separately inserted, and can be removed from above the frame, and of the method shown in the Kneppler patent, it does not appear that there was patentable invention in the use of the Kneppler removable cross-slats in an upholstered car-seat. It was simply the use in a car-seat of the separate spring sections of a bed-seat, without substantial change in the manner of application, and without substantially distinct result. Indeed, if the Kneppler patent had not existed, it would seem to me somewhat questionable whether the removal of the spring sections from below instead of from above the frame could properly be considered to be an invention. Much reliance is placed by the plaintiff upon the extensive use of the Cobb seat, and the success which it has attained; but I am not sure that this success is not attributable in part to the details of manufacture described in the claims which are not infringed, as well as to the fortunate transference of the separate spring bed-slats to a car-seat. The first claim, for the general principle of separate slats removable from below, without regard to the details of construction, is within the doctrine of *Railroad Co. v. Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220. I place no stress in the decision of the case upon the L. W. Fillebrown patent of July 10, 1866, which showed a spring car-seat having springs fastened to slats extending lengthwise of the seat, and removable from below, and which were removable as a whole from the frame, without disturbing the upholstering, because I think that the question of patentable invention is presented more clearly and decisively by the Kneppler spring-seat. The bill is dismissed.

YALE & TOWNE MANUF'G CO. v. CORBIN *et al.**(Circuit Court, D. Connecticut. November 27, 1888.)***1. PATENTS FOR INVENTIONS—INFRINGEMENT—LOCK AND KEY.**

Letters patent No. 234,002, issued November 2, 1880, to Charles C. Dickerman, for an improved lock and key, the improvement consisting in the use of a sinuous parallel key-way in the rotating hub, and a corrugated flat metal key, of equal thickness throughout, are not infringed by a lock having a sinuous key-hole without parallelism in the sides of the slot, through the hub, and a key, grooved on each side, without corresponding projections opposite the grooves.

**2. SAME—LOCK CYLINDERS.**

Letters patent No. 234,213, issued November 9, 1880, to Warren H. Taylor, for improvement in lock cylinders, the improvement consisting in the use of a key-hub composed wholly or partly of sinuously or angularly slotted disks, are not infringed by a key-hub having an angular key-hole leading to a smooth slot.

**3. SAME—PATENTABILITY—LOCKS AND LATCHES.**

The second, third, and fourth claims of letters patent No. 180,287, issued July 25, 1876, to Henry R. Towne, for an improvement in locks and latches, consisting of a slide within the lock case, and controllable only when the door is open, and provided with wings to engage with either or both of the escutcheons and prevent their withdrawal from the lock case, describe a patentable invention.

Bill for Injunction by the Yale & Towne Manufacturing Company against P. & F. Corbin.

*Frederick H. Betts and J. H. Hindon Hyde, for plaintiff.*

*Charles E. Mitchell, for defendants.*

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of three letters patent, viz., No. 180,287, dated July 25, 1876, to Henry R. Towne, for an improvement in locks and latches; No. 234,002, dated November 2, 1880, to Charles C. Dickerman, for an improved lock and key; and No. 234,213, dated November 9, 1880, to Warren H. Taylor, for improvements in lock cylinders. The Dickerman patent is the most important, and will be first considered. The application for this patent was pending for a long time in the patent-office. The claims, as presented from time to time, were rejected, and therefore the specification and claims were frequently amended. The final specification was carefully drawn, and presents clearly the views which the assignee and plaintiff had of the nature of the invention. The history of the application shows with significance that the patent-office limited the scope of the patented invention to a narrow compass, and that this is especially true of the first claim. The important part of the specification is as follows:

"My invention relates to that class of locks in which, for economy of construction and convenience in use, the keys are made of thin sheet-metal; and it consists, particularly, of an improved construction of the key and its hub or trunnion, so as to increase the safety of the lock against picking, and so, also, as to admit of the key being wholly formed of a single piece of thin sheet-metal, and yet insuring its thorough guiding and support during its insertion and rotation. My invention applies particularly to locks operated by sheet-



metal keys, and provided with rotating plugs, or roll-backs, for guiding the key, and supporting it during its revolution to operate the lock. The locks to which my invention relates may be also provided with key-hole escutcheons, as hereinafter described. The objects of my invention are to obviate a great difficulty which has been found with flat keys, viz., the tilting of the key, and also to increase the difficulty of picking the lock. In the old forms of locks the keys rotate on round stems in suitable round bearings in the front and back plates of the lock. If a flat key is used, it is necessary to provide some device to guide it during its insertion, and to support it during its rotation. The device usually employed has been a hub or trunnion, which has been fitted in the bearing formerly used for the round-stemmed keys. In this plug has been cut a straight slot or key-way, into which the key could be inserted, and, the key being in place, the key and hub would revolve together, so that the bits of the key could operate the tumblers. The difficulty of this construction is that it offers inadequate resistance to the tilting of the key; that is, to its vibrating on an axis at right angles to the length of the key. The result of this tendency to tilt is twofold: *First*, it prevents the easy insertion of the key into the lock; and, *second*, it allows the key to get out of place during its rotation, and thus either stick, or perhaps fail entirely to operate the lock. In my patent No. 111,782 I have shown a key provided with a laterally-projecting rib, which, in connection with the hub therein shown, will obviate the difficulty of tilting, above pointed out. This construction, however, while effectively remedying the difficulty of tilting, adds nothing to the security of the lock against picking, and practically precludes the use of sheet-metal in the construction of keys, because a rectangular key-bit, having a rib projecting out from one side of it, with no corresponding depression on the opposite side of the bit, cannot economically be made of thin sheet-metal, if it can be made of it at all. My present invention enables me to construct a key entirely of sheet metal, and yet provided with longitudinal grooves and ribs or sinuosities, whereby the sheet-metal key is effectively guided in the lock during insertion and rotation, the security of the lock is increased by the obstacles presented to the introduction of picking tools; and these advantages are obtained without materially increasing the cost of this sheet-metal key beyond that of others of the ordinary flat form. The ordinary method of picking locks is by the insertion of a picking tool, which is placed against the tumblers. The tool is then tilted up and down, retractive pressure at the same time being kept on the bolt, the tumblers being finally adjusted by this tentative process until the bolt can be retracted. It is evident that if any obstruction is made to this tilting of a picking tool, the difficulty of picking will be increased, and my invention increases this difficulty by making the key-way in the plug of a sinuous or contracted form. Such a novel form of key-way in a slotted rotary key-hub, of course calls for a corresponding sinuously-shaped key of like wavy outline on its opposite sides, and such a key is much stronger and better in every respect than the ordinary flat plate-key. \* \* \*

"Figs. 3, 8, 11, and 12 show a modified application of my invention, which consists of forming the key of thin sheet-metal, in the ordinary way, and in subsequently milling, or otherwise cutting a longitudinal groove or depression in both of its sides. In this case, the hub or trunnion has a corresponding rib or projection on both of its inner walls, thus forming a key-way of a cross-section coincident with that of the key. This construction, and that shown by Fig. 22, although accomplishing the desired results in some measure, does so at a greater cost of manufacture, and at the expense of weakening the key, and is therefore less desirable than those forms which are more properly termed 'sinuous,' and which preserve the parallelism of the sides of the key and key-way. \* \* \* I am aware that a key-blade of angular zigzag outline has heretofore been made, as in the patent of Holmes and Butler; but

that key is what is known as a 'push-key,' *i. e.*, the moment the key is pushed into place the lock may be unlocked without rotating the key. The result is that, in this class of locks, picking tools do not have to be tilted to effect the desired object, and therefore corrugations are not safeguards. Moreover, the Holmes and Butler key is bitted upon its end, and is not made complete of a single piece of sheet-metal. \* \* \* It will be perceived that my invention does not contemplate the use of a flat, rectangular key-blade, having a mere lateral rib or projection from one or both of its sides, because that would not accomplish two very useful objects desirable to be attained in connection with my present invention, as above stated, *viz.*, to prevent picking, and to cheaply and easily manufacture a parallel-sided plate-key of equal thickness throughout, and of greater strength than other parallel-sided plate-keys for rotary locks. I only use ribs upon my key where the forming of grooves by depression necessarily causes them; the essential thing being to obtain a key and a key-hole of sinuous contour, as best illustrated in Figs. 6 and 9 and 18 and 19, and to combine the advantages of these with a rotating key, and thus improve the generally preferred class of locks operated by rotary keys.

"In my said patent No. 111,732, Fig. 8 shows a rectangular plate-key, with a rib projecting from one side of its blade, and Fig. 9 shows a corresponding rectangular key-hole, with a recess in one of its sides, to accommodate the rib. The only purpose of this rib and recess is to aid in guiding and securing the key in position in the lock. It does not at all tend to prevent picking. I do not claim in this application, or intend, that it shall reach a merely ribbed plate-key, such as my said patent discloses. I do not broadly claim a key with projections or depressions upon its side or sides, or broadly claim a slotted rotary key-hub; but what I do claim is: (1) A flat or sheet-metal rotating key complete of a single piece of metal of uniform thickness, with one or more longitudinal grooves on one side, and corresponding ribs on the other, substantially as described, and adapted to be bitted transversely to said grooves and ribs. (2) In a lock, a rotating hub or trunnion, provided with a sinuous key-slot adapted to the use of a sinuous sheet-metal key, bitted on one side, the sides of the slot being parallel to each other, as described. (3) A key-hole escutcheon, with a revolving disk, in which is cut a key-hole of sinuous shape and parallel sides, substantially as described. (4) In a lock, the combination of a flat or sheet-metal key complete of one piece of metal, whose sides are parallel, and of which a cross-section is sinuous, with a hub or trunnion, provided with a key-way of the same form as the key. (5) The combination of a plate-key complete of a single piece of metal, of sinuous cross-section, and of uniform thickness, a hub provided with a key-way of a shape corresponding to the key, and tumblers, which are operated by the rotation of the key, substantially as described."

The first, second, and fourth claims are the only ones which are alleged to have been infringed by the defendant. The Dickerman lock of 1871, shown in his patent No. 111,732, was a night lock, operated by a flat key, and provided with a rotating plug or hub, into which the shaft of the key is passed, and which rotates as the key is revolved. The key had a longitudinal rib or projection upon one side, and was adapted to be bitted transversely to this projection, and to operate upon tumblers, and move the bolt when rotated. The key-hole had a groove, which corresponded with the projection upon the key. The Holmes & Butler lock had an angular key-hole, and a flat metal corrugated or grooved and ribbed "push" key, which was adapted to the angularities of the key-hole. For the purpose of fully stating the devel-

opment of the art at the date of the Dickerman invention, it may be added that the locks of the Stephenson patent of 1848, and of the Garuchon patent of 1858, each had rotating hubs, zigzag or sinuous key-ways, into which the correspondingly shaped wing of a round-stemmed key entered; but the key-holes, or the rotating hubs, were only obstructed at the wing-way of the key, and the round stem of the key "centered" the key as in the old and customary method. It will thus be seen that the Dickerman hub of the patent of 1880 was the hub of his patent of 1871, with the addition of the ribs in the hub, so arranged with grooves as to give to the key-way such a shape that it can properly be termed "sinuous," and which fit into corresponding longitudinal grooves upon the key. The corrugations upon the key, and the corresponding shape of the key-hole, are the same as the corrugations and the shape in the Holmes & Butler push key. The object of the addition to the Dickerman hub and key of 1871 was to obstruct or prevent picking. The patent of 1880 is commercially valuable, and describes an important improvement upon the well-known "Security" Yale lock. The principal part of the invention, being the portion included in the second, fourth, and fifth claims, consisted in making the key-way in the rotating hub, which is to receive the shaft of the key, sinuous, and making the key to correspond with the key-way; in other words, the combination which is distinctly described in the second claim, of sinuous parallel-sided key-way in the hub, and corrugated flat metal key. It did not consist in a sinuous key-hole, which existed in the Holmes & Butler lock, but it was limited to a key-slot or key-way, the sides of which were parallel to each other. Neither did the invention consist, so far as the key of the first claim is concerned, in any corrugated and grooved flat metal rotating key, which was bitted transversely to the ribs, or the ribbed key of 1871, plus the grooves of Holmes & Butler. Such a key could have little claim to patentable novelty. The key of the first claim, as the result of the struggle on the part of the patent-office to reject the application entirely, was limited to a key of a single piece of metal of uniform thickness, with one or more longitudinal grooves on one side, and corresponding ribs on the other. The second claim does not require that the sinuous key-way, grooved through the hub, must necessarily be combined with a key which possesses all the limitations of the first claim.

The defendant's lock is a pin-tumbler lock, with a rotating hub. The key has two longitudinal grooves upon one side, and one longitudinal groove upon the other side, and is transversely bitted. These grooves are made by milling, and have no corresponding ribs or projections, caused by the formation of the grooves, upon the side directly opposite them. The cylinder of the lock has a thin piece of metal at the front, which contains an angular key-hole. The remaining portion of the slot, and the portion which extends within the lock-plates, is plain and smooth-sided. The slotted plate will not seriously obstruct picking. The means which are relied upon for this purpose are contained in another part of the lock. The key is not an infringement of the first claim, which required that the key must be, when completed, of uniform thickness; that is, the

depressions on one side must have a corresponding rib on the other side, and the uniform thickness must thus be preserved. The key must be as thick where the grooves are as in any other part; and where there are no grooves it must be no thicker than in any other part. The defendant's key is not of uniform, but of varying, thickness, because it has no ribs on one side which correspond with the grooves on the other side. The ungrooved portions are about twice as thick as the grooved portions. The defendant's lock does not infringe the second and fourth claims, because each claim requires that the rotary hub should be provided with a sinuous key-slot or key-way, which demands more than a mere sinuous or angular key-hole, without parallelism in the sides of the slot through the hub. An angular or sinuous key-hole which is the entrance to a plain straight slot cannot justly be included in the second and fourth claims of the patent.

The object of the Taylor patent was, in the language of his specification, "to form in a cheap and simple manner a key-hub or cylinder, with an angular, curved, or sinuous slot, such as is used in connection with a longitudinally grooved or corrugated sheet-metal key, having side-bits or serrations, like the well-known 'Security' Yale lock key." The patentee further says:

"My invention consists in forming such a key-hub wholly or in part of a series of corresponding disks, suitably slotted. One method I adopt in carrying out my invention is to take a number of these disks and lay one upon another, with their slots coincident, until a pile is formed of a height equal to the desired length of the hub, and then secure them all together by one or more longitudinal rivets, or by any other well-known mechanical means. I thus obtain a cylinder with a longitudinal, sinuous, or angular slot that will fit a suitable-shaped sheet-metal key on each side of its blade at all points, when it is inserted in place; but it is not essential that the side walls of the slot shall impinge against the sides of the key-blade at all points; and hence I may, without departing from my invention, or detracting from the value of my cylinder, form it in sections, only part of which are correspondingly sinuously-slotted disks, and the rest of which are rectangularly-slotted parts, or half-cylindrical blocks, or other shaped filling pieces, sufficiently cut away to leave an open path for the key, and serving merely to connect the coincident disks, and help form the body of the hub, which, when in place in a lock, is out of sight, except its front end. Such a formation of the hub will give a sufficient fitting sinuous-bearing surface to guide the key during its insertion, and to be acted upon in turning it for the operation of the lock."

The utility of the invention consists in the economy and rapidity with which longitudinally and sinuously slotted lock-hubs can be made by its means, instead of by cutting the slots in solid cylinders. The claim of the patent is for "a key-hub, composed in whole or in part of sinuously or angularly slotted disks, substantially as described." Inasmuch as the defendant's key-hub has merely a plate in which is an angular key-hole as the entrance way to a smooth slot, it is plain that it is not, in any proper sense, the sinuously or angularly slotted key-hub of the claim.

The claims of the Towne patent are as follows:

"(1) The combination, substantially as set forth, of the bolts, the slide, or plate, moving at a right angle thereto, and the pivotal links for guiding said  
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slide; the combination being such that vertical motion of the slide shall cause a simultaneous horizontal motion of the bolt. (2) In a mortice lock, the mechanism of which to be operated upon by the key is contained within one or two separate tumbler-cases or escutcheons, adapted to be secured to the lock-case after the latter has been morticed into the door, a set or slide contained within said lock-case, and controllable only when the door is open, which set or slide is adapted to suitably engage with either one or both of said escutcheons, inserted through either or both sides of the door, and to prevent the withdrawal of said escutcheons from the lock-case. (3) The combination, substantially as set forth, of the slide H, adapted to engage with one or more escutcheons or tumbler-cases, and to prevent the withdrawal of the latter from the lock-case, and the operating-screw, J, inaccessible when the door on which the lock is used is closed. (4) The slide, or set H, provided with two wings or projections, *h, h*, and adapted to engage, as desired, with either one or two escutcheons or tumbler-cases inserted from one or both sides of the case of a mortice lock."

It is admitted that the first claim is not infringed, and that the other claims are not infringed by the slides which the defendant now uses, and that it did make a few locks which infringed those claims. The defendant denies that the improvement which they describe was a patentable invention. In view of the Yale and Winn patents, which are relied upon by the defendant as disclosing the prior state of the art, I think that there was invention on the part of the patentee, as distinguished from mechanical skill. Let there be a decree for an injunction, and for an accounting for the infringement, by the use of the "Complainant's Exhibit, Defendant Lock," of the second, third, and fourth claims of the Towne patent. The bill is dismissed as to the Dickerman and Taylor patents. The questions in regard to costs will be reserved until the final decree.

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### THE BONNIE DOON.<sup>1</sup>

BAIRD, Sheriff, *v.* THE BONNIE DOON.

(District Court, D. Delaware. November 24, 1888.)

#### 1. ADMIRALTY—COURTS—JURISDICTION—RECOVERY OF POSSESSION.

Where a sheriff has attached a vessel, which is afterwards taken out of his custody and removed into another state, he can sue in admiralty to recover possession in the district court of the district into which the vessel has been removed.

#### 2. SAME—ATTACHMENT—RIGHT TO POSSESSION.

A vessel was attached on a libel against the master individually. The master, without the knowledge or authority of the owner, removed the vessel to another state. Held that, the attachment having been illegal, and the vessel never *in custodia legis*, the sheriff was not entitled to the possession as against the owner. The owner was not chargeable with the *quasi* criminal act of the master in removing the vessel.

In Admiralty. Libel *in rem*. Exceptions to answer.

<sup>1</sup>Reported by Marks Wilks Collet, Esq., of the Philadelphia bar.

Libel by David Baird, sheriff, to recover possession of the steam-yacht Bonnie Doon.

*W. C. Spruance and C. M. Curtis*, for libelant.

*Bradford & Vandegrift*, for claimant.

WALES, J. This is a libel to recover possession. On the 7th of June, 1888, the libelant, as sheriff of Camden county, N. J., by virtue of a writ of attachment, issued out of the circuit court for said county, against John Craig, at the suit of Joseph Campbell, in an action of contract, levied on and took possession of the small steam-yacht Bonnie Doon, then lying in the Delaware river, near Beach-Street wharf, in the city of Camden, as the property of the said Craig, who was then in command and acting as master thereof. A few days after the sheriff had acquired possession of the yacht in the manner just described, and while the property was still in his custody, Craig, as is alleged, with the assistance of other persons, unknown to the libelant, unlawfully took the yacht out of the possession of the sheriff, and brought it within this district, where it was found by the sheriff, who now seeks to recover possession by virtue of his special property obtained under the levy. The answer of Craig, the master and claimant, in behalf of James Graham, of New York city, sets forth that Graham is the true and sole owner of the yacht; that he (Craig) is only the master, and as such master, in behalf of and as bailee for Graham, is entitled to have possession of the property, subject to the claim of the marshal. It is admitted that Craig quietly carried off the yacht on the ground that it was not his property, but belonged to Graham. The substance of the exceptions is that the answer affords no justification of the conduct of Craig.

Possessory actions may be brought in this court to recover ships, or other property, to which a party is entitled by virtue of a maritime right, being analogous to the common-law actions of replevin and detinue, in which the specific property is recovered, instead of damages. These actions may be brought by owners to try the right to the possession of a ship as among themselves, and by a master or owner to recover possession. Petitory, as well as possessory suits, are also within the admiralty jurisdiction, and may be brought in all cases to reinstate the owners of ships who have been wrongfully deprived of their property. Ben. Adm. §§ 276, 311. This case, then, is properly in court, and, as there is no controversy about the facts, the question for decision is one of law only, and that is, whether the libelant, whose possession of the vessel was obtained and lost under the circumstances stated in the record, should have a decree for restitution. The action in the Camden county court was against Craig, individually, for a cause of action in which he alone was liable, and had no relation to the yacht or its owner. The sheriff was commanded by his writ to attach the goods and chattels, etc., of Craig, and had no authority under that writ to seize the goods or property of any other person. In taking the property of Graham, therefore, he acted illegally, and was a trespasser. He may have been misled by seeing Craig in command, but that is no

excuse for, much less a justification of, the wrongful seizure. Possession alone is never reliable evidence of ownership. He should have informed himself of the fact of ownership, and, if in doubt, called on the plaintiff in the attachment to protect him by an indemnifying bond, which is a very common practice in such cases. Failing to do this, he took the risk, and must abide the consequences, whatever they may be, of having made an illegal levy. Drake, Attachm. § 196; Freem. Ex'ns, § 254. There is no intimation that Graham ordered the removal of the yacht from Camden, or that he has ratified Craig's conduct in causing the removal. As master, Craig had no right to take the yacht from the sheriff, and in doing so acted outside of the line of his duty. His act was of a *quasi* criminal nature, and an owner cannot be held responsible for the criminal offenses of his servant, when committed without his knowledge or consent. But the contest here is not between the sheriff and Craig; it is between the sheriff and Graham. It is conceded that Graham is entitled to have the property restored to him, but that he should go to Camden, and assert his right in the place where the seizure was made. Why so? If this court has jurisdiction of the cause, there is no reason why it should not be decided here and now, instead of putting Graham to the expense and delay of going to Camden, and renewing the contest there. It must be remembered that this whole difficulty has grown out of the sheriff's mistake in levying on property that did not belong to the defendant named in the writ. Property cannot be placed *in custodia legis* by an unauthorized levy. The custody of the sheriff in such a case is an unlawful, and not a legal, custody. The defendant (Craig) or a stranger could not interfere, but the true owner of the property may bring an action of trespass or replevin against the sheriff, or he may even take it away peaceable, if he can. Freem. Ex'ns, § 268. Craig's conduct in running off with the yacht cannot be approved. His doing so was ill-advised, but not more so than was the improvident and hasty seizure by the sheriff. It is one of the incidents of his office that a sheriff will sometimes be called on to exercise his judgment promptly in executing a writ, and he may be placed in the dilemma of making himself liable to the plaintiff in the writ by refusing to seize property represented to belong to the defendant, or, by taking it, of making himself responsible to the owner for an unwarranted levy. The owner, if he be without fault, as it appears he was in this case, must always have his property restored to him. The sheriff may have a remedy against Craig, but has no right to retain or demand possession of the vessel after the title of the owner has been established. The exceptions are overruled.

## THE EGYPTIAN MONARCH.

## ROBERTS v. THE EGYPTIAN MONARCH.

(District Court, D. New Jersey. November 17, 1888.

## 1. ADMIRALTY—JURISDICTION—CONFLICT OF LAWS.

A proceeding *in rem* by a seaman for personal injuries received on board an English vessel, while within English territorial waters, is governed by the law of England, though libellant is a naturalized American citizen.

## 2. SAME—ENGLISH HIGH COURT—SHIPPING—PERSONAL INJURIES.

The jurisdiction of the high court of admiralty of England does not extend to a claim for damages by a seaman for personal injuries received on board an English ship while within the body of a county of England.

## 3. MASTER AND SERVANT—FELLOW-SERVANTS.

A second mate, who superintends the reeling in of a hawser, is a fellow-servant with a seaman engaged in turning the reel.

## In Admiralty.

Libel by John Roberts against the British steam-ship Egyptian Monarch, Royal Exchange Shipping Company, claimant, for damages for personal injury.

A. B. Caldwell and Chas. Blandy, for libellant.

E. B. Convers, for claimant.

WALES, J. This is a proceeding *in rem* to recover damages for injuries sustained by the libellant, a seaman on board the Egyptian Monarch, on her voyage from England to the United States, in the month of July, 1886. The libellant, a naturalized citizen of the United States, had shipped as an able-bodied seaman. The vessel left the Milward docks, in the port of London, on July 14th, being towed out into the river Thames by a tug-boat attached to a two-and-a-half inch wire hawser, which was a part of the tackle of the steam-ship, and fastened at the other end to the aft-deck of the Monarch. At the time of the accident the vessel was going down the river, but was still within the limits of the port of London. The libellant, with another member of the crew, was reeling in the hawser, which had been cast off by the tug, and triced up along-side of the Monarch. One end of the hawser was fast to the reel, a horizontal drum between two uprights, passing thence out through the after-quarter chock, and along the ship's side forward to her waist, where the other end was made fast by a hempen line to the midship davit, so that the bight of the hawser just touched the water. The second mate superintended the work of reeling. Under his direction the boatswain's mate paid out the hawser from the davit by means of the line, and the men at the reel wound it up. During this operation the hawser was paid out more rapidly than it was taken up on the drum, in consequence of which the bight sank into the water at the vessel's stern and was caught by the propeller, which reversed the motion of the drum, causing the handle at which the libellant was working to fly back, and inflict on him serious bodily injuries. The libellant alleges that the accident occurred through the negligence of the second mate, and seeks to hold the owners of the ship liable. There



is not much dispute over the facts. The ship was well equipped. There was no defect in her machinery, or in the appliances or means by which the hawser was being taken in. The second mate and the boatswain's mate were competent and experienced men, and the work in which they and the libelant were engaged, at the time of the accident, was being done in the regular course of the navigation of the ship. There was nothing unusual in the character of the work, which belonged and was incident to the ordinary duties of the officers and crew. The defenses are (1) that the accident having occurred on board of an English ship while in the territorial waters and within the body of a county of England, the law of England must govern the case, and that by that law the libelant has no lien enforceable in admiralty; (2) that both the officers who were engaged in the work with the libelant were fellow-servants of the latter, and neither the ship nor her owners are liable.

The law of the ship's home is applied by comity to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline. *The Brantford City*, 29 Fed. Rep. 373. And this rule will not be affected by the fact that one or more of the crew are citizens or subjects of different countries. In *The M. Moxham*, 1 Prob. Div. 107, 114, it was held (citing *Reg. v. Anderson*, 1 L. R. Cr. Cas. 161) that a seaman, having entered into articles to serve on board an English ship, so long as he remained on board that ship was in the same position an English subject would have been. In the celebrated case of *Phillips v. Eyre*, L. R. 4 Q. B. 225, 238, which was an action for assault and false imprisonment on the island of Jamaica, Lord COCKBURN, in delivering the judgment of the court on a demurrer to the plea, said:

"The rule which obtains in respect of property and civil contracts, namely, that an act, unless intended to take effect elsewhere, shall, as regards its effect and incidents, if a conflict arises between the *lex loci* and the *lex fori*, be governed by the former, appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect, if possible, should be given."

In *The Scotland*, 105 U. S. 24, 29, the supreme court of the United States held the same doctrine. Speaking through Mr. Justice BRADLEY, it said:

"In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. These laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it was shown what that law was."

See, also, *The Olga*, 32 Fed. Rep. 329, and Whart. Conf. Law, § 475. The *lex loci*, it is generally admitted, governs the duties, rights, and rem-

edies of seamen, unless modified by treaty stipulations. *The Belgenland*, 114 U. S. 355, 364, 5 Sup. Ct. Rep. 860; *The John Ritson*, 35 Fed. Rep. 663. In *The Maud Carter*, 29 Fed. Rep. 156, the rule of comity, as thus defined, was applied in the most liberal manner. There the libelants claimed a maritime lien against a British vessel for advances and supplies while in a British port. Under the maritime law of the United States advances and supplies of like character would not create any lien; "but," says Judge NELSON, "this vessel is a British vessel, and subject to British law. Under the circumstances it is the duty of the court to administer and apply the British law exactly as it would be applied if the vessel were in an English court. \* \* \* As the lien would be enforced against this vessel in an English court, it can, as between the parties here, be enforced in this court."

It is clear, therefore, in the light of the authorities just cited, and which could be multiplied, if necessary, that, under the application of the rule of comity, the right of the libelant to redress must be governed by the law of England; and what that law is in relation to cases of this kind abundantly appears from an examination of the English books. The industrious research of his proctor has not produced any authority to show that the law of England has ever recognized the existence of a maritime lien for personal injuries such as are alleged to have been received by the libelant, under the circumstances and in the manner set forth in his libel. On the other side, the conclusion is successfully established that the English courts have not only ignored the creation of any lien under such circumstances, but that they have expressly denied it. In *The Public Opinion*, 2 Hagg. Adm. 398, a collision took place in the river Humber, 20 miles up from the sea, but within the body of a county. Sir CHRISTOPHER ROBINSON, J., said:

"That since the statutes of 13 Rich. II. c. 5, and of 3 Hen. VI. c. 11, it has been strictly held that the court of admiralty cannot exercise jurisdiction in civil cases, or causes of action arising *infra corpus comitatus*. \* \* \* No case has been found to support such proceedings, and I think I can venture to say that none has occurred within a pretty long experience which I have had in the practice of this court."

This decision was rendered in 1832. The admiralty court act (1861) 24 Vict. c. 10, extending the jurisdiction of the high court of admiralty, provides, by section 7, that the said court shall have jurisdiction over any claim for *damage* done by any ship, whether within the body of a county or upon the high seas; but it has been held that the word "damage," as used in the statute, was not intended to apply to injuries done to the person, but is solely applicable to mischief done to property. *Smith v. Brown*, (1871,) L. R. 6 Q. B. 729; *The Vera Cruz*, 10 App. Cas. 59. Lord COCKBURN, in *Smith v. Brown*, *supra*, commenting on the distinction between damage done to property and injury to the person, says that the distinction is not one of verbal criticism, but of a substantial character, as appears from the fact that this distinctive phraseology has been observed in subsequent statutes relating to the same or analogous subjects.

On the part of the libellant it is contended that this defense is a mere question of remedy, and that he is entitled to redress in this court, irrespective of any local restriction in England. There would be force in this position if the form of action only was in dispute, but the objection to the present proceeding lies deeper, and concerns the substance of the law. This is not the case of a process of attachment to compel the appearance of a defendant. The libellant sets up a charge against the ship of a specific lien, and asks for a decree of condemnation, and sale to satisfy his claim. If he is not asserting a right of property, *pro tanto*, in the ship, he assumes the right to hold her as security for the payment of whatever damages may be awarded to him. In other words, he is suing for the enforcement of a lien which does not exist under the law of England, where his personal injuries were received, and where, if at all, the lien must have been created or recognized in order to entitle him to a decree of condemnation in this court. He may have a common-law remedy, but the proceeding here is *in rem*, and is to be treated according to the law and practice of admiralty courts, and is not a remedy afforded by the common law; it is a proceeding under the civil law. *The Moses Taylor*, 4 Wall. 431. It is only when a maritime lien arises that it can be enforced in admiralty. *The City of Panama*, 101 U. S. 462.

Who are fellow-servants? There can be no controversy over the rule—now long settled, both in this country and in England—that, where several persons are engaged in the same employment, and one of them is injured by the negligence of another, the master or employer is not liable, provided always that he is not negligent in their selection or retention, or in providing adequate materials and means for the work; it being implied in the contract of service that the servant takes upon himself the risks arising from the negligence of his fellow-servants in the same employment. *Railroad Co. v. Ross*, 112 U. S. 383, 5 Sup. Ct. Rep. 184; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Morgan v. Railway Co.*, L. R. 1 Q. B. 149. Admitting, then, that the libellant was injured through the negligence of the second mate, and that he was himself without fault, yet, if this officer was his fellow-servant, the ship and her owners are exempt from liability. It will be seen by an examination of the English cases cited and commented on by Mr. Justice FIELD, in *Railroad Co. v. Ross*, *supra*, that the second mate and libellant would be considered as fellow-servants, on the ground that they were in the same common employment, and engaged in the same common work under that common employment. Conflicting decisions on this question may be found in our own courts,—federal and state,—but numerous and respectable authorities among them classify the subordinate officers of a ship as fellow-servants with the members of the crew, who are subject to their orders. The prevailing opinion is that, when the master is on board, the subordinate officers and seamen are fellow-servants. *U. S. v. Huff*, 13 Fed. Rep. 630; *Halverson v. Nisen*, 3 Sawy. 562; *Olson v. Clyde*, 32 Hun, 425; *The City of Alexandria*, 17 Fed. Rep. 390; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371; *Malone v. Transportation Co.*, 5 Biss. 315; *The E. B. Ward, Jr.*, 20 Fed. Rep. 702; *Benson v. Goodwin*, (Mass.) 17 N. E. Rep. 517. In *The City of Alexan-*

*dria*, and in *Malone v. Transportation Co.*, the court go to the extent of holding that a ship-owner is not liable for injuries received on board a vessel by one of the crew through the negligence of any of its officers, provided the ship is well equipped, and the officers are competent; this rule being founded on the principle that subordinates must be deemed to have entered upon the service with the understanding that they took their chances of negligence or carelessness on the part of others engaged in the same employment; and it is also held that the analogies of the municipal law do not always apply to accidents happening among officers and crew on shipboard. The foregoing review of the law, as applicable to the evidence, sustains both defenses, and there must therefore be a decree entered dismissing the libel.

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THE JAMES H. PRENTICE.

MYLES *et al.* v. THE JAMES H. PRENTICE.

(*District Court, E. D. Michigan.* November 21, 1888.)

1. MARITIME LIENS—MATERIALS FURNISHED—PRINCIPAL AND AGENT.

S., sole owner of a barge, contracted with B. to repair and improve her. While the work was going on he agreed to sell a half interest in her to K., and further authorized K. to superintend the work, and to settle the bills therefor. He subsequently conveyed to him his half interest. Libelants, knowing nothing of the contracts with B. and K., and supposing K. to be a part owner, furnished lumber to the contractor B., which K. inspected and promised to pay for. *Held*, that S. had so conducted himself as to lead libelants to believe that K. was authorized to bind the vessel, and that they had a lien for the amount of their bill.

2. SAME—USE OF MATERIALS.

Under a statute giving a lien for materials "furnished" in and about the building and repairing of water craft it is sufficient to show that the materials were ordered for and delivered to or near the vessel, though it appeared that a part of them were subsequently diverted, and used for other vessels. The act does not require proof that the materials were actually incorporated into the vessel sought to be charged.

In Admiralty. Libel for material furnished.

On libel for lumber furnished the steam-barge James H. Prentice, a domestic vessel, while being repaired at Detroit, in March and April, 1886. The following defense was interposed by Lewis D. Sanborn and John Kelly, claimants, viz.: That in January, 1886, Sanborn, who was then sole owner, made a contract with one Beaudry to build a cabin upon and double deck the Prentice, furnishing all work and material necessary for that purpose, for \$3,850; that about January 10th Beaudry began work under his contract, and continued the same until April 28th, when he abandoned the job, leaving it incomplete, whereby Sanborn suffered

damages in completing the work in the sum of \$400; that when Beaudry abandoned his contract there was nothing whatever due him thereunder, nor was there anything due to him at the time the lumber sued for was furnished; that no notice was given to the respondents, or either of them, nor to the master, of the libellant's claim or any part thereof, until after the abandonment by Beaudry of his contract. The answer also denied, upon information and belief, that any of the lumber furnished was used in or upon the steam-barge, and avers that whatever was furnished was supplied upon the personal credit of Beaudry, and that the same did not constitute a lien upon the barge.

*George W. Radford*, for libellants.

*H. H. Swan*, for claimants.

BROWN, J. By How. St. § 8236, "every water craft of above five tons burden, used or intended to be used in navigating the waters of this state, shall be subject to a lien thereon: (1) For all debts contracted by the owner or part owner, master, clerk, agent, or steward of such craft \* \* \* on account of work done, or materials furnished, by mechanics, tradesmen, or others in and about the building, repairing, fitting, furnishing, or equipping such craft: provided that, when labor shall be performed, or materials furnished as aforesaid, by a subcontractor or workman other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said person or persons shall have a lien upon said craft, *pro rata*, for his or their said claim, to the amount that may be due by said owner to said original contractor for work or labor then done on said water craft."

As there is no allegation in the libel that this steam-barge was used or intended to be used in navigating the waters of this state, it is undoubtedly defective in this particular. I have had frequent occasion to hold that this allegation was jurisdictional, and must appear wherever it was sought to enforce a lien given by the state statute; but as the fact appears to be that the *Prentice* was a domestic vessel of more than five tons burden, and was actually used in navigating the waters of this state, I will permit the libel to be amended, and will dispose of the case upon its merits.

As the lumber was furnished to Beaudry, the contractor, who had undertaken to improve and repair the barge, it is incumbent upon the libellants, in order to charge the vessel or her owner, to show that the lumber was furnished upon the order of the owner or his agent. The facts in this connection are as follows: Some time in January, 1886, Sanborn, who was then the sole owner of the barge, contracted with Beaudry to put a double deck and cabin upon the *Prentice* for \$3,850. While this work was pending, Sanborn agreed to sell a half interest in the vessel to John Kelly, his co-respondent in the case. It appears that Kelly was to become a half owner on the completion of the work by Beaudry, and that when she was completed he did become such, and now appears as one of the claimants in this case. Prior to March 11,

1886, libelants, who were lumber dealers in this city, delivered certain lumber to the Prentice upon the order for the same by Beaudry, who was then engaged upon his work. This lumber, however, they charged upon their books to the Prentice directly. They had no knowledge of the contract between Sanborn and Beaudry for the work, or between Sanborn and Kelly for an interest in the vessel. Some time in February Mr. Myles, one of the libelants, asked Beaudry for money on account of the lumber then furnished, and by appointment with Beaudry went to the dry-dock where the vessel was being overhauled, for the purpose of meeting Capt. Kelly; Beaudry having told Myles that he expected one of the owners down, and as soon as he came down he would get the money. Myles was there introduced to Kelly as one of the owners of the vessel. He then stated to him that he needed some money on the lumber account, to which Kelly replied that he expected some, and as soon as it came Myles should have it. A day or two afterwards Kelly came to the libelant's office with Beaudry, and asked him the amount of the bill, which was stated to him. He was also informed that the lumber had been charged to the Prentice; that it had always been libelant's custom to charge lumber furnished by them directly to the boats, to which Kelly stated: "That is all right. I am expecting a draft from Sanborn in a day or two, and, as soon as it comes, we will call in and settle your bill." Kelly also stated that Sanborn was the other owner. At this time Kelly was shown the residue of the lumber intended for the Prentice, which libelants had already gotten out, and had stored in their sheds. Kelly, in speaking of the lumber, announced his satisfaction with it, and, on Myles asking him about payment, stated that it would be all right, and that they would pay for the lumber before the boat was taken away; that they should let Beaudry have all the lumber necessary to complete the boat, and should have him certify to the bill and send it to Saginaw, and they would send a draft. After this conversation, which occurred about the 11th of March, Kelly called upon the libelants, and presented them a draft drawn and dated at East Saginaw, March 12th, payable to the order of Sanborn, for \$476. This draft was indorsed by Sanborn, payable to Kelly. Kelly indorsed the draft, and gave it to Myles, who gave Kelly a check for \$178.54, the difference between the amount of the draft and the bill of lumber furnished up to that time to the Prentice. From that time onward libelants furnished to the Prentice the lumber in question, and when the last of it was furnished obtained Beaudry's certificate to the correctness of the bill, in accordance with the instructions given by Kelly, and for the amount of this bill filed their libel. Prior to this, however, they wrote Kelly at East Saginaw, demanding a settlement, to which he replied under date of May 10th as follows:

"Mr. Beandry settled up with me a week ago Wednesday, and said he would settle his bills. He had the contract to complete our boat for a certain sum of money, and we paid it to him, and durst not pay any of his bills without an order from him, as we had never appointed him our agent. If you had got an order from him before I settled with him, I might have been able to fix it

as I did with others, I understand Beaudry left for Canada, and paid no bills. He was doing work for other boats at the same time, and taking lumber from us to them. I claim we are not holden for Beaudry's drafts."

1. Assuming these to be the facts, (and the testimony largely preponderates in this direction,) the first question here is whether Kelly can be considered a part owner, or the agent of the owner, within the meaning of the statute, since it is clear that he bore no other relation to the vessel which would authorize him to bind her by the purchase of materials on her account. It is equally clear that Beaudry had no such power, since he was a mere contractor. *The Brunette*, 19 Mo. 518. The statute above cited also distinguishes the position of a contractor from that of an agent, and makes special provision for materials furnished to such contractor. Kelly, however, had contracted with Sanborn to purchase half the vessel as soon as her repairs were completed. This contract was subsequently carried out, and he appears in this case as one of the claimants, and part owner of the vessel. By his own statement he was to superintend Beaudry's work under his contract with Sanborn, and see that it was done in accordance therewith. As such superintendent he inspected the ceiling which Beaudry had selected of libelants, and assumed to make a modification of his contract. He appears to have been put forward by Sanborn as his only representative in Detroit, and to have attended to the payment of libelant's first account against Beaudry, and also to a certain account for timber furnished by parties in Royal Oak. If, under these circumstances, he told Myles that it would be all right to let Beaudry have all the lumber he wanted, and approved of such as Beaudry had selected, and represented himself as one of the owners of the vessel, it was very natural that the libelants should act upon his supposed authority to bind her. The tone of Kelly's letter, written from Sanborn's office on the 10th of May, in which he speaks of the Prentice as "our boat," and disclaims having appointed Beaudry "our agent," but does not disclaim his own authority, certainly indicates that he supposed he was acting for and in the interest of the vessel, of which he soon after became a part owner. While the case of *The John Farron*, 7 Ben. 53, resembles this in its leading features, it is distinguishable in the important particular that the proposed purchasers, who stand in the place of Kelly in this case, never completed their contract of purchase, and the vessel was returned to her original owner. But the authority of this case, even if it were directly in point, is very considerably impaired by the fact that it was reversed upon appeal, (14 Blatchf. 24,) Judge JOHNSON holding that the owner, having put the proposed purchasers in possession of the vessel, by which they were enabled to appear as owners to third persons, and thus to obtain credit for the vessel as her owners, the vessel was liable to answer for the debt. To the same effect is the case of *The James Smith*, cited in 2 Pars. Shipp. & Adm. 146. In this case possession of the vessel was delivered to certain persons who had contracted to purchase her, and, while in possession of the proposed vendees, repairs were put upon her, which were held to constitute a lien enforceable after the original owner had resumed possession, in conse-

quence of a breach of the condition of sale. See, also, *The May Queen*, 1 Spr. 588; *The Julia Smith*, Newb. Adm. 61.

In this case Kelly now represents a moiety of the vessel. Certainly, so far as this interest is concerned, he ought not to be permitted to repudiate his own orders, given while he was the equitable, though not the legal, owner, and represented himself as the actual owner to Myles. If libelants' testimony be true,—and I think the preponderance is largely in their favor,—he would be holden personally for this bill; and, as the credit was given to the vessel, I see no reason why they should not have a lien upon his interest. But I think the vessel is liable upon the further ground that Sanborn put Kelly in a position to lead the libelants, who knew nothing of his contract with Kelly or with Beaudry, to believe that he had authority to represent him in the purchase of the lumber for the repair of the vessel. He agreed to sell him half the vessel, sent him to Detroit as his sole representative to superintend the repairs, and paid his bills through him. Under these circumstances it was not strange that the libelants were misled as to his actual authority, and I do not think Sanborn has a right to complain.

2. Further objection is made to a recovery in this case upon the ground that there is no evidence showing how much of this lumber was actually used in repairing the vessel. The evidence upon this point is that all the lumber was sent to the vessel, and was placed either upon the vessel itself, or upon the dock at which she lay, for her use; but that subsequently Beaudry, without libelants' knowledge, drew a portion of this lumber away, and used it upon other vessels; and that, when she was taken away from this dock, a residue of the lumber which still remained on board was thrown upon the dock, and left there. In this connection a large number of cases are cited to the effect that under similar statutes it has been held necessary to show that the materials have been actually incorporated into the vessel sought to be charged. Upon careful examination, however, it will be found that few of these cases support so broad a contention. It is, indeed, held that the materials must have been actually "furnished," and that no lien arises from the breach of an executory contract, *e. g.*, a refusal to accept materials ordered. *The Pacific*, 1 Blatchf. 569, 588; *The Cabarga*, 3 Blatchf. 75; *The Daniel Kaine*, 31 Fed. Rep. 746, 748; *The Alida*, Abb. Adm. 173; *The Muskegon*, 7 Ohio St. 377; *Veltman v. Thompson*, 3 N. Y. 438; *Clark v. Smith*, 14 Ill. 361; *Stout v. Sawyer*, 37 Mich. 313; *Williams v. Chapman*, 17 Ill. 423. They must undoubtedly be appropriated to the use of a particular vessel; and, where materials were furnished for two vessels, which a contractor was building, without distinction between them, it was held the libelant could only recover against each vessel for the part which was used for her benefit. *The Kiersage*, 2 Curt. 421; *The Young Sam*, Brunner's Cases, 600; *Sewell v. Hull of a New Ship*, Ware, 565. In some cases, too, the statute required in terms that the materials should be "used in the construction or repair" of a vessel, which of course necessitated a more stringent proof of an actual use than simply when they are required to be "furnished." *The Antarctic*, 1 Spr. 206. In *Moore v. Lunt*, 1 Hun, 650,



the lien, under the New York statute, was held not to extend to cases where the vessel was in another state at the time the supplies were furnished.

In three or four cases the courts seem to have gone the full length of holding that, even if the materials be ordered for and delivered to the vessel, no lien will attach if they be subsequently diverted, and sent elsewhere by the vendee. The principal one of these is *Phillips v. Wright*, 5 Sandf. 342. This was an action upon a bond for the release of the vessel. The case was referred to Mr. Johnson, subsequently judge of the court of appeals and of the circuit court of the United States; indeed, it was he who delivered the opinion of the court in the case of *The John Farron*, above cited. He found that the timber, for the value of which the action was brought, was purchased by the owners of the vessel, and furnished by the plaintiff to them within the state as materials for or towards the building of the ship, and were delivered at the yard where the ship was building, but that some part of the timber was not in fact actually employed in the building of the ship, but was used for other purposes; that plaintiff did not in any manner assent to such use, nor was he aware thereof. He held as a matter of law that the plaintiff was entitled to recover his whole claim. Judge SANFORD, however, held that the whole theory of the lien rested upon the basis that the materials "entered into and contributed to the production or equipment of the thing upon which the lien is impressed. This imposes on the material-man the necessity of seeing to it that his materials are applied to the purposes for which they are procured, if he design to rely upon a lien given to him by reason of such purpose." This case is followed in *Hiscox v. Harbeck*, 2 Bosw. 506, in which a charge to the jury that proof that materials were ordered for a vessel then building, and were furnished upon and pursuant to such order, and were sent to the yard where the vessel was being built, was *prima facie* evidence of the use of them for the purpose for which they were ordered to entitle the plaintiff to recover, was held to be erroneous. "It is not enough," says the court, "in order to establish a lien upon a vessel, that an owner should order them, and that they be traced to the yard where the vessel is being built in common with other vessels." Substantially the same ruling was made by the supreme court of Maine, in *Taggard v. Buckmore*, 42 Me. 77, and, with reference to a mechanic's lien, in *Hunter v. Blanchard*, 18 Ill. 318, in *Chapin v. Paper-Works*, 30 Conn. 461, and in *Houghton v. Bluke*, 5 Cal. 240.

Notwithstanding this formidable array of authorities, I find myself irresistibly impelled to a different conclusion. The statute authorizes a lien for "materials furnished in and about the building or repairing" of the craft. How those words can be tortured to mean that the materials so "furnished" must actually be incorporated into the craft, I am unable to see. When we speak of a bill of goods "furnished" to a person, we mean simply that they have been ordered for and delivered to such person. It would be a novel doctrine to hold that the vendor's rights could be affected by his subsequent disposal of the goods. So, by materials furnished in and about the building of a house, we understand such as are

furnished to a house in the process of construction, and for the purpose of being incorporated therein. Under the theory of the above cases the vendor could never be sure of his lien, unless he kept a man to watch that the materials are actually built into the vessel, and are not diverted to another purpose. As well might it be claimed that the grocer is bound to trace his supplies to the oven in the cook's galley. This is a stringency of proof required in no other class of cases. Such a construction operates as a constant temptation to fraud, and would serve to entrap, rather than to protect, the rights of those dependent upon it. Unless he be given a lien upon the ship for which the materials were ordered, and to which they are delivered, the libellant is practically remediless; since, if they are put upon other vessels, he has no lien upon them without a previous contract that they shall be so applied. *Rogers v. Currier*, 13 Gray, 129; *Read v. Hull of New Brig*, 1 Story, 250.

We are by no means without authority in favor of the position we have taken. The earliest case is that of *Wallace v. Melchoir*, 2 Brown, (Pa.) 104, in which, under a statute of Pennsylvania providing for a lien upon buildings "by reason of any materials found and provided by any lumber merchant for or in the erecting and constructing such building," it was held to be sufficient that the debt was contracted for and on the credit of the building, that the lumber was delivered at or near the building, at the place pointed out by the defendant, with the understanding of the parties that it was to be used in the erection thereof, although the defendant subsequently, without the knowledge or consent of the plaintiff, sold it to other persons. This case is followed by that of *The Olympic Theatre*, Id. 275, by *Hinchman v. Graham*, 2 Serg. & R. 170, and by *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507. The rule appears to be the same in Maryland. *Greenway v. Turner*, 4 Md. 296. The question was also carefully considered in *Barstow v. Robinson*, 2 Allen, 605, in which a lien was sustained upon a ship for spars furnished and wrought for it, by virtue of an express contract to that effect with its owners and builders, and delivered to and accepted by them for that purpose, although the same were never attached to the ship, or removed from the premises of those by whom they were furnished and wrought. In delivering the opinion of the court, Mr. Justice MERRICK observed:

"They [the plaintiffs] furnished the spars, and delivered them to the owner, who accepted them for the purpose for which they were made. They had therefore done everything which they could do to entitle themselves to a lien. It is difficult to see how the owners of the ship could defeat it by their subsequent conduct, for the lien arises by operation of law from the contract, and the complete performance of it by the party who thereby becomes a creditor. It certainly is of no consequence that the owners permitted the spars to remain, after delivery, and after acceptance by them for the use of the ship, in the yard of the vendors."

This case was subsequently cited with approval in *The Orpheus*, 119 Mass. 179.

The substance of this collocation of authorities is that the cases in Pennsylvania, Maryland, and Massachusetts are arrayed against those in

New York, Maine, Connecticut, Illinois, and California, and that, for the reasons I have already given, I think the former enunciate the sounder and more equitable doctrine. It results that libelants are entitled to a decree for the amount of their claim, which, however, will not be entered until the libel is amended.

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**HOLLAND v. SEVEN HUNDRED AND TWENTY-FIVE TONS OF COAL, (SUNDERLAND & RUCKER, Claimants.)**

(District Court, E. D. Wisconsin. December 4, 1888.)

**1. SHIPPING—CARRIAGE OF GOODS—DELAY—FREIGHT.**

A vessel agreed to carry coal to M. during the season of navigation, if possible, and sailed with a barge, carrying part of the cargo, in tow. The crew then lacked three men, to supply whom the vessel stopped at several ports, losing about a day. Afterwards, on the ground that the windlass of the barge was broken, the vessel put back about 65 miles to a port of refuge, instead of going forward to a similar port on her course. On resuming the voyage a gale was encountered, and the vessel put into port for the winter. The master telegraphed the consignees that the vessel was frozen up, and in answer to their reply said, "Weather too cold for open boat." Navigation was still open and the voyage could have been completed. The master knew then, while waiting for instructions from the owners, that a vessel bound for the same port had passed on her way. *Held*, that the master acted in bad faith, and was not entitled to the extra freight agreed on, but only to the highest rate paid when the delivery was made the next spring.

**2. SAME—DELAY—SPECIAL DAMAGE—NOTICE.**

Notice to the ship-brokers, given long before the shipment, that claimants wanted the coal to deliver under a contract with a third person, will not render the vessel liable for the expense of procuring other coal in fulfillment of the contract.

In Admiralty. Libel for subtraction of freight.

*George D. Van Dyke*, for libelant.

*George C. Markham*, for claimants.

JENKINS, J. This is a libel for subtraction of freight-money for the carriage of a cargo of coals. The steam-barge *Westcott*, a single-deck vessel, owned by the libelant, at Cleveland, on Tuesday, the 16th day of November, 1886, contracted with the consignors of the claimants to carry a cargo of coal from Sandusky to Milwaukee, for the freightage of \$1.35 per ton. A similar agreement was on the same day made with the barge *Middlesex*, also a single-decker, which vessel was to be towed by the *Westcott*, the latter to receive from the former for such service one-third of the gross freight-money earned. The vessels were to have "quick dispatch" in loading, contingent upon their arrival at Sandusky by Thursday, the 18th November. A like agreement was made by the consignors at Cleveland, on the same day, with the *Wall*, a single-deck barge, except that she should arrive at Sandusky on the 20th November. This vessel was to be towed by the *Cormorant*, a double-deck steam-barge. But two ves-

sels could be loaded at a time at the docks at Sandusky. On Thursday, the 18th, the shippers had some 1,900 tons of coal at the docks, a sufficient supply for the Westcott and Middlesex, and expected to give such dispatch in loading that they would be able to receive cargo and give place to the Wall upon her arrival on Saturday. At the time of the contract the Westcott was on the dry-dock at Cleveland for repairs. She, with her consort, did not arrive at the docks at Sandusky until Sunday, the 21st November. The Wall arrived at Sandusky on Saturday, the 20th, and commenced to load. Her bill of lading bears date the 23d November. She had completed her loading on or before that date. The Westcott and Middlesex commenced to load at 1:30 of the 23d, and continued until 9:30 A. M. of the 24th, then suspending for lack of coal until the morning of the 25th, when work was resumed, and three or four car-loads put on board. Then work was again suspended for lack of coal until 3 P. M. of that day, when, with an abundant supply, the loading was resumed, and completed at noon of the 26th, and bills of lading bearing that date, and in the usual form, were executed and delivered. The cargo of the Westcott was 725 tons, of the Middlesex 1,097 tons, and of the Wall 1,035 tons. The detention upon the 24th and 25th was incident to the inability of the shippers to get proper dispatch from the mines by reason of some blockade upon the railways. The Westcott, with her consort, the Middlesex, sailed from Sandusky at 2 P. M., November 26th. The Wall, from the 23d, was at anchor, waiting for the Cormorant, and did not leave Sandusky until after the Westcott, but when thereafter is not disclosed by the evidence. Upon starting, the Westcott was short three men of her usual complement of crew. She proceeded with due dispatch to Detroit, where she arrived at 12 P. M., November 26th. She there remained until 7 A. M. of the 27th, for the purpose of completing her crew, but, failing therein, proceeded, and for a like purpose put into Marine City, at 2:30 P. M. of that day. She there obtained two men. A snow-storm prevailed during the night. At what hour the men were obtained, and when the storm commenced, is not disclosed. She departed from Marine City at 4 A. M. of the 28th; arrived at Port Huron at noon, delaying there one hour to obtain and obtaining a seaman, thus completing her crew. Proceeding into Lake Huron, she passed Sand Beach at 8.15 P. M., and at midnight of the 28th, in the midst of a thick snow-storm, with a south, moderate wind, was averaging a speed of eight miles an hour. In the early morning of the 29th the wind veered to the N. W., and at 4:30 A. M. was blowing a gale. At 6 A. M., when off Sturgeon Point, the Westcott turned on her course, and made for Tawas, 35 miles to the south, for shelter, arriving there at 11 A. M. Here, the master affirms, the Middlesex discovered her windlass to have broken, and it was deemed unsafe for her to proceed further on the voyage; that there were no means of repair at Tawas; that the Middlesex could not get in behind the docks there, and it was unsafe for her to lay outside because of insufficient depth of water; and, being unable to obtain a tug, it was determined to return to Sand Beach, a harbor of refuge, 65 miles to the south. The Westcott, with the Mid-

dlesex in tow, left Tawas at 9 P. M. on the 29th, on abatement of the storm, arriving at Sand Beach at 7 A. M. of the 30th. Here a tug was obtained to tow the Middlesex back to the river, and the Westcott proceeded for Milwaukee at 1:30 P. M., with a light wind from the N. E. Thence, without difficulty, she pursued her voyage, passing Cheboygan at 8:15 A. M. of December 1st, arriving at St. Ignace at 11 A. M., where, compelled by a north-west gale, she remained until 12 P. M. of December 2d, when she proceeded with a light north wind until abreast of the north point of the South Fox. At 7 A. M. of December 3d, the wind veered to the N. W., and was working a gale. She turned about, and returned on her course, arriving at Cheboygan at 2:30 P. M. of that day. Here there was found to be six inches of ice in the harbor inside, but the Westcott went in along-side the docks without difficulty. The master from this point at once wired the owner for instructions, and wired the consignees of the cargo that he would lay the boat up, and proceed no further that season. The log discloses that on December 4th the weather was pleasant and calm, the thermometer at zero, and on the 5th, at 6 A. M., the weather was cold, accompanied by a south, fresh wind. At 4 P. M. of the 5th the master received directions from the owner to either return to Marine City, the home port of the vessel, or to lay up at Cheboygan, as his judgment should dictate. On the 6th December, the weather continuing fine, the master commenced to strip the vessel, paid off the crew, and on the evening of the 7th, having completed the stripping of the vessel, left for home. The Cormorant, with the Wall and another single-deck barge in tow, passed Cheboygan on the 6th, to the knowledge of the master of the Westcott, arriving at Milwaukee on the 8th of December. The weather remained good for some 10 days after December 5th. In the spring of 1888, and on the 24th April, the Westcott resumed her voyage, encountering and being detained by floating ice, and arriving at Milwaukee on the 26th April, delivering her cargo to the claimants upon receiving freight at the rate of 80 cents per ton, the going spring rate, preserving, however, the lien of the vessel upon the cargo for such further amount as it might appear should be justly paid.

The claimants insist (1) that the agreement with the Westcott was a time contract, the cargo to be delivered in any event before the close of navigation; (2) that the voyage was intentionally delayed; that the cargo should properly have been delivered before close of navigation, and by reason of failure therein the vessel was only entitled to the highest rate of freight at the time of delivery; and (3) that they purchased large quantities of coal, of which the cargoes of the Westcott and Middlesex were part, in fulfillment of a contract with the Wisconsin Central Railroad Company, requiring delivery to be made during the winter of 1886-1887, of which the Westcott at the time of the agreement with her had notice; that by reason of her failure to transport and deliver according to her contract, the claimants were compelled to purchase other coal in fulfillment of their contract with the railway company, at largely increased prices, and to convey the same from the mines to the places of delivery by rail, at rates of freight greatly in excess of the rate contracted

to be paid the Westcott; and seek to set off the damages so sustained against the claim of the libellant.

It was undoubtedly, as stated by the master of the Westcott, the intention of all parties that the cargo should be delivered at Milwaukee before the close of navigation. The master affirms that he took the coal to so deliver it, if he possibly could. The high rate of freight contracted to be paid leaves no room for doubt upon that subject. Such a state of facts does not, however, establish a time contract to deliver by a certain date, and at all hazards. There was no conversation upon the subject with the master, by any one, and no evidence of such a contract. It becomes unnecessary, therefore, to consider the question raised at the bar, whether a bill of lading is such a contract that, being silent as to time of delivery, a prior parol agreement of the carrier for delivery by a certain date can be imposed upon it. There was here no such parol agreement. The circumstances adduced—however strong to point the duty of the vessel with respect to avoiding all unnecessary delay on the voyage—do not warrant the claim in that behalf.

The delay of the Westcott in arriving at Sandusky, although unavoidable, could not avail her to insist upon quick dispatch. There was coal sufficient to load both the Westcott and the Middlesex had they arrived at the stipulated date. By reason of their delay and the prior arrival of the Wall, sufficient of the cargo intended for the other barges was properly given to her. The shipper was not required to await their tardy arrival. The vessels, however, had the right to ordinary dispatch. They were denied that right. The shipper engaged to have 2,900 tons of coal ready for loading the three vessels by the 21st. Therein he failed. But as only two vessels could be loaded at the dock at a time, and the Wall, under the circumstances, properly had the preference, the shipper is not chargeable with detention until the 23d. There was thereafter a delay of a day and a half. The cargo, however, was received, and bills of lading executed and delivered. The prior delay on either side is not material. By the receipt of cargo and delivery of bill of lading a legal duty was imposed upon the Westcott not to be avoided by any prior misconduct of the shipper. She then engaged, the bill of lading being silent as to time, to deliver her cargo during that season of navigation, if it could be done, with a staunch vessel, a proper crew, and without unnecessary delay. Any liability or excuse for non-performance must be predicated upon events occurring subsequent to the receipt of cargo.

The Westcott was at fault at the outset of her voyage. She was insufficiently manned. A carrier by water is bound to provide a seaworthy vessel, "capable of resisting the external forces to which it is subjected in the ordinary course of navigation," (*The Northern Belle*, 9 Wall. 526,) and equipped with the necessary officers and crew. The vessel is not seaworthy if there be a failure to provide a proper crew. *The Planter*, 2 Woods, 490. The omission to furnish such a crew occasioned certain delays on the way, in efforts to obtain seamen. If those delays of themselves prevented a delivery of the cargo during the then season of navigation, the Westcott is chargeable for such damages as naturally and

proximately resulted from such non-delivery. She would also be so liable, although such delays did not alone prevent delivery, if they operated effectively, in connection with other default of the master, to work a breach of contract to deliver.

It is first to be ascertained what delay, arising from want of a sufficient crew, is justly chargeable to the Westcott, and the effect of that delay upon her failure to deliver during that fall. There was a conceded delay for that cause of seven hours at Detroit, and of one hour at Port Huron. She stopped at Marine City to obtain men, and there remained from 2:30 P. M. of the 27th November until 4 A. M. of the 28th, a period of 13½ hours. It is claimed for the libellant that the vessel is not justly chargeable with the entire time of detention at that port, upon the ground that most of the delay there was occasioned by a snow-storm, which prevented her departure. It is true that the navigation of the river St. Clair is by means of ranges on shore by day, and of lights on shore at night, and that it was proper for the Westcott not to proceed in that storm; but, had she performed her duty, and shipped a proper crew at the outset of the voyage, she would not have had occasion to stop at that port. The necessity of detention there was imposed upon her by her own fault. If there had been no stoppage at Detroit, Marine City, or Port Huron, the Westcott would have passed out of the river and into Lake Huron, by 3:30 P. M. of the 27th, and before the snow-storm commenced. In the open lake there existed no occasion for delay upon that account. The vessel should therefore be charged with the whole of the delay at Marine City. The aggregate of the detention in the river, chargeable to the Westcott, is 21 hours and 30 minutes. The time actually consumed in making the distance from Detroit to Cheboygan, according to the vessel's log, was 41½ hours. Leaving Detroit November 26th, at 12 P. M., as she should have done if she had left Sandusky with a full complement of men, she would have arrived with her consort at Cheboygan on the 28th inst., before the gale of the 29th, which compelled her to put back to Tawas for shelter. Proceeding thence on her voyage, if, upon encountering the gale of the 29th, which set in at 4:30 A. M., she had returned on her course to Cheboygan for shelter, as was subsequently done, she would have arrived there at about the same hour she did arrive at Tawas, seeking shelter from the same blow. Leaving there on the abatement of the storm on the night of the 29th, at the same hour she left Tawas, she would have arrived at Milwaukee on the 1st of December, before the N. W. gale of that day, or would have so far progressed upon her course as to be able without difficulty to make the stiller waters of the west shore, finding shelter, if need be, at some one of the ports of refuge on that shore, ready to resume and complete her voyage on abatement of the storm.

On arriving abreast of the South Fox, the Westcott encountered a N. W. gale, and returned to Cheboygan. The master had determined upon turning about that he would attempt to go no further that season. He states the reasons for this decision to be that the boat was loaded with ice, the scuppers on deck, where the water ran off, were frozen, and the water would not run;

the decks and rigging were coated with ice; that he considered the season of navigation was closed, and that there was nobody but himself to judge whether it was fit to go or not, and he therefore laid the vessel up for the season. The master was in error in the conclusion that his judgment was final. He was not the sole arbiter of the necessity. This is not the case of sudden emergency, where error of judgment is not accounted fault. It would be intolerable if the master of a vessel charged with the duty of delivering during the season of navigation, if delivery could be effected by diligent effort, is to be the only judge of the time when effort should cease. If that were so, the obligations of contracts of affreightment would be of slight binding force, and the owners of cargo would be subjected to the mere caprice of the master. Such is not the law. It is for the court to determine whether the master was guilty of negligence in wintering his vessel under the circumstances, and at that time. His action, to be justifiable, should be had in entire good faith, and reasonable in view of his surroundings.

The vessel arrived at Cheboygan at 2:30 P. M. of the 3d December, finding six inches of ice in the still waters of the harbor, but proceeded to the docks without difficulty. The master at once wired the owner his determination to winter the vessel, and requested instructions. He received none until 4 P. M. of the 5th December, and commenced to strip the vessel on the 6th. During those three days the weather was pleasant, but cold. The *Cormorant*, with her tow of two single-deck barges, passed through the straits on the 6th, to the knowledge of the master of the *Westcott*, and arrived at Milwaukee on the 8th. This fact is not of itself controlling to charge the *Westcott* with negligence, (*Wilcox v. Five Hundred Tons of Coal*, 14 Fed. Rep. 49, 52,) but is a circumstance proper to be considered in connection with all the surroundings, as bearing upon the question of good faith. Pleasant weather continued for some 10 days thereafter. Beyond question the *Westcott* could have reached Milwaukee, had she left Cheboygan on the 4th, 5th, or 6th December. This fact, standing alone, is not decisive, but is to be considered. It has been well said that the event is always a great teacher. Possibilities are not the standard of judgment. The question is whether all that reasonable prudence required to be done under the circumstances was performed. *The Nevada*, 106 U. S. 154, 1 Sup. Ct. Rep. 234: 'The duty of the carrier is to carry safely, and to make timely delivery. Time is subordinated to safety, if both duties cannot be concurrently performed. A careful scrutiny of the evidence, however, fails to disclose any well-grounded apprehension of inability to safely carry. The vessel was staunch and strong. No injury had occurred to her through any peril of the sea. She had breasted the gales of the 29th November and of the 3d December, without damage. It is true the scuppers were frozen, and the decks and rigging were coated with ice. This is usual in all navigation in the fall. No effort appears to have been made to relieve the vessel in that regard, as might have been done, and no suggestion is hazarded that the safety of vessel or cargo was thereby endangered. The weather was more or less tempestuous. That was usual to the season of the year. The ves-



sel contracted with reference to that condition of things, and was to receive nearly double freight over spring and summer rates because of storms and tempestuous weather. The vessel owed diligence and promptitude in delivering. She was bound to diligent effort, and was obligated to deliver during that season of navigation, unless prevented by stress of weather, endangering the safety of the cargo, or preventing further progress. Exposure to inclement weather, or fear of encountering ice or cold, constitute no excuse. *The Maggie Hammond*, 9 Wall. 435. The season of navigation was not closed. The straits were open and unobstructed. There was no blockade preventing continuance of the voyage. She reached dock at Cheboygan without difficulty, in despite of ice in the still waters of the harbor. The engineer testifies, even, with respect to the storm of December 3d, that it was safe to operate the engine in that weather; "it would run all the time;" that the weather and ice furnished no obstacle to the progress of the boat. There is no good reason shown, preventing the Westcott from proceeding upon abatement of the storm of the 3d December. Fear of further foul weather furnishes no excuse.

There are circumstances indicating on the part of the master want of good faith,—a studied intention to palter with his duty. Upon the arrival of the vessel at Cheboygan, he wired the claimants, "Westcott froze up in Cheboygan. Will go no further." That was not true. He does not so assert in his testimony, and the engineer states to the contrary. He encountered no ice save that in the harbor of Cheboygan. In answer to his dispatch the consignees wired him, "Others are getting through, why can't you? We want the coal." To which the master replied on the same day, "Weather too cold for an open boat." This reply is a shifting of excuse for not proceeding, stamping the previous assertion as untrue. The excuse furnished no warrant for wintering the vessel. He had contracted to carry with respect to cold weather, and with respect to an open boat. He had demanded, and was to receive, a high rate of freight, predicated upon apprehended exposure to cold and tempestuous weather. It was not true that open boats could not proceed by reason of the cold. The *Wall* and another open boat did proceed in tow, and made safe and timely arrival.

At Marine City, on the second day of the voyage, the master of the *Middlesex*, then in tow of the *Westcott*, wired the shippers that both vessels could not get to Milwaukee; that if the *Middlesex* were released from the contract the *Westcott* could get through alone, and proposing to sell the *Middlesex's* cargo at Port Huron, and to accept river rate of freight. The *Westcott* was to receive for towage one third of the gross freight earned by the *Middlesex*. This message was sent with the knowledge of the master of the *Westcott*, and from her home port, the residence of the libellant. It is not to be presumed that the dispatch was forwarded without the assent of both owner and master of the *Westcott*. At the time the vessels had encountered no storm or heavy weather of any kind, and had but commenced the voyage. The reasons for such a message at such a time are not disclosed, and, unexplained, the act in-

dicates a disposition at the outset to evade a duty which demanded immediate and diligent action, not laggard performance, nor shuffling effort to evade.

It is claimed that at Tawas the windlass of the *Middlesex* was broken, and, from inability to obtain repairs there, and from want of a tug, it became necessary for the *Westcott* to tow her back to Sand Beach, a distance of 65 miles, where she could and did obtain a tug, which towed her to the river. In so doing the *Westcott* lost some 21 hours of time. The accident to the *Middlesex* is not mentioned in the *Westcott's* log, and no reason is there assigned for her action. The engineer of the *Westcott* confesses ignorance of the motive for the return. Assuming, however, the fact to be as stated by the master of the *Westcott*, it is not established that the injury to the windlass of the *Middlesex*, whatever it was, in any way prevented her towage. She was in fact towed back to the river. It remains unexplained why she was not rather towed to Cheboygan, on the course to Milwaukee, and left there, if the injury rendered it imprudent for her to proceed further. That was a harbor of refuge which could have been reached from Tawas by the evening of the 30th. Whether or not the *Westcott*, thence proceeding alone, could have so far progressed upon her voyage before encountering the storm of December 1st as to have found shelter therefrom at a harbor of refuge on the west shore of Lake Michigan, proceeding on its abatement to Milwaukee, is not necessary to be determined. The facts are stated as indicative of the want of recognition by the master of the character of his duty to make speedy delivery, and as giving color to his previous and subsequent conduct.

It was incumbent upon the *Westcott* to satisfactorily account for the non-delivery of her cargo during the season of navigation, and to clearly establish that non-delivery was properly attributable to causes beyond her control; not to her default. The evidence satisfactorily discloses that with proper, diligent effort the cargo could have been timely delivered. It convinces the judgment that, if there was not a studied attempt to procrastinate, there was exhibited a timidity of action, illy according with duty, preventing performance. The general policy of the maritime law holds the master responsible for all unnecessary deviation or delay in the voyage. It is in the interest of commerce that that policy should not be relaxed. The carrier should be held to strict performance of his undertaking. Contracting for high rate of freight in view of anticipated boisterous weather, he should not be absolved from his duty through apprehension of storms. Every proper effort to deliver should be exacted, and inability to proceed should be clearly shown. A strict rule of liability for delay removes all temptation to withhold delivery, constrains the master to active, vigilant, and courageous discharge of duty, and promotes commerce. It imposes the motive of self-interest, which alone is adequate to secure the precision and punctuality necessary in all maritime transactions. The libelant must be held accountable for the non-delivery of the cargo during the season of navigation.

Ordinarily, the measure of damages for delay in delivery is the differ-

ence between the value of the goods at the place of destination when they ought to have been delivered and when they were delivered, if there has been a decline in market value. This rule will usually indemnify the owner against the direct and natural consequences of the carrier's delay. It does not appear from the record that there was any decline in the market value of coals. Consequently this rule cannot be applied. It is asserted that the libelant should be held responsible for the expense incurred by claimants in procuring other coals by rail in fulfillment of their contract with the Wisconsin Central Railway Company. This claim proceeds upon the postulate that notice of that contract was given to the shipbrokers in the spring or summer preceding the shipment. If any such notice was given them,—which is doubtful,—there was none given the master of the vessel, and the brokers at the time of the alleged notice were in no sense the agents of the vessel. Notice of such a contract, to have the effect to create liability for more than ordinary damages, must be given under such circumstances as to make it a term of the contract that such damages are to be met in case of breach. *Horne v. Railway Co.*, L. R. 7 C. P. 583, L. R. 8 C. P. 131. There is no evidence warranting the application of that rule.

The consignees, having only paid the going spring rate of freight, have sustained no damage. They would suffer injury if required to pay for tardy delivery the price agreed to be paid for speedy delivery. To compel payment of more than the going spring rate of freight would work punishment to the innocent, and tender premium to wrong. The libelant, having failed in his duty, ought not to be compensated by a recovery of the price agreed upon for performance of that duty. This ruling is not predicated upon a supposed right of the court to scale the contract rate upon any notion of equity. Nor is it necessary to consider whether it was well decided in *Wilcox v. Five Hundred Tons of Coal*, 14 Fed. Rep. 49, that, delay being unavoidable, it was within the province of the court to scale the rate of freight upon the inference that the rate was based upon delivery during the then season of navigation. The decision here is placed upon another basis. The libelant seeks a recovery upon his contract, asserting performance. The contract was not performed. The stipulated freight was bottomed upon seasonable delivery. The libelant has made breach of contract with respect to the very thing which was the essential condition of the rate stipulated. Failing to duly perform, the stipulated rate of freight was not earned. Standing in breach of contract, he cannot recover upon that contract as for fulfillment of it. But, having made actual, though untimely, delivery, for the beneficial service rendered by him and accepted by the claimants, the law infers a promise, upon equitable considerations, to pay the reasonable worth of such service. This he may recover, not upon the contract, but upon an implied *assumpsit*. The libelant was paid the highest going rate of freight at the time of delivery. He is entitled to no more. The libel will be dismissed, with costs.

THE BENISON.<sup>1</sup>SEAMEN *et al.* v. THE BENISON AND HER CARGO.

(District Court, S. D. New York. November 23, 1888.)

## 1. SALVAGE—VESSEL DAMAGED BY COLLISION—TOWAGE—COMPENSATION.

The steam-ship Benison, while on a voyage from Matanzas to Philadelphia, came into collision with another steamer, by which her bow and stem were carried away down to her foot, and nearly back to her collision bulk-head. The bulk-head prevented her sinking, but there was apprehended danger of its giving way. The steam-ship Hudson, bound from New York to New Orleans, observing the signals of distress set by the Benison, bore down to her, and took her in tow. The weather and the sea at the time were calm, but the Benison, owing to the loss of her stem, could not be steered straight, but surged from side to side, twice parting the towing hawser, and threatening collision with the Hudson. After about 10 hours' towage she was brought in safety to Hampton Roads. The value of the Hudson was about \$250,000. The Benison's cargo saved was worth about \$150,000, and the vessel herself was subsequently sold at auction for \$40,500. *Held*, that the peril of the Benison was great, and the service of the Hudson of no small merit. \$7,500 was therefore awarded as salvage, besides the damage to the Hudson.

## 2. SAME—SPECIAL DAMAGE TO SALVING VESSEL.

In addition to her claim for salvage, the Hudson claimed a large sum for damage received by her machinery during the towage, and for detention. The evidence indicating that some parts of the machinery claimed to have been especially hurt had been about two-thirds worn out before this service began, and that the strain of the towage had completed that damage, and there being doubt about the other damages, *held*, that the Benison should be charged with one-third the cost of the whole repairs, including the detention of the vessel for that purpose.

## 3. SAME—VALUE OF DAMAGED VESSEL—AUCTION SALE.

A vessel damaged by collision having been sold at auction, and it appearing that the auction sale was fully attended; that the vessel had been previously examined by various persons, who afterwards attended and bid at the sale; and that her owners suffered her to pass into other hands,—*held*, that the price realized on such a sale was on the whole the most certain evidence of her market value in her damaged condition.

## 4. SAME—COSTS.

It is important that claims for special damage incurred in rendering a salvage service should be fully made known at the outset of a case, and opportunity given to contestants to attend any surveys that may be made; and where such claims were not advanced until the trial, even though full opportunity was thereafter given contestants to meet such claims, *held*, that costs would not be allowed to libelants.

In Admiralty. Action by the owners of the steam-ship Hudson, of the Cromwell line, against the English steam-ship Benison and her cargo, for salvage services rendered in towing the latter steam-ship, when disabled, from a point about 60 miles E. S. E. from Cape Henry into Hampton Roads.

John E. Parsons, for libelants.

Butler, Stillman & Hubbard, (Wilhelmus Mynderse, of counsel,) for claimant.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. The above libel was filed by the owners of the steam-ship Hudson to recover salvage compensation for towing the English steamer Benison into Hampton Roads in May, 1888. The Benison was an iron steam-ship, built in 1883, 245 feet long, 34 feet beam, 24 feet draught, with two decks, and of 1,736 gross tons. She was fully loaded with a cargo of about 2,200 tons of sugar in bags, and on the 6th of May, 1888, when about 60 miles E. S. E. from Cape Henry, in a dense fog, came in collision about noon with the Eureka, by which her stem and bows were carried away, down to her foot and nearly back to the collision bulk-head. Her iron plates were left projecting from 12 to 14 feet forward of the bulk-head on each side. The weather and sea were calm, and signals of distress were immediately set, and help requested. The Hudson is one of the Cromwell line of steamers, plying between New York and New Orleans. She was 284 feet long, 34 feet beam, 24 feet deep, and of 1,873 gross tons. On her southward course, observing the Benison at a distance, apparently not under control, and exhibiting signals of distress, the master bore down towards her, reaching her a little before 2 P. M., and, after a conference with the master of the latter, took her in tow upon a hawser supplied by the Hudson, starting about 3 P. M., and arriving within two or three miles of Thimble Shoal light about 4 next morning, in anchorage ground, where they waited for day. After day-light the Hudson accompanied the Benison inwards until she got a tug along-side, and then resumed her voyage to New Orleans. The Benison, after being taken to Norfolk, and receiving some slight temporary repairs and protection to her bows by planking, was taken to Philadelphia in completion of her voyage.

The only questions before me are the amount of compensation that should be awarded, and the value of the Benison, for the purpose of apportioning this compensation between her and the cargo. The admitted value of the Benison's cargo saved was \$150,000. The evidence as to the value of the Benison in her damaged condition ranges from \$30,000 to \$70,000. She was sold at auction for \$40,500. She was subsequently repaired at an expense apparently of not more than \$15,000 or \$20,000, and, having thereupon obtained by special act of congress an American register, which, according to the testimony, would add 60 per cent. to her market value in this country, was deemed worth \$135,000. During the year previous she had been insured by her English owners under a valued policy at the sum of \$97,500, and after the collision the owners received on a settlement with the insurers about \$72,000 in money, and retained the vessel, and the policy was canceled. The policy contained the usual clause limiting the liability of the insurers in case of collision to three-fourths of the insurance. It is urged that the insurance value ought not to be considered as evidence of the actual value, because, under the English law holding the owner in case of collision to a liability to the extent of £8 per ton, the policy should be regarded as an indemnity policy against the liability for collision; \$72,000 being about the amount of the liability of the owners upon the Benison's tonnage, and the full policy of \$97,500 being necessary to secure \$72,000 under

the three-fourths collision clause. But considering that steam-ships are subject to many other dangers of loss or damage than collision, and that for loss through any of these other causes the owner could recover on abandonment up to her valuation of \$97,500, the explanation offered is not satisfactory, in the absence of any evidence that the common understanding between the insurers and the assured was that the value was fixed in reference to the statutory limit of liability on collision. I think it is clear, however, that she was insured much beyond her actual value as an English ship. Irrespective of the auction sale, I should be inclined, upon the whole evidence, to fix her probable value as a British ship in her damaged condition at from \$50,000 to \$55,000. But considering the uncertainty of all such estimates; the fact that the auction sale was fully attended; that she was previously examined by various persons desiring her for different purposes, who attended and bid at the sale; and that her owners themselves suffered her to pass into other hands,—I am disinclined to depart from the auction price, or to hold that such a sale, evidently fairly conducted, and on full competition, is not on the whole the most certain evidence of her market value. I fix her value, therefore, at \$40,500, for the purpose of assessing the salvage charges. This makes the aggregate value of the property saved \$190,500. The value of the Hudson was about \$250,000, and her cargo the same. Her policies and bills of lading permitted her to tow and assist vessels in all situations. The weather and sea being calm, there were no other elements of difficulty, risk, or danger to the salvors than such as naturally attend the towage of so large a steamer, which, through the loss of her stem, could not be steered straight. The hawser was broken twice; the period of actual towage was about 10 hours; the extra coal consumed, 24 tons; extra oil, 5 gallons; and the detention of the Hudson was about 24 hours.

Aside from the question of damages occasioned to the Hudson during the towage service, the most material point in controversy is the degree of the Benison's danger when the towage service was begun, and her need of that service. For the claimant it is contended, and the master testifies, that she was in no immediate danger; needed no towage; could have reached Hampton Roads at about the same rate of speed as with the Hudson's help; required a convoy only; and that a convoy was all that he requested. The master of the Hudson testifies that the Benison's master stated that the reason why he desired a convoy was because he feared that the bulk-head would give way if he was towed; that the former considered there would be less danger to the bulk-head from towage, because the speed and the steering of the Benison, which, in her condition, was liable to steer wildly, could be better regulated. The towage service was consequently agreed on and accepted; and some efforts, not of much service, were made to relieve the front pressure by canvas stretched across the bow. The testimony of the master of the Benison seems to me disingenuous. He is reluctant to admit the evident and great apprehension that he felt for the safety of the ship. After her stem was carried away by the collision, the steamer settled down from

two to three feet by the head, and the water rose at once two or three feet above her fore-castle, or lower deck, and afterwards somewhat more. There was not only great fear that the collision bulk-head might give way, but the giving way of the hatch and wooden trunk leading from the fore-castle deck into the chain-locker, immediately behind the collision bulk-head, would speedily cause the vessel to fill. The hatch-cover of the wooden trunk was some two or three feet under water, and was only kept down by shoring fitted by the carpenter. The hatch, however, was not tight; and one witness testifies that on arrival at Norfolk the joints of the wooden trunk were started apart. At 6:30 p. m. the Hudson was stopped by signals from the Benison, and the latter's small boats were swung off by order of her captain; and her crew, with their clothing, and with the private instruments and effects of the master and other officers, were all sent aboard the Hudson, lest the bulk-head might give way, and the steamer sink, during the night. They stayed on the Hudson till the next morning; only the master, first officer, engineer, carpenter, and two other men remaining on board the Benison, who kept a small boat ready for instant use in case of further disaster. Nothing further, however, gave way. But it is evident that during the towage considerable water must have got in behind the collision bulk-head, as the donkey steam-pump aft was kept going continually, which was not required in the Benison's previous condition. This water must have come partly through the trunk of the chain-locker, and partly at the stringers on each side of the ship, where it oozed through the bulk-head to some extent, and ran down upon the bags of sugar underneath. I think the evidence shows that the steamer settled somewhat more by the head, through the addition of water; but when the water made its way aft it was controlled, after reaching the level of the stern pumps, by the constant use of those pumps. The consequent loss of sugar was therefore small; only about 280 bags out of 22,000 being damaged.

The Benison, in my judgment, was in a situation of great peril. Any unfavorable weather would have been likely to carry her to the bottom speedily, either by the giving way of the bulk-head, or by rending off the sides of the projecting plates. It was impossible at that time to tell to what extent the bulk-head, or the junction of the bulk-head and the projecting sides, had been strained or weakened by the carrying away of the bows. The recent instance of the *Iberia*, though not in evidence, illustrates the fact of such dangers, which, indeed, common knowledge recognizes. The situation of the Benison was much more dangerous than that of *The Colon*, 10 Ben. 60, or *The Leipsic*, 10 Fed. Rep. 585, to which my attention has been called; for both of the latter had only broken their shafts, and there was no doubt of their ability to reach port by sail. The behavior of the officers and men at the time, though the sea was then calm, is the strongest possible proof of their judgment of the matter; and the fact that the Benison might, in calm weather, have succeeded in reaching Hampton Roads, does not seem to me to lessen the actual danger, or the urgent need of the Hudson's services. Even if the Hudson had consented to act as convoy merely, on the attempt of the Benison to

steam into Hampton Roads, it is doubtful whether her necessary seamen and firemen would have been willing to remain on board during the night to serve her; as above stated, they left her at 6:30 P. M., and a stop was made at that time for no other purpose. The services of the Hudson were neither easy nor unattended by danger, on account of the irregular steering of the Benison. They made from five to seven knots an hour; but, being deep by the head, and with no stem, the Benison could not be held to her proper course. She ran first upon one side and then upon the other, rendering management difficult; and at about 4 A. M., when they were in the narrow channel way near Thimble Shoals and had swung nearly stern to stern, the Hudson was compelled to cut the hawser over her stern. And at the beginning, when the two were lying near each other, collision through the sudden sheering of the Benison was narrowly avoided. A special watch was constantly maintained at the stern of the Hudson for the purpose of counteracting, as far as possible, the surging of the Benison from side to side. Nevertheless, the Benison occasionally would run off at an angle of 45 deg. from the Hudson on either side; and in one of these lurches, at 8:30 P. M., the hawser was broken. Upon this branch of the case, therefore, although the sea and the weather were favorable, there were some special difficulties and hazards in the towage; and, as respects the peril and the value of the Benison and her cargo, the urgent necessity of immediate help, and the promptness and effectiveness of the Hudson's services, her claim is one of no small merit. For her services I allow \$7,500.

A further claim is presented for about \$7,070, for injuries caused to the Hudson's machinery by the towage service; and for \$6,500 more for her detention during the consequent repairs. On her return from New Orleans to New York, on completion of the towage voyage, upon an examination it was found that the keys of the propeller were loose, and the hub cracked and forced about an inch forward upon the tapering shaft, so as to work upon the flange of the stern bushing; that the brass sleeve of the shaft at the outer stern-bearing was loosened, shoved forward, and somewhat broken at each end; the *lignum vitæ* tube or bushing that formed the outer stern-bearing, was worn through into the brass sleeve of the bushing; and this sleeve was broken into three pieces by one cross-section and one longitudinal section. These were serious injuries. If they were the proper effects of the towage service alone, the libelants are as much entitled to be made whole for these damages, and for the necessary detention of the Hudson while repairing them, as for the loss of a hawser in the same service, so long as they would not exceed "the recognized limits of salvage awards." *The City of Chester*, 9 Prob. Div. 182, 190; *The De Bay*, 8 App. Cas. 559. In the case of *The Colon*, *supra*, \$300 was allowed for injuries to the deck and machinery, and \$2,200 for damage to the cargo of green fruit through the increased delay. The chief difficulty is usually in determining whether the alleged general damages to the salvaging ship or machinery have been caused by the salvage services. *The Alaska*, 23 Fed. Rep. 597, 610; *City of Chester*, *supra*; *The Colon*, 10 Ben. 73. The injuries alleged in this case are specific; not such as general strain



merely. The libellant's superintendent contends that they were wholly caused by the salvage service, from the extra strain upon the machinery in towing so much additional dead weight, and from the frequent changes made necessary in backing and going ahead under the severe strain; and that these things would fully account for the loosening of the keys, which, it is said, would necessarily be followed by a play of the propeller back and forth upon every reversal, with the accompanying shocks, which would naturally lead to the cracking of the hub, and the forcing of it against the outer flange of the bushing, thereby interfering with the lubrication of the bearings, and causing the wear, tear, and breakage afterwards found. One other witness concurs in this view, as respects such results after the keys became loosened. Seven experts called on the part of the respondents do not recognize in the towage service anything naturally producing such results, if the machinery were previously in a sound condition.

So far as I am able to understand mechanical principles, I cannot find in the extra dead weight of the towage service, or in frequent reversing alone, any sufficient explanation of the extraordinary wear through the *lignum vite* of the stern-bearings. So far as I understand, this wear, unless accompanied by hammering, is due to friction, the amount and effect of which, under proper lubrication, are dependent on the weight or pressure of the parts, and the speed of revolution. Other circumstances being equal, I cannot perceive how the mere additional dead weight astern during the towage service should materially affect the wear of the bearings, since the pressure on the bearings remained the same, and the speed of revolution was in fact diminished. The evidence shows that about eight months before, when the steamer was upon the dry-dock, the bearings were found worn down a quarter of an inch, after several years' use. On the examination after the salvage service they were found worn down about five-eighths of an inch. On April 21st, when the steamer was in New Orleans on the trip previous to this service, the log contains the entry: "After examination, found propeller blades touching shoe." Her blades were accordingly clipped at that time. The bearings must, therefore, have been already considerably worn down. The evidence does not show exactly the original space between the blades and the shoe. The log also shows that on the evening of May 6th, after the hawser was first broken, the "wheel was discovered to be loose," which, as the engineer testifies, was inferred from a peculiar noise noticed on reversing. This was before the towage service was half completed. I am satisfied that the trouble began with the loosening of the keys; and, though it is possible, it is not probable, that this originated in the towage service. For it is not testified, and I see no reason to suppose, that reversing, with a tow behind on a hawser, subjects the propeller, or the bearings, while the keys are tight, to any more strain than reversing under ordinary circumstances; nor is any previous experience cited as specially connecting heavy towage with loosening of the propeller keys. From the natural probabilities, as they seem to me, as well as from the preponderance of expert testimony, it is more probable that the loosening

of the keys began on the previous voyage, from the contact of the blades with the shoe, and the previous working of the propeller so near the shoe as to make the water operate "like a hard substance." This would produce a succession of vibrations or shocks liable to loosen the keys; and, if once started, the loosening would be naturally increased by the frequent "racing" of the engine on the tempestuous passage that followed. Afterwards, the frequent reversals during the towage service, and the play of the propeller back and forth on the shaft, might naturally, and in the manner described by Mr. Coryell, be followed by the various injuries afterwards discovered. There are no means of determining with certainty whether the hub was cracked on the previous voyage or during the salvage service. If there had been frequent contacts of the propeller blades with the shoe before the blades were clipped, plain marks would have been worn upon the shoe. None were seen during the repairs. Marks of slight contact might either have been effaced, or not observed; and shocks to the propeller in playing back and forth after the keys were loose, on the frequent reversals during the towage service, are as adequate to explain the cracking of the hub as the previous contact with the shoe, which must have been for a brief period. But the fact that the wheel, after the keys were first loosened, would naturally remain fast upon the tapered shaft while working ahead; the fact that there was afterwards very little reversing until the towage service; and the fact that no looseness of the wheel was noticed until about the middle of the towage, when the changes and consequent shocks upon the wheel had become frequent, favor the probability that the cracking of the hub may have arisen then. Whether the hub became cracked then or before, I have no doubt that the injuries to the shaft-sleeve and the bushing arose through the ultimate contact of the hub with the flange of the outer bearing during the towage service. The interference with proper lubrication thereafter, and the shocks of the wheel playing back and forth on frequent reversals, seem to me far more likely to have caused the rapid wear of the lower part of the *lignum vitæ*, and the breakage of the bushing and the sleeves, than any other cause.

The fact, which I think must be found, that the keys had become loosened before the salvage service was entered upon, and that the Hudson's machinery was in that respect defective, and exposed her to the liability of special damage in rendering the salvage service, does not affect the justice of her claim to be made whole for any actual injuries sustained. No improper management of the Hudson, or of her machinery, while rendering the service, is charged or proved. The principle on which salvage compensation is awarded is to afford sufficient encouragement to masters and owners to take all risks of person or property necessary for the rescue of other vessels in imminent peril. Ships in distress must be aided by means of such vessels as may be at hand, whether in perfect or in defective condition. Where, as in this case, the defect of loose keys was not suspected, and special damages were sustained, within reasonable limits they should be made good. Nor is the same strictness of proof that is required in cases of contract, or of tort, as to the cause of

the damage, to be exacted, when from the nature of the case such proof is impossible. The peculiar grounds of salvage compensation are still applicable. The property saved, within the recognized limits of salvage awards, ought to bear all the risks of the service; and the necessary encouragement of such service to vessels in distress demands that when the lack of certainty in the proof as to the moment or cause of damage is unavoidable, an adjustment ought to be made that does not throw all the risk of such uncertainties upon the salving vessel, but which shall afford at least such a reasonable degree of satisfaction, in view of these very difficulties and uncertainties, as shall not leave owners in doubt whether they are to get compensation for the risks incurred in such services or not. The evidence shows with reasonable certainty that the bearings before the salvage service must have been so worn down that about two-thirds of their natural life was spent. The salvage service practically consumed the rest. This service should therefore be charged with one-third the cost of replacing the injured parts, including the detention of the vessel for that purpose; and, in the unavoidable doubt that exists as to the time of the break in the hub and the bushing, it is, I think, so closely connected with the salvage service that the same apportionment ought to be made as to those repairs also. The amount allowed will therefore be made up as follows: Salvage service itself, \$7,500; one-third of repairs to machinery, and of the detention of the Hudson, at \$150 per day, \$4,406.84; damage to cable, and extra coal and oil consumed, \$475.66; total, being  $6\frac{1}{2}$  per cent. on value, \$12,382.50; to be paid by the ship and cargo in proportion to their values as above found. Of the \$7,500 allowed for the service, three-fourths, together with the last two items of \$4,406.84 and \$475.66, should go to the owners of the Hudson; and the one-fourth of the \$7,500 to the master, officers, and crew; of which one-fourth the sum of \$300 is to be paid to the master, and the residue to the master, officers, and crew, in proportion to their wages.

The claim for damages and detention was not stated in the libel. Though some reference was made to it in the negotiations, it was not presented in any definite form. No notice of the survey was given to the respondents, nor did they understand that any such claim was made, until after several of the defendants' depositions had been taken, and after the trial had been commenced. This operated to some extent as a surprise to them; and, though full opportunity was given to meet this claim, and although it has been allowed so far only as seems just, I deem it so important that such demands should be fully made known at the outset, and opportunity given to the contestants to attend the surveys when practicable, that, in the absence of this, costs will be withheld, that it may not be supposed that the court looks with indifference upon this practice. It is with reluctance that the court has felt constrained to make this disposition of costs, since the cause, though sharply litigated, has on both sides been conducted with the most friendly consideration for the convenience of each other and for the common interest.

BRADFORD v. HALL *et al.*

SAME v. TURNER.

*(Circuit Court, S. D. Mississippi, E. D. November 20, 1888.)***1. PUBLIC LANDS—SWAMP LANDS—TITLE FROM STATE.**

By act Miss. March 12, 1852, the swamp lands theretofore granted the state by congress were transferred to a board of commissioners to sell, and cause certificates of purchase to issue to the purchaser thereof. Upon presentation of these certificates, the secretary of state was authorized to issue a patent. By act April 2, 1871, a corporation was created as the successor to the commissioners, and vested with their rights, properties, etc., and upon filing a bond the corporation was to receive a patent for the lands, except lands theretofore sold to legal purchasers. *Held*, that a purchaser from the board of commissioners, who had paid the price, and received a certificate, before the passage of the act of April 2, 1871, acquired the equitable title, which was sufficient as against purchasers from the corporation.

**2. SAME—CURATIVE ACTS.**

By the act of 1871 the execution of a valid bond was made a condition precedent to the vesting of the title in the corporation. The bond having been declared invalid, an act was passed reciting that, as under the patent to the corporation the land had been assessed for taxation, and taxes paid, the corporation should have the right to purchase lands patented by it, upon paying into the state treasury, within a certain time, a certain sum per acre. *Held* that, as no payment by the corporation had been made for the lands in controversy, the curative act was inoperative as to them.

**3. SAME—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.**

The purchasers from the corporation were chargeable with notice of the recitals in the act creating it and authorizing the transfer of the lands, as well also the failure of the corporation to comply with the terms of the act.

**4. SAME—CERTIFICATE OF PURCHASE—REGISTRATION.**

The registry laws of the state have no bearing upon complainant's title, as the certificates were not required to be registered as notice to the world of their existence.

**5. SAME—TAX TITLE—EVIDENCE.**

Tax deeds from the state auditor are insufficient to show title in the grantee, where there is no evidence of the tax sales, and report of the tax collector, by which title to the land vested in the state.

**6. SAME—VOID PATENTS—RIGHTS OF PURCHASERS—TAXES.**

The purchasers from the corporation are entitled to have refunded money expended by them in good faith in the payment of taxes and for the purchase of the tax title of the state, and it is immaterial that the complainant applied to the assessor to have the lands taxed in his name, and to the tax collector to pay the taxes, and was refused.

In Equity. Bill to quiet title.

Actions by J. J. Bradford against Israel Hall and wife, and one against Margaret P. Turner, to quiet title to certain swamp lands in the state of Mississippi.

*W. P. & J. B. Harris*, for complainant.

*E. E. Baldwin and Russell & Boone*, for defendants.

HILL, J. These two causes are submitted together upon bills, cross-bills, answers, exhibits, and proofs, from which the following facts appear: By an act of the congress of the United States, approved 28th September, 1850, the title to the lands described in the bills, together with many other lands known as "swamp lands," in this state, was vested

in this state, to be used or sold, and the proceeds used in reclaiming said lands, and for other purposes. To carry into effect the object of this donation by congress, the legislature passed an act, approved on the 12th day of March, 1852, creating a board of commissioners for the Pearl river swamp lands, in which the lands in controversy are situated, and by said act the swamp lands in said district, including the lands in controversy, were transferred and granted to said commissioners, and gave power to said board to sell and dispose of any of the lands so transferred and conveyed, for the purposes stated, and to order and cause certificates to issue to the purchaser or grantee of these lands, specifying the number of acres that the purchaser may be entitled to, and the number of the section and subdivisions of sections transferred, and the township and range in which situated. That, upon the presentation of the certificate of the treasurer of said board of commissioners, the secretary of state should issue a patent to the lands described in the certificate, in the same manner as patents are required to issue for the improvement lands. This act was amended by an act approved November 21, 1865, which, among other things, provided that after the 1st of January, 1866, the minimum price of said lands then unsold should be  $12\frac{1}{2}$  cents per acre, each. On the 29th day of March, 1871, the complainant, jointly with J. J. Seal, now deceased, purchased from Hiram Bonner, the then treasurer of said board, the lands in controversy, at the rate of  $12\frac{1}{2}$  cents per acre, and received from said Bonner, as such treasurer, certificates for the same, in compliance with said act.

The legislature passed an act which became a law and was in force on the 2d day of April, 1871, without the approval of the governor, incorporating the Pearl River Improvement & Navigation Company, and for other purposes. This act declared the said company to be the successor of the said board of commissioners, with power and authority to carry out the powers and duties of said board according to the act of March 12, 1852, and vested the company with all the rights, properties, claims, and demands, real, personal, and mixed, belonging to said board, or under their control. The third section of the act has this provision:

"That said company shall within sixty days after the passage of this act file in the office of the secretary of state, a bond in the sum of fifty thousand dollars, with two or more good securities, who shall make oath that they are worth the penalty of the bond, over and above all liabilities and exemptions, which securities shall reside in this state, to be approved by the governor; and upon the approval and filing of said bond said secretary shall from time to time, as demanded by said company, make out a patent or patents to said company, which patents shall vest the title in fee-simple in said company: provided nothing in this section shall be so construed as to require patents to issue for any land heretofore sold to legal purchasers; provided further, that no lands shall be disposed of or sold for a less sum than twenty-five cents per acre."

On the 11th day of June, 1871, and on the 27th day of June, 1871, patents were issued, signed by the governor and secretary of state, under the seal of the state, conveying, among many other lands, the lands in

controversy to the Pearl River Navigation Company; and on the 21st day of November, 1872, a deed, or what purports to be such, was executed by Samuel A. Vose, as the president of said navigation company, for all of said lands described in the two patents aforesaid, to M. S. Baldwin, for the recited consideration of \$11,000. On the 29th day of November, 1872, the navigation company, by Vose as president, executed another deed to Baldwin for lands described therein for the recited consideration of \$10,000, but stated to be to correct certain descriptions of the lands intended to be conveyed in the deed of November 21, 1872. On the 17th of April, 1873, Baldwin, by Vose, as his attorney in fact, executed a deed of conveyance to defendant Israel Hall, for the lands described in the bill against Hall's wife, and in the cross-bill, for the recited consideration of \$40,000, but which was paid in other lands and real estate situate in several of the northern states; and on the 5th day of November, 1874, Israel Hall executed a deed of conveyance to a one-half interest in the land to his wife and co-defendant. On the 15th day of December, 1873, Baldwin executed a deed of conveyance to the lands described in complainant's bill against Mrs. Turner, and in her cross-bill, to Charles H. Shepard, for the recited consideration of \$53,804.61, with other lands. Shepard gave his notes for part of the purchase money, one of which was purchased by Mrs. Turner. Shepard, to secure the note, executed a mortgage, which, with the note, was transferred to Mrs. Turner, who filed her bill in this court to foreclose the mortgage, obtained a decree for the amount due, which, not being paid as required by the decree, in pursuance to the decree the land was sold, when she became the purchaser, and obtained a deed therefor from the commissioner, all of which was confirmed by the court. The proof shows that neither Mrs. Turner, nor her husband, who acted for her, knew of any defect in the title under which she claims. The same is true of the testimony regarding Hall and wife. Both parties continued to pay the taxes on the lands claimed by them respectively, up to this present time. On the 20th day of July, 1881, patents were issued by the governor and secretary of state, under the seal of the state, to complainant and J. J. Seal to the lands described in the bills and cross-bills in these cases, under the certificates of purchase so executed by Hiram Bonner. On the 19th of April, 1873, the legislature passed an act declaring that the purpose of the act of 1871, incorporating the Pearl River Navigation Company, had failed, but that, as the patent to the lands before then made to the company had subjected them to taxation, which taxes had been paid, that, upon the payment into the treasury of the state of 25 cents per acre of all the lands that had been patented, the secretary of state should cancel and deliver up the bond or undertaking that had been filed in his office, intended to be the bond required by the act of incorporation to be executed, approved, and filed; that the purchase money so directed to be paid should be paid on or before the 1st day of October, 1873; and that, unless payment was made as provided in the act, that the title to the land should rest absolute in the state; and that the patents issued should be deposited with the secretary of state. This act also provided that if any of the lands patented to the company had

been sold by the board of commissioners and had been paid for in good faith, and received a certificate of purchase, but had failed to present the certificate, and obtained a patent, the company, upon proof of the fact, and by the affidavit of the payment, should execute a quitclaim deed to the applicant to said lands, relinquishing all right, title, claim, and interest to such lands; that the applicant should make the application for the deed within six months from the date of the act, and, if not done within that time, the title to the land should become complete in the company; that for all lands so deeded the company should receive a credit at the rate of 25 cents per acre. The act further provides that all acts and parts of acts, deeds, and proceedings whatever of the Pearl River Improvement & Navigation Company be and the same are hereby legalized, ratified, and confirmed. An act of the legislature was passed and approved on the 1st day of February, 1877, appointing a commissioner of swamp lands in this state, and directing that the secretary of state should give notice in the official journal for four weeks to all persons who had theretofore entered or purchased any of the state lands, and had not received patents from the state for the same, to come forward and procure the same by paying the purchase money, and, in case the purchase money had been paid in good faith, to exhibit the receipt therefor, or satisfactory proof that the same had been mislaid, lost, or destroyed, and on satisfactory proof of such payment the secretary should issue patents therefor, and should cancel any patents that had been improperly issued for said land. The legislature passed another act, approved on the same day, which, among other things, provides that the secretary of state, under the directions of the governor, should issue patents for land heretofore sold by and under any authority of law to persons presenting the proper certificates, or upon satisfactory proof of the loss thereof. An act was passed by the legislature, approved March 6, 1882, amending the act of 1877, directing the commissioner of the state to cancel upon his records the last entry made, and certify the same to the secretary of state, who is directed to cancel the last patent; and provision is made in said act for the refunding the money to the party, making the entry canceled.

The original bill was filed in the chancery court of Marion county, as to the lands claimed by Hall and wife, and that against Mrs. Turner in the chancery court of Hancock county, as to the lands claimed by her, both under the provisions of section 1839 of the Code of 1880, and both were removed to this court. In both it is averred that the complainant is the owner in fee-simple of the lands described as set off to him under the decree of the chancery court of Hancock county, and of four-fifths of that set off to the heirs of J. J. Seal, under conveyances from them; that the claims set up to the lands respectively by Hall and wife and Mrs. Turner, are clouds upon his title; and prays that the same be remanded by decree of the court, and that they be declared void, and canceled. The cross-bills make the same averments as to the title of the complainants in the cross-bills respectively, and the same allegations as to the defective title of Bradford, and that his claim is a cloud upon their

title, and prays that the same be declared void, and canceled. The answer and cross-bill of Hall and wife allege that the claim of Bradford was a fraud from the beginning; that no money was paid when the entries were made, or since; that there was no compliance with the statutes authorizing the entries and procurements of the patents; that complainant and Seal were barred of all right and claim thereto by the act of 1873; and other allegations; and, relying upon their being purchasers for value without notice of any defect in the titles under which they claim, they also rely upon the statute of limitations of 10 years. The same reliance upon the statute is made by complainant. The allegations in the bills and cross-bills and answers are substantially the same in both cases.

The foregoing statement of facts and allegations in the pleadings, are all that need be stated to an understanding of the questions for decision. It is a well-settled doctrine that under the statute under which these bills and cross-bills are filed, as well as under the general rule, that the complainant must show that he has a valid title to the lands claimed. Under the statute, I take it, a complete equitable title will be sufficient, so that the first question to be decided is, has complainant shown a sufficient legal or equitable title to the lands described in the bill, and superior to that of the defendant's title? It may be remarked that neither party has shown a title under the statute of limitations for want of sufficient adverse possession. The inception of complainant's title set up is the purchase and entries made on the 29th day of March, 1871. It is alleged in the answers and cross-bills that the entries were not made on that day, but on a subsequent day after the title had passed to the Pearl River Company, and were antedated; and further, that the purchase money was never paid. This allegation is denied, and, such being the case, the burden was on defendants to establish it by proof. This, in my opinion, they have failed to do. Upon the contrary, the proof is that they were made on that day, and there being no question that Hiram Bonner was the treasurer of the board of commissioners, and authorized to sell the lands, and to receive and receipt for the purchase money, and that he was only authorized to make the entries and give the certificates upon the payment of the purchase money. The certificates state that Bradford and Seal did make the purchases, and the price at which made, which could not have been done without the payment of the purchase money. Besides Bradford testifies that Bonner stated when the entries were made that he had received the purchase money from Seal; that Seal was making payments while he was attending to the issuance of the certificates; and there is no proof to the contrary. The proof shows that Bonner and Seal both died before these controversies arose, and that Bradford is the owner of four-fifths of the lands set off to Seal's heirs. I must hold that the purchase money was then paid, and the certificates issued in pursuance to the statute. The act of 1852 transferred these lands from the state to the swamp land commissioners with power to sell and dispose of the same, and it is not controverted that Bonner as the treasurer of the board had authority to sell, and give the certificates of purchase, and that, this being done, Bradford and



Seal thereby became vested with a complete equitable title to the lands so purchased. The patent from the state being the only act necessary to vest in them the complete legal title thereto, there has been no limit of time in which they should be done fixed by law; the only statute on this subject being the act of 1873, and that related to the quitclaim deeds to be executed by the Pearl River Navigation Company. The act of 1871, intended to transfer these swamp lands to the navigation company, excepted from the transfer all lands theretofore sold by the board of commissioners, so that the title to them did not and could not pass to the company. The company was made the successor of the board of swamp land commissioners, and as such was bound by all that the board had done, and took the lands, if they took them at all, with this exception, and was put upon the inquiry as to the sales that had been made. I am satisfied that neither the equitable nor a legal title to the lands in controversy ever passed to the Pearl River Navigation Company. The act of 1871, as a condition precedent to the transfer of the swamp lands in the Pearl river district to the Pearl River Improvement & Navigation Company, provided that the company should execute a bond, with two or more good and sufficient sureties, to be approved by the governor, payable to the state, in the penalty of \$50,000, and conditioned for the faithful performance of the obligations upon the part of the company in relation to the trust assumed. These are the substantial conditions required in the bond. The bond so required was to be the bond of the company, executed by its proper officer under the corporate seal of the company, and by which the company would have been bound. This bond never was executed, but what purports to be a bond made by some of the incorporators of the company, dated on the 7th day of April, 1871, was approved by the governor, and filed. This bond the supreme court of this state in the case of *Hardy v. Hartman*, 4 South. Rep. 545, (decided at last April term,) decided not to be in conformity to the requirement of the act of 1871, and that the bond required was a condition precedent to the transfer of the lands to the said company, and that no title to these lands had passed to the company. This, being a construction of the statute of the state by the supreme court of the state, becomes a part of it, and is binding on this court, in which construction I concur.

But it is contended by defendants' counsel that, whatever defects there might have been in the proceedings, they were cured by the act of 1873. This act declared that the purposes of the act of 1871 had failed, but that, as under the patent to the company the lands had been assessed for taxes, and the taxes paid, that the company should have the right to purchase the lands patented to it, by paying into the state treasury in cash, on or before the 1st of October thereafter, 25 cents per acre, but, if said payment was not made within that time, then the title to all these lands should rest in the state. It also provided that in the event the money was paid, and the title became vested in the company under the patent, and the patent had embraced lands before sold to other persons before the issuance of the patent, that, on proof of the entry and payment of

the purchase money, the company should execute to the purchaser a quitclaim deed, and the company should have a credit for the lands so quitclaimed at the rate of 25 cents per acre, this upon the presumption that the company had paid. But no payment of any money was ever made by the company to the state, so that no title ever vested in the company under this act; and all the confirmations provided in the act became inoperative, so far as it related to these lands, the title to which thereafter rested, as the act terms it, in the state, unless since transferred to others by patent; so that, in my opinion, the act of 1873 in no way conflicts with the rights and title of complainant.

The main defense set up to the original bills and rights set up in the cross-bills is that the defendants in the one and the complainants in the other are innocent purchasers for value, without notice of the defects in the chain of title under which they hold, and of any notice of complainants' title, and are not affected thereby. As to the chain of title under which they claim, they are chargeable with notice of all that goes to make their chain of title, so far as the same appears of record, or facts to which they refer, and upon which they depend, whether they examined them or not. If they did not, they must take the consequences of their neglect. Hall and wife claim under Baldwin's deed. That deed refers to the act of 1871. By reference to that act they would have found that lands theretofore sold were not transferred to the company. They would further have found that the bond was required as a condition precedent to the transfer of the lands to the company, and the place where the bond was to be filed, and could be found; and, if the one purporting to be the one required was not discovered to be sufficient, must be held to take the risk that it was the proper bond, and that the claim of title was complete from the state,—the source of title under which both parties claim. For these reasons I am satisfied that Hall and wife and Mrs. Turner do not occupy the position of innocent purchasers for value without notice of the defect in their own claims of title. The registry laws of the state have no bearing upon the title of complainant under his certificate of purchase; these laws do not require these certificates or patents to be registered as notice to the world of their existence. The patents may be registered, and copies made evidence, and that is all. The bar of six months, provided in the act of 1873, only applied to the company, and, before it expired, the company had forfeited all rights to any of the lands by reason of noncompliance with any of the conditions imposed, and no limitations of the time within which the patents should be applied for as against the state or any one else than the company have been passed by the legislature; and, the patents having been issued to the lands in controversy, I must hold that the plaintiff has shown a good title, equitable and legal, to the lands in controversy, and that the defendants to the original bill and complainants to the cross-bills have failed to establish their title to these lands so as to entitle them to the relief prayed for in the cross-bill.

Mrs. Turner has filed, as evidence in the cause, deeds from the auditor, but has failed to show the tax sales and report of the tax collector by

which the title to the lands under the sales was vested in the state, and without which the auditor's conveyance, even if the sales were valid, must fail to show title under them in Mrs. Turner. While the complainants under their cross-bills are not entitled to have their titles declared valid, and that of Bradford declared void and a cloud upon their titles, and to have them canceled as prayed for, yet, under the general prayer in the cross-bills, they are entitled to have the money expended by them in the payment of taxes, and Mrs. Turner is entitled to have the money paid by her to the auditor for the purchase of the title of the state refunded to her, with interest from the time the same was so paid. It makes no difference that Bradford applied to the tax assessor to have the lands assessed in his name, and that he applied to the tax collector to pay the taxes, and was refused the right to do so. The taxes were a charge upon the lands, and Hall and wife and Mrs. Turner paid them, believing in good faith that the lands belonged to them. They are justly and equitably entitled to have the money, with interest, refunded to them, and this charge will be a lien on the lands, and, if not paid within 60 days, the clerk of this court, as commissioner, will be directed to sell so much of the land for which the taxes were paid by the respective parties as will pay the same with the costs of sale. The result is that the prayer of the complainant in the original bill must be granted, and the prayer of the complainants in the cross-bills, with the exception stated, must be denied. The complainant in the original bill will pay one-half the costs in each case, and the defendants in each case will pay the other half of the costs respectively.

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THOMAS *et al.* v. PEORIA & R. I. RY. CO. *et al.*, (WESTERN CAR CO., Intervenor.)

(Circuit Court, N. D. Illinois. August 29, 1888.)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—FORECLOSURE—ACCOUNTING—CAR RENTS—LEASES—PUBLIC POLICY.

On foreclosure of the railroad mortgage in this case and the adjustment of claims of intervening creditors, the contract of lease of cars to the mortgagor company, by the car company dominated by the same persons, cannot be made the basis of an accounting for the use of the leased cars.

2. SAME.

But the lessor is entitled to such reasonable rent as could be obtained in the open market for similar cars, to be used in the same manner.

3. SAME—RECEIVERSHIP—CHARGES ON INCOME—CAR RENTS.

Where both before and during a receivership of the property of a railroad corporation pending mortgage foreclosure, moneys from current receipts are expended for improvements and equipment, a claim for rent of cars may be charged on the income during the receivership, and, if that is inadequate, upon the proceeds of the mortgaged property.

4. SAME—CLAIMS ACCRUING SIX MONTHS BEFORE RECEIVERSHIP.

In the absence of special circumstances, the income during the receivership, or the proceeds of the sale, will not be charged for rent of cars, claims for loss of cars, etc., accruing more than six months before the receivership.

## 5. SAME—REPAIRS OF LEASED CARS—WAIVER OF CLAIM.

A claim by the lessor for the expense of repairs to the cars will not be allowed where no claim upon the receiver, pending the foreclosure, was made, but was first made in the amended petition of intervention by the lessor, filed three years after the cars were surrendered, and there is not sufficient evidence that the cars required repairs.

## 6. SAME—RECEIVER'S CONTRACT.

A claim in this case for repairs allowed, on the receiver's agreement to keep the cars in good repair for use on the road.

## 7. SAME—INTEREST ON RENT.

While a lease of the cars by the receiver is valid until disaffirmed by the court, it is not such "an instrument in writing" as entitles the lessor to interest under Rev. St. Ill. 1885, p. 1356.

## 8. SAME—UNREASONABLE DELAY.

Where the lessor steadily claimed a larger sum than was equitably due, and was refused payment of any amount approaching that to which it was entitled, there is such an "unreasonable and vexatious delay" as will justify the allowance of interest on the aggregate amount due, from the date of the filing of the master's report.

**In Equity.** On the claim of the Western Car Company, an intervening creditor in the foreclosure of a railroad mortgage.

The original cause, in which the Western Car Company became an intervenor, was a proceeding to foreclose a mortgage executed by the Peoria & Rock Island Railway Company to secure its first mortgage bonds to the amount of \$1,500,000. The original bill was filed in October, 1874, and on February 1, 1875, J. R. Hilliard was appointed receiver of the railway company. He remained in control, and operated the railroad until after its sale under a final decree of foreclosure, passed January 11, 1877. At that sale R. R. Cabell became the purchaser. On the 17th of September, 1877, the sale was confirmed; the purchaser being allowed to pay into court, upon his bid, all the first mortgage bonds of the railway company held by him. On December 11, 1877, a further order was entered in the original cause, reciting, among other things, the assignment by Cabell to the Rock Island & Peoria Railway Company of his interest as purchaser, and ordering the master to execute and deliver to that company a deed of conveyance of the property so purchased, and the receiver to deliver to it possession. By said order it was further provided that Cabell should execute to certain sureties therein named a penal bond in the sum of \$100,000, payable to the clerk of the court, for the use of whoever should be thereto entitled, and conditioned to pay into court such sum or sums of money as the court should thereafter direct. One of the purposes of that bond was to secure the payment of any sums that should be awarded in the cause to the Western Car Company. A bond in the amount named was executed as required. It should be stated in this connection that the decree of sale provided that the residue of the proceeds of the sale of the property, after paying certain specified costs and debts, should be applied under the direction of the court—*First*, to the payment of all remaining claims of intervening creditors, as they shall be allowed by the court; *second*, to the payment of the bonds and coupons secured by the mortgage, pay-

ing the same in full if the residue was sufficient for that purpose; otherwise, paying *pro rata* upon such bonds and coupons. The report made by the master, Henry W. Bishop, upon the claim of the Western Car Company is as follows:

*"To the Honorable, the Judges of said Court:* These intervening petitions allege that on March 1, 1872, the defendant company and the petitioner made a contract in writing, by which the car company leased to the defendant company ninety cars, seventy of them box cars, numbered from 151 to 220, inclusive, and twenty stock cars, numbered from 51 to 71, inclusive, for a term of five years, at a rental for each car of \$20 per month, from the date of the delivery of said car; the contract also providing that, if any of them were disabled or destroyed, the company would immediately replace them with other cars of like quality and value, which should become the property of the car company, and also to maintain and keep said ninety cars, during the term of said contract and its renewals, in good repair and safe, and in proper running order, and at its own expense to furnish all the materials, and to make all the renewals of said cars from time to time, as they should be needed, and to put and keep them in proper condition for regular use, and, at the termination of said contract or renewals, to return said cars to the Western Car Company in proper condition and repair for their immediate and active use. That said company furnished said cars to said railway company about the date of said contract, and that the railway company received and used them, by reason of which they are entitled to the rent provided in said contract. That on October 1, 1873, another contract of a similar character was made between the parties, by which the petitioner rented to the defendant company 150 other cars, being fifty box-cars, numbered from 220 to 270, inclusive, and 100 White Line cars, numbered from 9401 to 9500, inclusive. That said second lease was also for the term of five years, and also provided for the payment of rent at \$20 per month for each car, and with the same provisions in regard to the destroyed or disabled cars, keeping the cars in repair, and returning them in good repair, at the end of the lease. That the cars referred to were used by the defendant company until its road went into the hands of the receiver, appointed by the court, February 1, 1875. That the rental was, by stipulation of July 1, 1874, reduced to \$15 per month, and continued until the receiver's appointment, leaving at that time a balance of \$35,106.48. That two of said cars were destroyed, which were of the value of \$1,500, and not replaced; and by an amended supplemental petition, filed October 16, 1877, it was claimed that there was due petitioner also the sum of \$4,000 for repairs put upon 100 White Line cars. Interest is claimed upon said sums since the dates they were respectively payable by the terms of the contract. This is, in substance, the claim of petitioner prior to the appointment of the receiver.

"The petitions further allege that a contract in writing was made on the 11th day of June, 1875, between the petitioner and the receiver, by which the petitioner rented to said receiver 138 cars for the term of one year, with the privilege of renewal, at a rental of \$10 per month for each car, keeping them in good repair for use on said road. That, under such contract, the receiver took possession of and used said cars until they were returned in bad order, with the exception of four, which were not returned at all; for the payment of which claim is made. That subsequently, in March, 1875, the receiver, with the consent of the petitioner, received 56 cars from the Chicago & Northwestern Railway Company, using the same at a rental per mile until December 1, 1875, when it is claimed, it was agreed between the parties that the use of the same should be retained by said receiver upon the same terms as provided in the contract last referred to, until the decision of the court in the

cause in which they had been replevied by the petitioner. That said receiver used the same, paying no rental therefor until rent had accrued to petitioner amounting to \$15,281.84, together with the sum of \$3,500, which, it was alleged, was the expense of putting them in good condition, besides the loss of rental or use during their repair. Interest is also claimed by said petitioner on each of said sums from the dates when payable by the terms of said contracts. These claims are therefore those which are alleged to have accrued prior to the six months immediately preceding the receivership, and those arising during the six months before the appointment of the receiver and during the receivership; and statements of account, made out in detail, are exhibited in connection with the petitions, showing the way in which they have arisen, and the basis upon which the account is stated. It is insisted upon the part of the respondent that in stating this account the rental contracts upon which the petitioner bases that portion of its claim which accrued to it from the railway company prior to the receivership, should be disregarded, because fraudulent and void; the officers and persons controlling the railway company having been at the same time interested in, and having the management and control of, the car company; and that the compensation for the use of said cars during the entire period for which the fund or the receiver is liable should be determined by its fair value, as shown by the testimony. This question seems to me to be unimportant in view of what I understand to be the settled practice of the court in cases of this kind, which practice I have endeavored to follow in stating this account by allowing to the petitioners such payments as they are shown to be reasonably entitled to by the testimony.

"The defense interposed to all of the claims set out in the petition is of the same general character, and I do not consider it necessary to refer to it here more specifically. It has been the practice of the court in cases of this character to allow against the fund or the receiver claims of this kind, established by the testimony as reasonable and just, which have accrued during the period of six months prior to the appointment of the receiver, and during the receivership, independent of any contracts which may have previously existed, unless such contracts have in some way been recognized and adopted by the court; and in stating this account, I have endeavored to follow this practice. It is insisted upon the part of the petitioner that, as to a portion of the rental term, there was such a recognition by the court of the contract relation between the parties as would charge the respondent with the payment of rentals and repairs, as provided therein. I think the testimony does not justify this belief, and I am unable to find any order of the court authorizing the receiver to enter into any contract whatever for the rental of cars upon stipulated terms. In stating this account, I have ignored that portion of it which accrued before August 1, 1874, six months prior to the appointment of a receiver, at which time it was claimed that there was due and unpaid for rentals the sum of \$32,400, upon the basis of the alleged contract price, or \$26,162.99 after a credit of \$6,237.01 for money received by petitioner for rent of the White Line cars. It is claimed by the petitioner that this sum should be applied on account of rentals due and accrued more than six months prior to the receivership. It appears, however, from the testimony, that this money was realized from the rental of the cars during the period of the three months immediately prior to the receivership, and I have therefore applied it as a credit in favor of the respondent on the account which accrued within the six months prior to the receivership. It is insisted, also, that upon the balance for rentals, as well as for repairs and renewals, interest should be credited at the rate of six per cent. per annum, and this has been done in every instance in the accounts presented by the petitioner. I have, however, disregarded this item, because I do not think it should be allowed against a receiver possessing no authority, except under the direction of the court, either to agree

upon the amount due from time to time, or to pay the same, except under its direction, or in a case where the amount in controversy is still undetermined, as in this instance.

"Upon the basis of what has already been stated, I find that for the period of six months prior to the receivership the respondents are liable for the rental of 240 cars at a stipulated price of \$15 per month, being the months of August, September, October, November, and December, 1874, and January, 1875; amounting to \$21,600. The payments which are shown to have been made upon this account amount to the sum of \$13,300, leaving a balance of \$8,300 due for the six months prior to the receivership. From the balance should be deducted the item of \$6,237.01, earned by the White Line cars during the three months immediately preceding the receivership, and paid to the petitioner by the receiver, leaving due as the balance of claim for rental that accrued within six months preceding the appointment of a receiver, the sum of \$2,062.99. The items which have been employed in making up this account are furnished in the statement of account between the petitioner and the railroad company, shown by Exhibit F to Whittredge's deposition, and also stated by counsel for petitioner in their argument; and from McKee's deposition in the demand which was made by the car company for payment of the sum claimed to be due, it appears there was included no charge for interest. The rental per month is also established by the testimony to have been a fair rental at that time. It is claimed by petitioner that there should be added to this sum due for the rental of these cars during the six months prior to the receivership the following items: Value of two lost cars, \$850.00; sum expended in repairs of White Line cars, \$4,003.86; and loss of rental during time of such repairs, \$1,000.00. The testimony shows that prior to the receivership five cars were destroyed and lost; and four of these, I think, are shown to have been lost more than six months prior to the receivership. I therefore have rejected the claims of petitioner for lost cars. It appears from the evidence that the receiver, upon his appointment, returned the 100 White Line cars, after which there was expended by the petitioners upon them for repairs the sum of \$4,003.86; and it is claimed that this expense is chargeable against the fund in court, as well as the sum of \$1,000 for loss of rental during the making of these repairs. I have disallowed both of these claims, which makes the total amount due to petitioner, exclusive of interest, and after allowing all credits prior to February 1, 1875, when the receiver was appointed, the sum of \$2,062.99. The claim of \$4,003.86 for money expended in repairs on 100 White Line cars is involved in so much uncertainty by the testimony that I have found it exceedingly difficult to deal with it. The receiver swears that no claim was ever made upon him for repairs upon these cars, and there is no testimony offered upon the part of the petitioner controverting it, and there is very little evidence, if any, tending to show that their condition required repairs when the receiver delivered them over to the petitioner, in 1875. In the original petition, filed November 11, 1876, nearly two years after their surrender, and, according to the testimony of McKee, nearly a year after the repairs were made, no claim was made for the payment of this charge; neither was any claim made until the amended and supplemental petition was filed, October 16, 1877, which was nearly three years after the surrender of the cars. In view of these facts, and the effect of the testimony in respect to the condition of the cars at the time of their surrender, I am unable to determine what, if any, proportion of these repairs should be borne by the respondent, and am therefore obliged to disregard this item of charge as not having been established by the testimony.

"The other claim of petitioner is against the receivership, and for rentals which accrued after February 1, 1875, and for cash paid for repairs of cars which were returned damaged, and for lost cars, and for interest upon all the

overdue claims. It appears from the testimony that, upon the appointment of the receiver, he returned the 100 White Line cars, and retained in his possession the remainder, claimed by the petitioner to have been 138 in number, but, as I find from the testimony, 135 only, although the auditor of the respondent treated the number as 138. The testimony shows, I think, however, that the remaining five cars were in some way destroyed or lost; that through some arrangement the receiver used these cars during February and March, 1875, at a rental of \$12 each per month, for which time payments were made at that rate, and at the rate of \$10 per month each for April, 1875, which was also paid, with the understanding that he should pay a rental of \$10 per car per month thereafter. The statement of account which is produced by the petitioner adopts these rates of rental, giving the payments that were made upon account, and charging rental during the time of their repair. A claim is also made for keeping these 135 cars in repair, and a statement of this is also exhibited in detail in connection with the petitioner's demand.

"The respondent denies that it is liable for the payment of these claims, because no engagement of that character was entered into between it and the petitioner, and, if liable at all, not to the extent demanded, for the reasons that the charges are in many instances excessive, having been unnecessarily incurred, and that a large number of the cars required were not received by it in good order. It is insisted by the respondent that it was never required by the terms of its engagement to return these cars in any better condition than they were when he received them, and that any expenses that were incurred by the petitioner in putting them into condition for releasing are not properly chargeable against respondent; that the repairs put upon said cars were excessive, unnecessary, and not suited to the character of the cars, amounting practically to renewals, and adapted to a better use than was intended for them in their original construction. I have found it difficult to deal with this branch of the case, for the reason that, while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident that in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver: and there is much testimony in the case showing this to have been the fact. It is also apparent from the testimony that in many cases cars were practically rebuilt and renewed. Upon a very careful examination of all of the testimony bearing upon this branch of petitioner's claim, I find it impossible to separate the items of this account in such a way as to equitably charge this respondent with such portion of the repairs as he should be called upon to pay upon the basis of the claim of the petitioner, although in my estimation the effect of the testimony is to show that a credit, at least to some extent, of the amount charged by the petitioner upon this item, should be applied to the reduction of this claim. A claim is also made for the value of four of the 138 cars which were never returned, amounting to \$1,800, and credit afterwards given by the return of one of them. I have already found that of the 138 cars but 135 went into the hands of the receiver, and I have therefore disregarded this claim. In addition to this, it is claimed that the receiver came into the possession of fifty-six box cars, which had been replevied from the Chicago & Northwestern Railway Company, and which, by arrangement, were used by the receiver until they were finally surrendered. For this use a mileage rent has been charged from March, 1875, to December 1, 1875, as appears by statement made by the auditor of the road, which rental, less certain conceded debits in the receiver's favor, amounts to the sum of \$391.34; and that thereafter, from December 1, 1875, to the time they were finally surrendered, for their use and for the time they were detained for repairs a charge of \$10 per month per car was made, amounting to the sum of \$13,122.23. For this last



term it is denied by the respondent that there was any written contract finally entered into. I think it is shown by the testimony that an arrangement of this character was agreed upon between the parties, and reduced to writing, though perhaps it was not finally consummated or delivered, and that, in any event, the cars were used during this time, and \$10 per month per car was a reasonable compensation for their use. A claim is also made by the petitioner for \$5,650 expended in repairing these fifty-six cars after their surrender to it by the receiver. It appears from the testimony that these cars were received in bad condition, after having been used for two or three years by the railroad, from which they appear to have been taken by the receiver, partly, at least, upon the suggestion and for the accommodation of the petitioner. It appears, however, that this sum was actually expended by the petitioner upon the cars; and, as I find it impossible from the testimony to determine to what extent the respondent is liable for the payment of these charges, I am unable to make what may be finally regarded as an equitable distribution of this liability, and am obliged to charge the respondent with the full amount of the payment shown to have been made on this account. Interest at the rate of six per cent. is charged upon all of the balances in these accounts, and credits have been given for moneys paid from time to time upon them.

"In estimating the amount due petitioner upon these claims, I have, as in case of the claim for the term prior to the receivership, not taken into account the interest demand, but have wholly disregarded it as to both branches of the account; and upon this basis I find and report that there is due and owing to the petitioner for the rent of 135 cars from February 1, 1875, to April 1, 1875, at a rental of \$12 per month per car, which rental I find from the testimony to have been a reasonable rental at that time, the sum of \$3,240.00. For the rent of 135 cars from April 1, 1875, to the date of their return at the rate of \$10 per month, which I find from the testimony to have been a reasonable rental during this term, the sum of \$35,375.97. I find that during this period there was paid out for repairing cars by petitioner the sum of \$14,046.55; and during both of these terms the payments made on account by the receiver was the sum of \$29,808.00; leaving due petitioner the sum of \$22,854.52. I find also there is due a mileage rental for the fifty-six replevied cars from March, 1875, to December 1, 1875, \$391.34; and for rent of fifty-five of these cars from December 1st to the date of their surrender at the rate of \$10 per month per car, which I find from the testimony to be a reasonable compensation for their use, the sum of \$12,857.32. That there is due for money expended for the repairs of fifty-five cars the sum of \$5,650.52; leaving due and owing petitioner upon this second branch of account against the receiver, the sum of \$18,899.18; making a total due the petitioner for the term commencing with the appointment of the receiver, and extending over the entire term of the account with the receiver, the total sum of \$41,753.70. I find the balance, therefore, due upon the claim of the petitioner for rentals and repairs and mileage, after deducting all credits, and the disallowance of interest, for the term beginning six months prior to the appointment of the receiver until the date of the surrender of the cars, respectively, the total sum of \$43,816.69, for the payment of which I recommend that a decree be entered.

"Upon this reference I have been attended by the solicitors of the respective parties, and in the examination of the matters referred to me I have had the benefit of their full and careful presentation of the case. If, however, the court should be of the opinion that the respondent is liable for the rental of cars, on the terms of the rental contracts, that accrued and remained unpaid when the six months prior to the receivership began, and for the interest upon the balances stated during that time, and for the repairs claimed to have been made during that time, and for interest upon balances for repairs claimed

during that time, then there would be due and owing petitioner for rentals prior to the receivership."

*Hopkins & Hayward and John M. Butler, for Western Car Company.*

*Chas. M. Osborne and Saml. A. Lynde, for the railroad company.*

HARLAN, Justice. The court cannot, consistently with any sound principle of equity or of public policy, recognize the contracts between the Western Car Company and the Peoria & Rock Island Railway Company, one dated March 1, 1872, and the other dated October 1, 1873, as the basis of accounting between the parties to this cause. The officers and individuals dominating the car company were, substantially, the same officers and individuals that dominated the railroad company. For every purpose of business the masters of the lessor company were also masters of the lessee company. Those who contrived and directed the making of the leases in question in behalf of the car company must, under the circumstances disclosed by the record, be deemed to have contracted simply with themselves in reference to the monthly rental of its cars, and the terms upon which they were to be used by the railroad company. When it is sought to use these leases as a means by which to reach the proceeds arising from the use and sale of the property of the lessee company, those who have an interest in such proceeds, as well as the corporation itself, are at liberty, for their own protection, to question their validity, or to insist that they shall not be made the basis of claims upon these proceeds. It would be extraordinary if the holders of the mortgage bonds of the railroad company should be denied the right to show that the obligation imposed by these leases to replace such of the leased cars as were disabled or destroyed with others of like quality and value; to maintain and keep all of them in good repair and in safe and proper running order; to furnish all the materials, and make all the renewals needed from time to time; to put and keep the cars in proper condition for regular use; and, at the termination of the lease, to return the cars to the lessor company "in proper condition and repair for immediate and active use,"—was, in effect, if not in fact, imposed upon the railroad company by those who, although holding stock in that corporation, were nevertheless interested, in behalf of the lessor company, in exacting the highest rentals for its cars, and in attaching to their use such conditions as were most favorable to it. The court cannot close its eyes to the fact that those who assumed to bind the railroad company by these leases were directly interested in the profits to accrue therefrom to the lessor company. The rule governing such transactions is not to be disregarded or enforced according as the court may happen to be able to ascertain the exact amount, in dollars and cents, which may be realized by an agent who undertakes to serve, in the same business, two principals, whose respective interests are antagonistic. Such an agent cannot make a contract for both principals that a court is bound to enforce against the wishes of the objecting principal, or other parties in interest. The present case is brought, by the evidence, within the principle announced in *Wardell v. Railroad Co.*, 103 U. S. 658. It was there said:

"The directors of corporations cannot enter into or authorize contracts in behalf of those for whom they are appointed to act, and then personally participate in its benefits. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned, whenever properly brought before the courts for consideration."

See, also, *Thomas v. Railroad Co.*, 109 U. S. 522, 3 Sup. Ct. Rep. 315; *Wright v. Railway Co.*, 117 U. S. 72, 94, 6 Sup. Ct. Rep. 697.

Practically, this is a suit by the Western Car Company upon a contract that it made, by its managers and controllers, not only for itself, but for the other contracting party, the railroad corporation. It is none the less so because those managers and controllers also had an interest in the lessee corporation. The leases referred to must therefore be put aside as a basis for ascertaining either the amount due the Western Car Company, or the nature of the obligations assumed by the railroad company or by the receiver on account of their having used the cars in question. But it does not follow that the railroad company and the receiver were entitled to use the property of the car company without making some compensation. While the leases of 1872 and 1873 cannot be made the basis of the accounting between the parties, the car company is nevertheless entitled to be reasonably compensated for the use of its cars; such compensation however, to be fixed without reference to, and wholly apart from, the leases. What is to be deemed such reasonable compensation? Or, rather, what are the elements in the inquiry as to reasonableness? On behalf of the railroad company and the bondholders it is contended, mainly upon the authority of *Thomas v. Railroad Co.*, that the true test is the value directly accruing to the railroad company from the use of the cars. If by this it is meant that the court must ascertain how much the railroad company in fact realized from the use of the cars, taking its whole business, so far as these cars were used, into account, that proposition cannot be sustained. The case cited hardly supports such a rule. All that was there said was that, in fixing the value of the labor and materials for which compensation was asked, the prices named in the contract there in question should not, in view of its illegality, govern the court; that compensation should not be given for labor and materials that were of no value whatever to the railroad company. If the labor and materials were of real value, that is, if they were needed or required by the business or necessities of the company, then they were to be paid for; the amount to be ascertained in some mode consistent with law. Such I understand to be the extent to which the *Thomas Case* goes. The court did not mean, by anything there said, to exclude evidence as to what was usually allowed for such labor and materials at that place, or in the locality where the labor was performed and the materials furnished. In the present case it is manifest that the railroad company actually needed

the cars furnished by the car company, and that they were of real value to it. Upon the question of reasonableness there is—and, in the nature of things, there must be—serious difficulty. The respondents call attention to the testimony relating to the stock dividends made by the car company, and insist upon such dividends as furnishing the proper test of rental value. But this test, while not to be disregarded altogether, is too uncertain, and would mislead; for the profits of the car company varied in different years. They also refer to the actual cost of each car, and upon that basis contend that the rent claimed by the car company is an exorbitant return for the capital at risk. This is a fair argument; but there are other considerations to be taken into account. The system of "mileage rates," as adopted between other railroad and car companies; the class of railroad companies among which that system should obtain; the rental paid, in open market, for similar cars furnished to other railroad companies by the Western Car Company, or by other car companies; the quality of the particular cars in question, as compared with cars made by other car companies,—these are all proper elements in the inquiry as to reasonableness of compensation. Recognizing it as impossible to lay down a rule that would be applicable in every case, it may be said, generally, that a fair compensation for the use of these cars during the several periods in question would be such amount as similar cars—to be used in the same manner, and upon similar roads—would commonly rent for in the open market. If the railroad company required the cars for ordinary or proper business purposes, as I think it did, it should be charged with such rental as, in the state of the market at the time, was fair and just under all the circumstances.

There are other matters of a general nature to which reference must be made before we come to consider the details of the accounting between the parties as set forth in the master's report. Under what circumstances, and to what extent, may the court charge the income of the railroad property in the hands of its receiver with the liabilities incurred by the railroad company, in respect to petitioner's cars, prior to the appointment of such receiver? Without stopping to discuss this question as if it were for the first time presented, it is sufficient to say that the following propositions are sustained by the decisions of the supreme court of the United States, viz.: (1) When "a court of chancery is asked by railroad mortgages to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable." (2) As it frequently happens, when a railroad company becomes pecuniarily embarrassed, that "debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided," and as in this way "the daily and monthly earnings, which ordinarily should

go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt," the presumption is that every railroad mortgagee, "in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." Consequently "the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements." (3) If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgage property, and hold the future income for the mortgagees, that "what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees;" this, notwithstanding the mortgage, may, in terms, give a lien upon the profits and income; for, "until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control." (4) So, also, if no order is made, when a receiver is appointed, that will, in terms, save the rights of creditors furnishing supplies, equipment, labor, etc., if it appear, in the progress of the cause, "that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business;" this "because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original equitable rights." (5) That "while ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of mortgaged assets that have been taken from the company, cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way;" as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used "to make permanent improvements in the fixed property or to buy additional equipment." *Fosdick v. Schall*, 99 U. S. 235, 252-254; *Miltenberger v. Railway Co.*, 106 U. S. 286, 311, 312, 1 Sup. Ct. Rep. 140; *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. Rep. 295; *Trust Co. v. Railway Co.*, 117 U. S. 434, 457, 6 Sup. Ct. Rep. 809; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675; *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. Rep. 1004; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887; *Trust Co. v.*

*Shepherd*, 127 U. S. 494, 8 Sup. Ct. Rep. 1250. In *Miltenberger v. Railway Co.*, and, again in *Trust Co. v. Railroad Co.*, the court said that it could not be affirmed "that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien;" that while the discretion to do so should be exercised with great care, and while the payment of such debts stands *prima facie*, on a different basis from the payment of claims arising under the receivership, the former may be brought, by special circumstances, within the principle governing the allowance of the latter.

I come now to the examination of the accounts rendered by the car company for the use of its cars. The money out of which it seeks payment of its several demands being either the proceeds of the sale of the mortgaged property, or income derived from the property during the receivership, the petitioner's claims for use of cars, etc., accruing prior to the period of six months immediately preceding the appointment of the receiver, are passed by without any expression of opinion as to their correctness. The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any published decision, has been not to charge the income of mortgaged property accruing during a receivership, or the proceeds of the sale of such property with general debts for labor, supplies, and equipment, back of the six months immediately preceding the appointment of a receiver. While the court has not, perhaps, committed itself against applying a different and more liberal rule, when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling in this case, and at this late day, to depart from it. Besides, I am of opinion that, under the circumstances that usually attend the administration of railroad property by the courts, through receivers, the rule stated is a wise and salutary one. It would not do to charge the income of mortgaged railroad property, managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies, or equipment. As was said in *Fosdick v. Schall*, the business of all railroad companies is, to a greater or less extent, done on credit. Those who perform labor, or furnish supplies and equipment, usually expect and contract to be paid within a reasonable time; and they do not ordinarily perform labor, or furnish supplies or equipment, after the railroad company has failed to pay within such time for what has been previously done or furnished. Expenses incurred within such reasonable time constitute what are called "current expenses," which ought, if possible, to be paid out of the receipts during the same period. When, therefore, debts of that character remain unsettled, or are not put in suit, for such a time as would be deemed unreasonable, it may be fairly presumed that the creditors have ceased to look to current receipts for payment, and have accepted the position of general creditors who, as such,

would have no claim for indemnity upon any special part of the income. Upon these grounds, substantially, rests the rule that recognizes the right of the court to charge the income earned during the receivership with obligations for labor, supplies, and equipment, contracted by the railroad company during the six months immediately preceding the receivership. Such debts constitute operating expenses incurred to the end that mortgage bondholders might be protected, and that the company might be kept upon its feet, and subserve the public purpose for which it was established, namely, the maintenance of a highway for the convenience of the people. I will also say that the six-months rule which this court has heretofore recognized, when applied in cases arising since July 1, 1872, finds support, by analogy, in the statute of Illinois of that date, providing that fuel, ties, materials, supplies, or any other articles or things furnished to and necessary for the construction, maintenance, operation, or repair of a railroad, by contract with a railroad corporation, or work or labor performed for such construction, maintenance, or repair by like contract, shall be paid for as part of the current expenses of the road, and a lien to secure the same is given upon "all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of such articles, or the commencement of said work or labor: provided, suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or materials furnished." It may be added that the grounds upon which the court may charge the income of mortgaged railroad property, earned during the receivership, with debts for labor, supplies, and equipment received prior to the appointment of the receiver, are so fully stated in some of the cases cited—particularly in *Fosdick v. Schall*—that further discussion of them is unnecessary. But I will say that the six-months rule was observed by me at the circuit, when disposing of the case of *Trust Co. v. Railway Co.*, and the final decree, so far as it rested upon that rule, was not disturbed by the supreme court.

What, then, is the amount due the petitioner for the use of its cars during the six months immediately preceding the appointment of the receiver; that is, from August 1, 1874, to February 1, 1875? The master finds the respondents liable for the use, during that period, of 240 cars at \$15 per month, in the sum of \$21,600; that on this account there was paid \$13,300, leaving a balance of \$8,300. From the latter sum he deducts \$6,237.01, earned by the White Line cars, and paid over to the car company, leaving a balance of \$2,062.99. The deduction of the \$6,237.01 was right, because that sum was earned by the White Line cars during the six months in question. But I am of opinion that the deduction of \$13,300 is too large by \$6,100. In estimating the payments on rental subsequent to August 1, 1874, and prior to February 1, 1875, the master included the following items in petitioner's account: August 11, 1874, \$2,500; August 22, \$3,600; September 22, \$3,600; and Octo-

ber 2, \$3,600. I am satisfied that the items of \$2,500, August 11th, and \$3,600, August 22d, aggregating \$6,100, are for rent that accrued prior to August 1, 1874; consequently, instead of \$13,300 being deducted from \$21,600, only \$7,200 should have been deducted; making a balance of \$8,162.99, instead of \$2,062.99, under this head. There is a further dispute between the parties upon this branch of the case; the petitioner contending that allowance should be made in its favor for these additional amounts: Value of two lost cars, \$850; repairs of White Line cars, \$4,003.86; loss of rental during the period of such repairs, \$1,000. The item as to the two lost cars must be rejected because, according to the weight of the evidence, they were lost prior to the six months in question. The remaining items of \$4,003.86 and \$1,000 must also be rejected for the reasons, if there were no other, that have been assigned by the master. It results that the amount due the car company, independent of any question of interest, for the period of six months just preceding the receivership, is \$8,162.99.

This brings us to the examination of the claims for the use of cars during the receivership. Upon the appointment of the receiver he retained the 100 White Line cars; but a dispute exists as to whether the number of other cars retained by him was 138 or 135. The master proceeds upon the theory that he received, and had in use, only 135 cars; five out of the original 240 cars, other than the White Line cars, having been "in some way destroyed or lost." The proof does show the loss of the two heretofore referred to, but it does not sufficiently appear that the others were destroyed. The remaining three may have been lost during the receivership. If so, the receiver was bound to account for them. Giving due weight to all the evidence, it must be held that the receiver retained and used 138 of the original 240 cars. The rent of 138 cars from February 1, 1875, to April 1, 1875, at \$12 per month, a reasonable rental for that period, makes \$3,312. I adopt that rental for the period stated, because it is reasonable, and because it is justified by the agreement between the car company and the receiver, under date of June 11, 1875, an agreement which was valid until disapproved by the court, and which, although not finally approved by the court, was so acted upon, with the knowledge of the parties, that neither side should now be permitted to question its validity. The rental from April 1, 1875, until the cars were returned, at \$10 per month, the rate specified in the receiver's agreement, aggregates \$36,163. These two sums, \$3,312, and \$36,163, make \$39,475. From this last sum deduct the difference between the rent paid by the receiver, \$29,808, and the amount paid out during the same period by the petitioner for repairs, \$14,046.55, that is, \$15,761.45, and there will remain on account of the rental of the cars from April 1, 1875, until they were returned, (excluding the replevied cars,) the sum of \$23,713.55.

The next item to be considered relates to the rental of the 56 replevied cars. The master reports, upon the basis of mileage rental from March 1, 1875, to December 1, 1875, the sum of \$391.34. That finding is approved. The main dispute here is as to the rental of the 56 cars from



and after December 1, 1875, until they were formally surrendered. He allows \$10 per month, which makes an aggregate rental, after December 1, 1875, for these cars, of \$12,857.32. Upon this branch of the case I have had great difficulty. The evidence is seriously, and, in some respects, painfully conflicting. But I perceive no reason to question the entire fidelity to truth upon the part of the witnesses. Looking at all the circumstances, I am of opinion that the indorsement by the receiver on the agreement of June 11, 1875, signed by him, that the 56 cars delivered to him, "being the cars replevied from the Chicago and Northwestern Railway Co.," shall be retained by him "upon the same terms set forth" in the above agreement, "commencing on the 1st day of December, 1875," should turn the scale. And as the terms of the agreement of June 11, 1875, were not unreasonable, and as the indorsement was one that the receiver might reasonably have made in the interest of a fair administration of the property in his hands, I approve the finding of \$12,857.32 as the rental of the replevied cars while they were under the control of the receiver. The finding of \$5,650.52 for repairs of the replevied cars, is also approved. The agreement of the receiver to keep those cars "in good repair for use on said road" justifies this allowance, if there were no other ground to sustain it.

It remains to consider the question of interest. The car company claims interest upon each item of its account for repairs, and each amount claimed as monthly rental for its cars. The demand for such interest is placed mainly upon the statute of Illinois, which provides that creditors shall be allowed to receive interest at 6 per centum per annum for all moneys after they become due on "any bond, bill, promissory note, or other instrument of writing," and "on money withheld by an unreasonable and vexatious delay of payment." Rev. St. Ill. 1845, p. 294; Id. 1874, p. 614; Id. 1881, p. 614; Id. 1885, p. 1356. In respect to interest on amounts due to the petitioner prior to the receiver's written agreement of June 11, 1875, the statute has no application; for, as already stated, the leases of 1872 and 1873 cannot be regarded valid instruments of writing, so as to be the basis of the accounting between the parties, or the foundation of a claim of interest under the local statute. Nor, assuming that statute to constitute a rule of decision in some cases for this court, do I think that the receiver's agreement of June 11, 1875, is such an instrument of writing as entitles the car company to claim interest as matter of absolute right under the statute. While that agreement or lease was valid as between the receiver and the car company until disaffirmed by the court that appointed the receiver, the car company would have had no legal ground of complaint, if the court had disapproved that agreement, and made such allowance for the use of the cars as was found to be just and reasonable, apart from the stipulations of the agreement. And while I have heretofore said that under all the circumstances of this case neither party ought to be heard to dispute the validity or terms of that agreement, it does not follow that it is a writing of the class described in the statute that has been cited. But I am of opinion that there has been, as to a portion at least of the period cov-

ered by this long litigation, a vexatious and unreasonable delay in the payment of what was justly due to the petitioner, and that some interest should be allowed. It is difficult to fix the precise date from which interest should equitably be calculated. On one side, it is apparent that the car company has steadily claimed a much larger amount than was, in good conscience, due to it, thereby justifying the respondents in making defense, from which occurred, necessarily, some delay. On the other side, it is equally apparent that the respondents have steadily refused payment of anything like the amount that the petitioner was, in good conscience, entitled to demand. Under all the circumstances of the case, I have concluded that it is right to allow the petitioner interest upon the aggregate amount due to it from June 22, 1885, the date of the filing of the master's report, until its claims are paid. I am of opinion that the following amounts should be allowed the petitioner, viz.:

|   |             |
|---|-------------|
| (1) Balance for use of cars during the six months preceding receivership, - - - - -   | \$ 8,162 99 |
| (2) Balance of rent of 138 cars from February 1, '75, to April 1, '75, at \$12 per month, and from and after the last date at \$10 per month, - - - - - | 23,713 55   |
| (3) Rent of replevied cars from March 1, '75 to December 1, '75, mileage basis, - - - - -   | 391 34      |
| (4) Rent of same from and after December 1, '75, - - - - -  | 12,857 32   |
| (5) Repairs of replevied cars, - - - - -  | 5,650 32    |
|   | <hr/>       |
|   | \$50,775 52 |
| Interest at 6 per cent. on this sum from June 22, 1885, the date of filing of master's report, to September 1, 1888, - - -                              | 9,985 80    |
|   | <hr/>       |
|   | \$60,761 32 |

This amount, increased by such interest as shall accrue on the above sum of \$50,775.52 after September 1, 1888, the petitioner is entitled to have paid out of the income of the mortgaged property earned during the receivership, and, if that be insufficient, out of the proceeds of the property itself. The stipulations between the parties, the letter of Hilliard, of date January 13, 1877, (which is admitted to be correct in its statements,) and the evidence in the cause showing the sums taken from current receipts that were applied, both before and during the receivership, for improvements, betterments, buildings, depots, machinery, and equipment, present a case that justifies the court, under the authorities cited, in charging the petitioner's claim upon the income of the property during the receivership, and, that being inadequate, upon the proceeds of the property itself. Counsel for the petitioner will prepare the proper decree, and, after submitting it to counsel for the respondents, will present it to the court for examination.

## GLENN v. FOOTE.

(Circuit Court, D. New Jersey. August 3, 1888.)

## 1. CORPORATIONS—STOCK—UNPAID INSTALLMENTS—LIABILITY OF ASSIGNEE—RELEASE OF ASSIGNOR.

Code Va. 1860, c. 57, § 24, relating to assignments of stock, provides that in any assignment the assignee and assignor shall each be liable for any unpaid installments which may have accrued or may thereafter accrue. Acts Va. 1883-84, p. 654, c. 472, authorizing compromises to be made by fiduciaries with debtors of the company, provides that the compromise made with any person claimed to be liable to the company shall not impair the liability to the company of any other person, on account of the cause of liability, but the amount so received shall be credited on the same, except, when the liability is joint it shall be credited with the full share of the party released. *He'd*, that a release of the assignor of stock by the trustee of an insolvent corporation, on payment of a certain amount on account of unpaid installments, does not discharge the assignee, the liability not being joint.

## 2. SAME—LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.

The right of the trustee to sue for unpaid subscriptions being dependent upon the making of an assessment, the statute of limitations did not begin to run until after the entry of a decree ordering an assessment, and an action brought within six years from that date is not barred.

## At Law.

This is an action for the recovery of the amount of certain assessments on 195 shares of stock of the National Express & Transportation Company owned by the defendant. Trial by jury having been waived, the cause was heard by the court on the evidence. There was no material difference between the parties as to the facts. From the record proofs, the stipulated admissions of the counsel, and the uncontradicted statements contained in the brief of plaintiff's counsel, the court makes the following special findings:

(1) The National Express & Transportation Company was chartered by the legislature of Virginia on the 12th of December, 1865, with an authorized capital of \$5,000,000, on which \$2 per share was payable at the time of subscription, and the balance as called for by the president and directors of the company.

(2) The company was duly organized, and had been in operation, only a short time, when, from mismanagement or other causes, its failure became evident, and, in order to protect its creditors, it executed a general deed of assignment to trustees of all its assets, in trust for the payment of its debts. This deed was dated September 20, 1866.

(3) The trustees named in the deed having neglected to perform their duties, the creditors of the company, on the 28th day of November, 1871, commenced a suit in the chancery court of the city of Richmond, Va., against William Parot, president of said company, William Davies, and others, upon which a writ of subpoena was duly issued out of said court, and was returned as follows: "Executed on Joseph R. Anderson, November 25, 1871, by delivering him a true copy of the within *spa*. in Chan. The others not found. BENJ. T. AUGUST, D. S. For JOHN W. WRIGHT, S. C. R. Executed in the city of Richmond, said Anderson being a resident of said city." Further return: "Executed December 4, 1871, as to M. G. Harman, by leaving at his

residence in the city of Staunton, with a white member of his family, over 16 years of age, a copy of this *ch. spa.*, explained its purport, and requested that the same be handed to said M. G. Harman on his return, he being from home at the time. W. L. MAWKY, S. A. Co." But no process was then issued against the said the National Express & Transportation Company, and on the 4th day of December, A. D. 1871, the said creditors filed their bill in said suit, praying for process of subpoena directed to the said the National Express & Transportation Company, its officers and directors, and to the trustees named in the said deed of assignment. No further process was issued therein until the 4th day of August, A. D. 1879, when an amended and supplemental bill was filed, upon which process of subpoena was issued against the said company on the 5th day of August, 1879, and served on the 8th day of August, 1879, upon Joseph R. Anderson, director, and M. B. Poiteaux, cashier, of said company, residents of the said city of Richmond. In said suit, by order of the court, the amount of the debts due by the company to its creditors was determined, and on December 14, 1880, a decree was made removing the trustees named in the deed of assignment, appointing John Glenn, the plaintiff in this suit, as trustee in their place, and ordering an assessment of 30 per cent. upon the stockholders, their legal representatives or assigns. Prior to the failure of the company, 20 per cent. of the subscribed-for stock had been collected.

(4) On the 27th of June, 1884, the equity suit was transferred to the circuit court of Henrico county, Va., and that court, on March 26, 1886, made an additional assessment of 50 per cent. upon the capital stock, and the holders thereof.

(5) These decrees authorize the plaintiff, as trustee, to collect the amounts of the assessments by suit or otherwise; and it is upon these decrees, duly certified, that the present action has been instituted.

(6) Prior to the order making the assessment of 50 per cent. the plaintiff had been authorized, by a decree of the chancery court of the city of Richmond, made July 21, 1883, to compromise with the owners of stock on which 30 per cent. had been assessed, by accepting from them 25 per cent. of the original amount of their subscriptions, if paid within six months from the date of the said decree, with interest at 6 per cent. from 30 days of the said decree; and a large number of stockholders had taken advantage of the offered compromise, by paying their assessments according to the terms and conditions of the said compromise, and such stockholders were credited on the books of the company with the full amount of the 30 per cent. call on their stock. And it is admitted by a stipulation of the parties to this action that all the stockholders named in the fourth plea of the defendant were severally solvent and able to pay the 30 per cent. assessment on their said shares which they had subscribed for or held, with interest from August 21, 1883, and also with such costs as had been incurred by the plaintiff in the prosecution of such suits as he had brought against such stockholders, or any of them; and that by virtue and in pursuance of said decree of July 21, 1883, the plaintiff herein received from the persons named in the said fourth plea 25 per cent. of the amount of stock for which they subscribed for or held, with interest, from August 21, 1883, with the costs which had been incurred, as aforesaid. In consideration whereof, and in further pursuance of said decree, the plaintiff released, acquitted, and discharged each and every of the said stockholders from all further liability on account of the shares so held by them, and on which they had been liable for said assessment of 30 per cent.

(7) At the February term, 1884, of the circuit court of the United States for the Southern district of Ohio, Western division, the said John Glenn, trustee, obtained a judgment against Charles H. Kellogg, for the sum of \$10,518.22, for the 30 per cent. assessed on 295 shares of the capital stock of the

said company, including the 195 shares owned by the said John T. Foote, the defendant herein, and which had been assigned to him by the said Kellogg. On August 22, 1884, proceedings in attachment were taken on this judgment in the Kenton county circuit court, in the state of Kentucky, by Glenn against Kellogg; and on January 31, 1885, Glenn recovered a judgment in the last-named court for \$10,518.22, and interest thereon from 5th of February, 1884. These two judgments were afterwards satisfied on the payment by Kellogg of \$6,581.25, and the following receipt was given to him:

"Received of Charles H. Kellogg the sum of six thousand five hundred and eighty-one and (\$6,581.25) 25-100 dollars, being an assessment of thirty per cent. on the capital stock of the National Express & Transportation Company, with interest at the rate of three per cent., included from December 14, 1881, to date, (interest calculated only to February 14, 1885,) the assessment above being on one hundred and ninety-five (195) shares of said stock known as the 'John T. Foote stock;' no claim being made for the remaining three per cent. so due as the interest on said assessment; the assessment, without interest, being \$5,850, except in case said Kellogg should recover against said Foote on account of this payment, in which event he is to pay the remaining three per cent., due from December 14, 1881, to February 14, 1885, and six per cent. on the amount then due to date of payment; said sum of \$6,581.25 being received without prejudice to any rights against said Kellogg on any further assessment calls on said stock.

"JOHN GLENN, Trustee.

"By HOADLEY, JOHNSON & COLSTON, his Attorneys.

"*Cincinnati, February 26, 1885.*"

On the 26th of February, 1885, a paper was filed in the circuit court of Henrico county, Va., by said Glenn, of which the following is a copy:

"The judgment and costs herein having been paid in full, the clerk is hereby requested to enter satisfaction of the same.

"J. C. BENTON, Atty. for Pltff.

"*Feb'y. 26, 1885.*"

On the 27th of February, 1885, the following satisfaction piece was executed by the attorneys of record of the said John Glenn, trustee, plaintiff in the Ohio action:

"*John Glenn, Trustee, vs. Charles H. Kellogg. (3,570.)*

("Circuit Court of the U. S., S. D. O., W. D.)

"Received of Charles H. Kellogg full satisfaction of the judgment and costs in the above case, and the clerk is hereby authorized to enter satisfaction of the same of record.

"HOADLEY, JOHNSON & COLSTON, Attys. for Plaintiff.

"*Feb. 26, '85.*"

And said satisfaction piece was on or about the said 27th day of February, 1885, filed, by the attorneys of plaintiff, in the office of the United States circuit court, Southern district of Ohio, Western division.

(8) In April, 1886, John Glenn, trustee, brought a suit in the United States circuit court for the Southern district of Ohio, Western division, against Charles H. Kellogg, to receive the 50 per cent. assessment on the par value of 295 shares of the capital stock of the said company; this being the same 50 per cent. assessment referred to and set forth in the plaintiff's declaration. After issue had been joined, to-wit, on the 16th of October, 1886, the said suit, and all claims against the said Kellogg made by the said Glenn, as trustee, were settled by and between the parties, in accordance with the terms and in

pursuance of an order made in the circuit court of Henrico county, Va., October 4, 1886, which order was as follows:

"IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO, OCT. 4, '86.

"*W. W. Glenn, Admr. & others, against The National Express and Transportation Company & others.*

"Upon reading the petition of John Glenn, trustee, in respect to compromising the claim of the defendant company against Charles H. Kellogg, as the holder of two hundred and ninety-five shares of stock this day filed, together with the statements of said John Glenn, trustee, and of Edward Colston, Esq., and the consent of a majority in value and number of the creditors of said company ascertained as prescribed by law, expressed in writing by Charles Marshall and John Howard, Esq., their counsel, it is ordered that, upon the payment to the said John Glenn, trustee, of the sum of twenty-two hundred and fifty dollars, and the court costs in the suit mentioned in said petition, the said John Glenn, trustee, be, and he is hereby, authorized to execute and deliver to said Charles H. Kellogg an acquittance and discharge of all claim of the said company against him for or on account of his connection with said two hundred and ninety-five shares of said stock; to have such effect as is prescribed by the Act of assembly of Virginia, approved March 17, 1884, being chapter 472 of the Acts of 1883-1884, page 654, authorizing certain compromises to be made by fiduciaries with the sanction of a court of equity."

Thereupon Kellogg paid to the plaintiff the sum of \$2,250, and was given a receipt in full satisfaction of all claims against him on account of the 295 shares of stock; and afterwards, on the 20th of January, 1887, the following entry was made in the journal of the United States circuit court for the Southern district of Ohio: "No. 3,873. It appearing to the court that this cause has been settled by the parties thereto out of court, and that as part of said settlement the said defendant agreed to pay the costs of this case, it is now ordered that the said cause be, and the same is, dismissed, at the costs of said defendant."

(9) The 295 shares of stock on which the two assessments of 30 and 50 per cent. were made included the 195 shares which had been assigned by Kellogg to Foote.

(10) The Code of Virginia of 1860, and remaining unrepealed in 1866, (chapter 57, § 24,) provides that "no stock shall be assigned on the books, without the consent of the company, until all the money which has become payable thereon shall have been paid; and in any assignment the assignee and the assignor shall each be liable for any installment which may have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided."

(11) By the Virginia statute of 1884, under which the fiduciaries were authorized to make compromises with the debtors of the corporation, it was provided that "any compounding and compromise that may be made under this act, with any person claimed to be indebted or liable as aforesaid to such company, shall not in any manner impair the liability of any other person to the company, or its creditors, on account of the contract or other cause of liability; but the amount so received on such settlement shall be credited on the same, except when the contract or other liability is joint, in which case it shall be credited with the full share of the party released." The writ of summons in this case was served on the defendant, with a bill of particulars, on August 5, 1886.

*George Biddle and S. H. Grey, for plaintiff.*

*Alfred Mills and Barker Gummerle, for defendant.*

WALSH, J., (after stating the findings as above.) The questions arising on these facts are two: *First*, whether Kellogg and Foote were jointly liable to pay the assessments, and the plaintiff's release of Kellogg discharged the defendant. *Second*, whether the causes of action declared on accrued within six years before the commencement of the action.

I am of the opinion that the liability of the defendant to pay the assessment was several, and not joint, and that the release did not discharge him; and that the defendant, being the owner of 195 shares of the stock, was liable, under the charter of the company, for the price of said shares, and for such assessments as should be made by competent authority for the payment of any percentage thereon; and that, as the right of the plaintiff to sue for the collection of unpaid subscriptions depended upon the making of an assessment, the causes of action declared on did not and could not accrue until after the making of the assessment of 30 per cent. by the decree of the chancery court of the city of Richmond, of December 14, 1880, and consequently that the present action, having been commenced within six years from that date, is not barred by the statute of limitations.

The plaintiff is therefore entitled to a judgment for the full amount claimed by him, which is made up as follows:

*J. T. Foote, Assignee, in acct. with John Glenn, Trustee W. E. & T. Co.*  
1888.

|         |  |             |
|---------|--|-------------|
| Aug. 3. | To 30 per cent. on 195 shs. W. E. & T. Co. stock, as per call Dec. 14, 1880 ordered by chancery Ct., city of Richmond, | \$ 5,850 00 |
|         | To 7 years, 7 mos., 19 days' int., to Aug. 3, 1888,  | 2,680 28    |
|         | To 50 per cent. on 195 shs. W. E. & T. Co. stock, as per call of Mar. 26, '86 ordered by Cir. Ct. Henrico Co., Va.,    | 9,750 00    |
|         | To interest to Aug. 3, '88, 2 yr., 4 mos., 7 da.,  | 1,376 38    |

1885.

|          |   |            |
|----------|---|------------|
| Feb. 14. | By this amt. paid by Charles H. Kellogg, assignor, on acct. of 30 per cent. call, | \$6,581 25 |
|          | By int. from Feb. 14, '85, to Aug. 3, '88, 3 yr., 5 mos., 19 da.,                 | 1,370 00   |

1886.

|             |   |             |
|-------------|---|-------------|
| October 18. | By 195-295 of \$2,250, pd. under compromise decree of Oct. 4, '86, on 295 shares, | 1,487 29    |
|             | By int. to Aug. 3, '88, from Oct. 18, '86, 1 yr., 9 mos., 15 days,                | 159 96      |
|             | By balance due trustee,   | \$10,058 16 |

\$19,656 66    \$19,656 66

1888.

|         |                      |           |
|---------|----------------------|-----------|
| Aug. 3. | Balance due trustee, | 10,058 16 |
|---------|----------------------|-----------|

It is ordered that judgment be entered for the plaintiff for the said sum of \$10,058.16, with costs.

## TROW CITY DIRECTORY CO. v. CURTIN.

(Circuit Court, S. D. New York. December 1, 1888.)

## 1. COPYRIGHT—ACTION FOR INFRINGEMENT—PLEADING.

A bill for infringing a copyright, which fails to aver that plaintiff delivered or mailed to the librarian of congress a printed copy of the title of the copyright book, that within 10 days after its publication he delivered or mailed to such librarian two copies of the book, and that he inserted in each copy of the book published, on the title-page or page following, the words, "Entered according to act of congress, in the year ———, by A. B., in the office of the librarian of congress, at Washington," is fatally defective.

## 2. SAME.

An averment that "the copyright was taken out by [plaintiff] previous to the publication thereof, in full accordance with the requirements of the laws of the United States," does not tender an issue of fact, but states a legal conclusion, and is insufficient.

## 3. SAME—SPECIAL DEMURRER—EQUITY—PENALTIES AND FORFEITURES—ENFORCEMENT.

A special demurrer to the parts of the bill which ask a court of equity to enforce penalties and a forfeiture, and for a discovery and delivery up to be destroyed of defendant's books, will be sustained.

In Equity. On demurrer to bill.

Bill by the Trow City Directory Company against Hugh A. Curtin for the infringement of complainant's copyright. Rev. St. U. S. § 4956, referred to in the opinion, provides that—

"No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail, addressed to the librarian of congress at Washington, District of Columbia, a printed copy of the title of the book \* \* \* for which he desires a copyright, nor unless he shall also, within ten days from the publication thereof, deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, two copies of such copyright book."

Section 4962 provides that—

"No one shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, \* \* \* the following words: 'Entered according to act of congress, in the year ———, by A. B., in the office of the librarian of congress, at Washington.'"

*H. Aplington*, for complainant.

*E. N. Taft*, for defendant.

WALLACE, J. The demurrer to the complainant's bill is well taken, and must be sustained as to each ground assigned. The bill of complaint is defective in failing to allege the performance of the acts required by sections 4956, 4962, Rev. St. U. S., which are essential, and conditions precedent to the title of the proprietor of a copyright. *Wheaton v. Peters*, 8 Pet. 591; *Jollie v. Jaques*, 1 Blatchf. 618; *Parkinson v. Laselle*, 3 Sawy. 330; *Music Co. v. Paper Co.*, 19 Fed. Rep. 758. The allegation that "the copyright was taken out by the said Trow City Directory Company, pre-



vious to the publication thereof, in full accordance with the requirements of the laws of the United States," is not sufficient. It does not tender any issue of fact, but is the statement of a legal conclusion. *Lipe v. Becker*, 1 Denio, 568; *Frary v. Dakin*, 7 Johns. 78. While it is not necessary or proper to state what is merely matter of evidence, the substantive issuable facts upon which the pleader's cause of action depends must be alleged. The special demurrer to the parts of the bill which ask a court of equity to enforce penalties and a forfeiture, and seek for a discovery, surrender, and delivery up to be canceled and destroyed of the copies of the defendant's directory, is supported by the authority of *Stevens v. Gladding*, 17 How. 447.

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### THE SYRACUSE.

#### GOLDSMITH v. THE SYRACUSE.

(Circuit Court, S. D. New York. November 14, 1888.)

#### 1. TOWAGE—NEGLIGENCE—PROCEEDINGS IN REM.

Where a canal-boat, while in tow by certain tugs, preparatory to making fast to a steamer which is to convey the tow to its destination, is injured by the negligence of the tugs, proceedings *in rem* cannot be maintained therefor against the steamer, though owned by the same company owning the tugs.

#### 2. WITNESS—FEES—MILEAGE—IN FEDERAL COURTS.

Witness fees in the federal courts are taxable for travel not exceeding 100 miles, unless the distance be wholly within the district, though the witness attend the trial voluntarily, at the request of one of the parties.

In Admiralty. Libel for damages. On appeal from district court.

Proceedings *in rem* by libellant, Goldsmith, against the steam-boat Syracuse for damage done to libellant's canal-boat by certain other tugs while in charge of a tow consisting of libellant's boat and others, preparatory to and before making fast to the Syracuse, which was to convey the tow to New York. The contract for towage was with the Schuyler Towing Company, by whom the tugs and the Syracuse were owned, but it did not specify the particular boat that should do the towing. The libel was dismissed by the district court, and libellant appeals.

*Hyland & Zabriskie*, for appellant.

*Owen & Gray*, for claimant.

WALLACE, J. If the towage contract in this case had been made with the master of the Syracuse, or if the suit were *in personam* against her owner, the question whether the injuries received by the tow were in consequence of what was done before or after the Syracuse made fast to the tow would be immaterial. But as this is a suit *in rem* against the steam-boat it can only be sustained by evidence of negligence or breach of obligation on her part with reference to the transaction. By the contract with the libellant the Schuyler Towing Company undertook to tow

his canal-boat from Albany to New York, but not by any particular tug or steamer. The company employed the tugs Robertson, Winants, and Betts to take the tow, of which the libelant's boat was one, up the river, and turn it about, and get the tow started on its course down the river; and the negligent acts by which the libelant's boat was injured were committed by these tugs while they were in charge of the tow, before the Syracuse undertook any towage service, or was under any responsibility for the management or supervision of the tow. The suit could as well be maintained against any other of the steam-boats or tugs owned by the Schuyler Towing Company which had no connection whatever with the voyage or tow in question as against the Syracuse. The libelant has mistaken his remedy, and for that reason the decree of the district court dismissing the libel is affirmed, with costs of this court.

The question has arisen as to the taxation of costs in the district court. It has long been the practice in this circuit to permit the taxation of fees of witnesses for travel, not exceeding 100 miles from the place of trial, unless the distance is wholly within the district of the court, although the witness was not subpoenaed, but attended upon the trial voluntarily, at the request of the party for whom he testified. The cases of *U. S. v. Sanborn*, 28 Fed. Rep. 299, and of *Spaulding v. Tucker*, 2 Sawy. 50, and *Haines v. McLaughlin*, 29 Fed. Rep. 70, have been cited. The first holds that the witness' fees may be taxed for the whole distance between his residence and the place of trial, although his residence is outside of the district, and more than a hundred miles from the place of trial, and although he has not been subpoenaed, but attends voluntarily; and the latter hold that in no case can a witness' fees be taxed unless he has been subpoenaed to appear. These cases have been considered, but with the result that the rule which has heretofore obtained in this circuit seems the more reasonable, and gives the best practical effect to the language and spirit of sections 876, 863, and 850, Rev. St. U. S.

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MORSE *et al.* v. LEHIGH & W. COAL CO.

(Circuit Court, S. D. New York. October 15, 1888)

DEMURRAGE—COAL ORDERS.

Libelants offered a schooner to defendants' agent to load, whereupon the agent filled up a "coal order" to one of defendants' coal pockets, which libelants accepted, nothing being said about chartering the vessel. *Held*, that the order was incorporated in the contract, and defendants were relieved from liability for failure to furnish a load by a clause to that effect in the order.

In Admiralty. On appeal from district court.

Libel for demurrage by Benjamin W. Morse and others against the Lehigh & Wilkesbarre Coal Company. Decree for respondent, and libelants appeal.

*Geo. A. Black*, for appellants.

*Henry S. Ward*, for appellee.

LACOMBE, J. A "coal order," such as the one now before the court, was considered in *Rackett v. Stickney*, 27 Fed. Rep. 878. It was there held that, when delivered by one of the parties, and accepted by the other, as the result of verbal negotiations, it is conclusively presumed that such acceptance is an assent to its terms; but also that, when an independent contract has been concluded verbally between the parties, assent to its modification will not be implied from the acceptance by one party of an order directed by the other party to his own agent, and which is to be delivered to the agent, and retained by him. Inasmuch as the document now under consideration is precisely such an order, the question whether or not the respondent is by the second clause of its indorsement relieved from liability for failure to furnish a load depends upon the determination of the further question whether or not an independent contract was concluded before the "order" was given. The libelants' broker, Van Cleaf, testifies that he called upon Wilder, the shipping clerk of the respondents, about January 15, 1886, and asked if they could charter a schooner of about 1,300 tons, then at Warren, R. I., for Boston, or any port east. Wilder said that he thought he could, and in answer to a further inquiry offered \$1.50 a ton for a voyage from Port Johnson to Mystic wharf, Boston. Van Cleaf asked time to telephone to his principals, which was granted. He did so, and, a satisfactory answer being received, at once came back from the telephone room and told Wilder that libelants accepted that charter, to which Wilder replied, "All right." Immediately thereafter Wilder filled up the order to the respondents' agent at Port Johnson, inclosed it in an envelope, gummed but not sealed, and directed to such agent, and delivered it to Van Cleaf. If this version of the interview is correct it would seem that a complete agreement of charter was made between the parties when Wilder assented to the libelants' acceptance of his offer; and the subsequent order to respondents' own agent would not, under the decision above referred to, be operative to relieve them from their obligation to load the vessel with reasonable promptness upon her presenting herself at Port Johnson. Wilder's statement of the conversation, however, is somewhat different. He says that Van Cleaf offered the schooner *Charles E. Balch* to load, and that he (Wilder) said he would give him an order to one of the respondents' coal pockets; and thereupon filled up the order and handed it to Van Cleaf, who took it and went out, nothing being said about chartering the vessel. If this version is correct, the order itself was incorporated in the contract, and respondents' only obligation was to conform to its terms. The learned district judge has evidently accepted Wilder's statement as the more credible. As he saw both witnesses, and could best judge of the relative value of their testimony, his finding will not be disturbed. Decree affirmed, with costs.

NEW ORLEANS WATER-WORKS CO. v. SOUTHERN BREWING CO. SAME  
v. PEOPLE'S ICE CO. SAME v. MCGINNIS OIL & SOAP WORKS.<sup>1</sup>

(Circuit Court, E. D. Louisiana. June 7, 1888.)

COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

In *Water-Works Co. v. Refinery Co.*, 35 La. Ann. 1111, the supreme court of Louisiana held that in spite of the charter of the water-works, giving that corporation the exclusive privilege of supplying water from the Mississippi to the city and its inhabitants, and reserving to the city council the power to grant persons contiguous to the river the privilege of laying pipes for his own use, the council, under said charter and the general laws of the state, could grant such privilege to persons without regard to their contiguity. In this decision the United States supreme court held that no federal question was involved, the determination of the council's power, under the state laws, being for the state supreme court, (8 Sup. Ct. Rep. 741.) Before this ruling, but after the state decision, the United States supreme court, in the case of *Water-Works Co. v. Rivers*, 6 Sup. Ct. Rep. 273, without referring to the state decision, held that the council's grant of such privilege under the provision of the state constitution adopted after the water-works charter had been granted, which abrogated monopolies, impaired the obligation of the state's contract with the company. Held, that the United States circuit court in Louisiana should be governed by the decision of the state supreme court, the matter being, as conceded by the United States supreme court, one for its determination, and the parties being all of them Louisiana corporations. BILLINGS, J., dissenting.

In Equity. Final hearing on injunction.

J. R. Beckwith, for complainants.

A. Goldthwaite and W. S. Benedict, for defendants.

Argued before PARDEE and BILLINGS, JJ.

PARDEE, J. Assuming that the questions arising under the constitution, upon which our jurisdiction rests, are to be decided in favor of the complainant, there remains the question of construction of complainant's charter, and the general laws of Louisiana with reference to the right of the city of New Orleans through its council to grant licenses or permits to the defendants to lay pipes in and across the public streets to their respective establishments for the sole purpose of supplying themselves respectively with water from the Mississippi river. In the case of *Water-Works Co. v. Refinery Co.*, 35 La. Ann. 1111, this question of the authority of the city of New Orleans under the complainant's charter and the laws of the state was presented to the supreme court of the state of Louisiana, and was decided in favor of the right. It is true that in the case the refining company, among other defenses to the suit, set up that it was a contiguous person to the Mississippi river, and therefore within the letter of the proviso in the eighteenth section of complainant's charter, but the court wholly ignored the contiguity defense, and based its judgment wholly upon the general law of the state, and upon the construction and effect of the charter from the legislature to the water-works company, and of the license from the city council to the refining company, and in no degree upon the constitution or any law of the state sub-

<sup>1</sup>Publication delayed by inability to obtain copy of opinion at time of delivery.

sequent to the water-works charter. The case was carried by writ of error to the supreme court of the United States, and there dismissed for want of jurisdiction; the court deciding that no federal question was involved, the right of the city of New Orleans to grant the license complained of being wholly a question to be decided under Louisiana law. See 8 Sup. Ct. Rep. 741. The decision of the supreme court of the state was rendered in 1884. In 1885 the precise question was before the supreme court of the United States in the case of *Water-Works v. Rivers*, and was then decided in favor of the water-works company, the court holding that an exclusive franchise granted to supply water to the inhabitants of a municipality by means of pipes and mains laid through the public streets is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of pipes so laid. Although the case of the *Water-Works Co. v. Refinery Co.* was then pending on a writ of error, and the counsel for the refining company submitted a brief in the *Rivers Case*, in the decision no reference whatever is made to the decision of the supreme court of Louisiana upon this very question, conceded to be not a federal question, but one wholly depending upon local Louisiana law. See *Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273.

The question is thus squarely presented whether, in a matter involving solely Louisiana law, where no property rights under former decisions are involved, this court should follow the decision of the highest court of the state or the decision of the supreme court of the United States. This same question was presented to the supreme court of the United States in the case of *Fairfield v. County of Gallatin*, 100 U. S. 47. In 1874, in the case of *Railroad Co. v. Pinckney*, 74 Ill. 277, the supreme court of the state of Illinois gave a certain construction to a provision of the constitution of the state. About one year afterwards, in *Town of Concord v. Portsmouth*, 92 U. S. 625, the same constitutional provision came before the supreme court of the United States, and received a contrary construction, the case of *Railroad Co. v. Pinckney* not being called to the attention of the court. In *Fairfield v. County of Gallatin*, *supra*, the same question was again brought before the supreme court of the United States, the defendant in error relying upon, and the court below having followed, *Town of Concord v. Portsmouth*, *supra*, and it was then held, reversing the circuit court, and citing *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Nesmith v. Sheldon*, 7 How. 812; *Walker v. Commissioners*, 17 Wall. 648; *Elmendorf v. Taylor*, 10 Wheat. 152; *Green v. Neal's Lessee*, 6 Pet. 291; *Leffingwell v. Warren*, 2 Black, 599; *Sumner v. Hicks*, Id. 532; *Olcott v. Supervisors*, 16 Wall. 678; and *State Railroad Tax Cases*, 92 U. S. 575,—that it is the general rule of decision to follow and adopt the decisions of the state courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of its highest tribunal; and that this rule of decision is to be followed even where the supreme court of the United States has given a different construction to the state law, provided no rights are affected which have been acquired under their former decisions. See, also, *Suydam v. Williamson*, 24 How. 427. To

the above general rule there are exceptions, *i. e.*, where rights of property have been acquired under former decisions of either the state or federal courts; where on the same transactions the federal court has first passed, and the decisions of the state court relied upon do not meet the independent judgment of the supreme court of the United States; and when general questions of commercial law are involved. See *Pease v. Peck*, 18 How. 595; *Morgan v. Curtenius*, 20 How. 1; *Thompson v. Perrine*, 103 U. S. 606; *Douglass v. County of Pike*, 101 U. S. 677; *Oates v. Bank*, 100 U. S. 239; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. In *Pease v. Peck*, and in the last cited case, it is intimated that the general rule should lose some of its rigidity in cases involving controversies between citizens of different states.

In the cases now under consideration the parties complainant and defendant are corporations deriving life entirely from the laws of Louisiana, and these causes are apparently brought in this court as arising under the constitution of the United States, when the real question in issue is one not federal, but arising solely in relation to the proper construction to be given to Louisiana laws, and where, if it is not the sole object, the main purpose is to escape the construction given by the supreme court of Louisiana to the laws of the state. Heretofore, in these cases on motions for injunctions *pendente lite*, where the main question argued was whether the complainant's monopoly had been extinguished by the fact that the complainant had procured and accepted remedial legislation under the present constitution of the state, (see Const. 1879, arts. 234, 258,) and considering that under the charter to complainant the city was limited in granting permits to persons actually contiguous to the river, and that such contiguity was a question for the court to determine, we have followed the *Rivers Case*, and granted temporary injunctions in those cases where more than public ground separated the parties from the river. But now it seems that in the courts the question of contiguity cuts no particular figure, but is decided by the city council when they grant or refuse a permit. In the *Rivers Case*, as interpreted by the supreme court in *Water-Works Co. v. Refinery Co.*, *supra*, it was not in issue, and in the supreme court of the state the defense of contiguity was wholly ignored. It can easily be inferred from a close examination of the *Rivers Case* that the only questions there intended to be decided were whether the monopoly granted complainant in its charter was abrogated by the state constitution, and whether the city of New Orleans could make the grant to Rivers by reason of such abrogation; and that the question whether, under a fair construction of complainant's charter and the general laws of the state, the city had the right to grant a license to a citizen to lay pipes to the river to supply himself with water for his private needs, was not at all considered. In a matter so important to the public, and where the action of the city council of New Orleans cannot be restrained, uniformity in the jurisprudence which determines the value of the permits or licenses granted is very desirable, and the rights of the party who receives a license should not wholly depend upon the selection made by the water-works company of the court (state or federal) to hear the cause.

This desirable uniformity is better attained by following the long line of decisions of the supreme court of the United States declaring that the federal courts should adopt and follow the decisions of the highest court of the state in the construction of its own constitution and statutes, than in following one decision of the supreme court on what is now conceded not to be a federal question. As these cases are now presented to the court, and upon final hearing, I am of the opinion that decrees should go for the defendants.

BILLINGS, J., (*dissenting.*) Complainant submits as his case that by the legislative action of the state the obligation of his contract is impaired. In such a case I understand the supreme court of the United States recognizes it as the constitutional mandate that that court shall by its own judgment interpret the contract, and decide as to its being impaired. This, therefore, is not a case where the construction of a charter by the court of last resort of a state is necessarily a part of the charter, and conclusively binding. The federal court must still measure the obligation and the effect of the hostile legislation. *Jefferson Branch Bank v. Skelley*, 1 Black, 436, 443. In the case of *Water-Works Co. v. Rivers*, 115 U. S. R. 674, 681, 6 Sup. Ct. Rep. 273, the supreme court have construed this charter in respect to the point here involved. While I agree with the circuit judge that the construction by the state supreme court is contrary to that by the United States supreme court in the *Rivers Case*, and that with reference to every other class of cases the construction of a charter by the state court of last resort would be obligatory upon the United States supreme court, and upon this court, I nevertheless think that the views of the supreme court in the *Rivers Case* should still control the action of this court as to the meaning of the charter already declared by it, and that the complainant should have a decree perpetuating the injunction.

As to the meaning of the expression "contiguous persons." Contiguous may have so broad a meaning as to make it proper to speak of the entire city of New Orleans as contiguous to the Mississippi river. This is not the meaning. The use of the word compels us to stop somewhere. There is no middle point. I think the word was meant, in the charter, to include only the proprietors who are actually riparian; that is, only those proprietors whose land by actual contact adjoins the river.

PIERSON v. PHILIPS *et al.*

(Circuit Court, E. D. Texas. December 18, 1888.)

## COURTS—FEDERAL JURISDICTION—UNITED STATES MARSHAL—ACTION ON BOND.

The circuit court of the United States has not original jurisdiction in suits on United States marshal's bonds, where the amount in controversy does not exceed \$500.

At Law. Action on United States marshal's bond.

*Waul & Walker*, for plaintiff.

*S. C. Hanscomb*, for defendants.

PARDEE, J. This suit was instituted June 23, 1886, and is against the late United States marshal and his sureties on his official bond to recover the sum of \$291.76, alleged damages for the breach of said bond, and the further sum of \$9.50 costs, with interest on the whole at 8 per cent. per annum from June 8, 1885. It is then a suit of civil nature at common law arising under the laws of the United States, (see *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. Rep. 289,) in which the sum involved does not exceed \$500. The proof submitted makes out the plaintiff's case, and he is entitled to the judgment asked if the circuit court has jurisdiction of the cause. When the suit was brought the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," was in force, and that act seems to be the first statute of the United States that seeks to give to the circuit court original jurisdiction of suits of a civil nature arising under the constitution and laws of the United States, regardless of the citizenship of the parties. In that act the only limitation on the jurisdiction in such cases is that the matter in dispute shall exceed the sum or value of \$500, exclusive of costs. There is no special or other act that in terms gives the circuit court jurisdiction in suits on United States marshal's bonds. The plaintiff contends that in suits on marshal's bonds the jurisdiction of the circuit court attaches, irrespective of the amount involved, by virtue of the act of congress of April 10, 1806, now found in section 784, Revised Statutes, to the effect that, "in case of a breach of the condition of a marshal's bond, any person thereby injured may institute in his own name and for his sole use a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form," and relies upon a line of decisions rendered prior to the jurisdiction act of 1875. See *Wetmore v. Rice*, 1 Biss. 237; *U. S. v. Davidson*, Id. 433; *Adler v. Newcomb*, 2 Dill. 45, and the number of such cases may be largely increased. The theory seems to have been as stated by Judge TREAT in *Adler v. Newcomb*, that the federal courts have jurisdiction, because the act of 1806 giving the right to a party injured by breach of the bond to sue thereon in his own name "puts such party in the place of the United States, and



does not take from the federal courts the jurisdiction they had before the act was passed when suit had to be brought in the name of the United States." In all these cases, so far as I have been able to examine, there was not one where the decision was made to turn on the amount involved or where the amount involved was stated as under \$500. Whether, prior to the act of March 3, 1875, the circuit court had jurisdiction of suits brought on marshal's bonds, irrespective of the citizenship of the parties and of the amount involved, does not seem necessary to determine in this case. It is well settled that the circuit courts of the United States can exercise no jurisdiction not conferred by act of congress. See *Livingston v. Jefferson*, 1 Marsh. 203, and *Harrison v. Hadley*, 2 Dill. 229, and authorities there cited. A suit on a marshal's bond is a suit of a civil nature arising under the constitution and laws of the United States. *Feibelman v. Packard*, *supra*. The jurisdiction of the circuit court in suits of a civil nature, arising under the constitution and laws of the United States, at the time this suit was brought, was fixed and determined by the act of March 3, 1875, and therein it is limited to suits in which the matter in controversy exceeds the sum or value of \$500. The same act gives the same minimum limit to the jurisdiction in suits of a civil nature in which the United States are plaintiffs or petitioners; so that, if this suit had been brought by the United States there would be the same question as to jurisdiction. See *U. S. v. Coke Co.*, 18 Fed. Rep. 708. It seems to me clear that since the act of 1875, whatever may have been the case before, suits on United States marshal's bonds are only within the original jurisdiction of the circuit courts when the sum involved exceeds \$500, and I limit this conclusion to cases of original jurisdiction, because there is no question made in this case as to the jurisdiction where the marshal and his sureties are sought to be incidentally made liable in some suit of which the circuit court has jurisdiction. Judgment will be entered dismissing the suit for want of jurisdiction.

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UNION MUT. LIFE INS. CO. *v.* WINDETT *et al.*

(Circuit Court, N. D. Illinois. December 3, 1888.)

APPEAL—EFFECT—MORTGAGES—FORECLOSURE—SALE—RIGHT TO DEED.

It is no defense to a rule on a master requiring him to make a deed to the purchaser at a sale made by him under a decree of foreclosure, that an appeal has been taken from the decree, where the appeal does not operate as a *supersedeas*.

In Equity. On motion for rule.

*Sweet & Grosscup*, for complainant.

*W. P. Black*, for defendants.

BLODGETT, J. This is a motion made by complainant for a rule on one of the masters of this court, requiring him to make a deed to complainants in pursuance of a sale made by the master under a decree of

foreclosure in this case. It appears from the record that the final decree of foreclosure was entered in this case on the 7th of December, 1886, and that in pursuance of such decree one of the masters of this court, on the 19th day of April, 1887, sold the mortgaged premises to satisfy the amount of the mortgage debt found due the complainant, and that at such sale the complainant became the purchaser, and the certificate of purchase was duly executed and delivered by the master to complainant, stating that complainant would be entitled to a deed of the premises in 15 months from the date of such sale, unless the premises were redeemed according to law and the rules of this court in that behalf; that the master reported the sale to the court, and the same has been duly confirmed; that on the 19th day of July, 1888, and long after the said sale had been made and confirmed, the defendant Arthur W. Windett prayed an appeal to the supreme court, and the same was allowed, on condition that he file an appeal-bond in the penal sum of \$1,500, conditioned according to law, and with surety to be approved by the court. The bond was filed and approved, and the complainant has since perfected his appeal by filing the record in the supreme court, where it is now pending. It also appears that the time for the redemption of the lands so purchased under the decree expired on the 19th day of July last, and that no redemption was made or attempted, and that complainant has requested the master to make and execute to it a deed of the mortgaged premises in pursuance of the decree and sale, and that the master declines to do so without an order of court, because it is insisted by the defendant that the appeal operates as a *supersedeas*, and suspends the right of this court to proceed any further in the execution of the decree. Complainant now asks that the master be directed to execute and deliver a deed in pursuance of the sale and purchase.

The appeal not having been prayed for and allowed within 60 days after the entry of the final decree, does not operate as a *supersedeas*. See *Kitchen v. Randolph*, 93 U. S. 92; *Sage v. Railroad Co.*, Id. 412; *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. Rep. 17, and many other cases which might be cited to the same effect. But the defendant Windett contends that by the appeal the case is wholly taken out of the jurisdiction of this court, and that this court cannot now direct its officer to execute the deed. I have no doubt that by the operation of the appeal this court was so far divested of control of the case that it can make no further orders or decrees touching the rights of the parties, but as the motion in question only has reference to requiring an officer of the court to do his duty under a decree entered long before this appeal was taken, and as the appeal in no way supersedes or suspends the operation of the decree, the court still has power to direct, or even compel, its officer to perform any necessary act to fully execute the decree, and carry it into effect. This position seems to me to be fully supported by the supreme court. *Carr v. Hoxie*, 13 Pet. 461; *Wallen v. Williams*, 7 Cranch, 278; *Hudgins v. Kemp*, 18 How. 530.

*Draper v. Davis*, 102 U. S. 370, cited by defendant does not, as it seems to me, in any degree support his position in this respect. In this

last case an appeal had been prayed and allowed within 60 days, and an appeal-bond duly filed, and yet, after the perfection of the appeal, the court made an order changing the terms upon which the appeal could be taken to the supreme court. It merely decides that, after an appeal has been completed and perfected within the time to make it a *superse-deas*, any proceedings by the court below are null and void.

The allowance and perfection of the appeal in this case only had the effect to take the record before the supreme court. It did not act upon the parties, or prevent the court from taking any steps in the execution of the decree; and, if an officer of the court declines to do an act within his duty in the execution of the decree, the complainant has the right to apply to the court for an order directing such officer to proceed in the performance of such duty. Any other rule than this would give rise to and encourage sharp practices entirely inconsistent with the rights of the parties and the duty of the court in protecting such rights. Suppose a judgment is rendered in this court, and the defendant takes a writ of error to the supreme court, but does not obtain a *superse-deas*, no one will doubt that the plaintiff has a right to take out execution, and place it in the hands of the marshal, and direct him to proceed to levy and collect the amount called for by the writ. But suppose the marshal is told by the defendant that the case has been taken to the supreme court, and that he has no right to levy, and that the marshal upon this suggestion refuses to proceed with the execution, can there be any possible room for doubt that the court has the power to direct the marshal to proceed? And yet that seems to me precisely this case. Or suppose the marshal did proceed with the execution, did make the levy, sell the property, and collect the money, yet, upon notice that the case had been taken up by writ of error, refused to pay it over to the complainant, would it not be the plain duty of the court to compel its officer to pay the money to the complainant, to whom it belonged? An order will be entered directing the master to execute the deed.

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GORSE *et al.* v. PARKER.

'Circuit Court, N. D. Illinois. November 5, 1888.'

**COSTS—ATTORNEYS' FEES—PARTY ACTING AS ATTORNEY.**

The docket fee and fees for depositions "allowed to attorneys, solicitors, and proctors" by Rev. St. U. S. §§ 823, 824, cannot be taxed in favor of a party not an attorney, who conducts his own cause.

In Equity. On motion for retaxation of costs in the suit by William Gorse and others against Andrew H. Parker.

D. Blackman, for plaintiffs.

A. H. Parker, *in pro. per.*

BLODGETT, J. A motion is made for retaxing the costs in this case. The case was a suit in equity, and the defendant appeared in his own behalf, filed his own answer, examined his own witnesses, and argued his own cause. The suit terminated in favor of the defendant, and the clerk in taxing the costs allowed the defendant a docket fee of \$20, and a fee of \$2.50 for each deposition taken, and the motion now is to retax the costs on the ground that these fees cannot be allowed to the defendant, he not being an attorney at law. I think the motion is well taken. The statute of the United States, (section 823, Rev. St.,) under which these fees are taxed, reads as follows: "The following, and no other, compensation shall be allowed to attorneys, solicitors, and proctors in the courts of the United States;" and then proceeds under section 824, as follows: "On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; and for each deposition taken and admitted in evidence in the cause, two dollars and fifty cents." In the case of *Vulcanite Co. v. Osgood*, 13 O. G. 325, Judge SHEPLY had substantially the same question under consideration, and there held that the docket fee allowed by these two sections can only be allowed to an attorney or solicitor of the court; that these costs are not recoverable to the defendant himself, but to his attorneys. And the reason in support of this conclusion is that, where a party is obliged by reason of his unfamiliarity with proceedings in courts to employ an attorney or solicitor, the law gives him this fee to aid in compensating his attorney; but if a party is not obliged to resort to a lawyer for assistance, then the allowance is not recoverable. The motion to retax is therefore sustained, and the clerk is directed to strike out from the fee-bill, as taxed, the allowance of \$20 for a docket fee, and the allowance of \$2.50 for each deposition.

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NEWBERRY *et al.* v. ROBINSON *et al.*

(Circuit Court, S. D. New York. December 20, 1888.)

1. EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATOR—ACTIONS BY.

An administratrix who recovers judgment makes the debt hers individually, and she may sue thereon out of the state where she was appointed; allegations showing representative capacity being treated as surplusage.<sup>1</sup>

2. STATUTES—PLEADING—UNITED STATES COURTS—JUDICIAL NOTICE.

The United States courts take judicial notice of the statutes of the states, and an objection that they are not well pleaded cannot be sustained.

In Equity. On demurrer to bill.

This action is brought by Helen S. Newberry, as administratrix of John S. Newberry, deceased, and James McMillan, citizens of Michigan,

<sup>1</sup>Respecting the authority of a personal representative outside the jurisdiction in which he was appointed, see *Gove v. Gove*, (N. H.) 15 Atl. Rep. 121, and note; *Allen v. Fairbanks*, 36 Fed. Rep. 402; *In re Cape May, etc., Co.*, (N. J.) 16 Atl. Rep. 191.

against Nelson Robinson, Frank C. Hollins, Walston H. Brown, and Arthur J. Moulton, citizens of New York, and others, alleged to be stockholders of the Lake Erie & Western Railway Company, to enforce a statutory liability created by the laws of Ohio, where the company was incorporated. Helen S. Newberry was duly appointed administratrix by the probate court of Wayne county, Mich., and on the 2d of April, 1887, she, in her representative capacity, and James McMillan, recovered a judgment against the railway company, upon which execution was issued, and returned *nulla bona*. The bill prays for a discovery, and that the amounts found due from the various stockholders shall be applied in satisfaction of the judgment. The defendants above named and the railway company demur on the ground that Helen S. Newberry, as a foreign administratrix, has no standing or capacity to sue in this court, and on the further ground, assigned *ore tenus* at the argument, that the laws of Ohio creating the liability are not properly pleaded.

*William W. Cook and Scribner & Hurd*, for complainants.

*E. C. Henderson and Cary & Whitridge*, for defendants.

COXE, J., (*after stating the facts as above.*) There is no doubt as to the general rule that an administrator cannot sue or be sued in his official capacity outside the limits of the state where he was appointed. *Vaughan v. Northrup*, 15 Pet. 1. It is also well settled that a judgment in legal effect creates a new debt, and it is this debt, so evidenced, that the complainants are seeking to enforce. Unquestionably the complainant Newberry could have maintained an action against the railway company upon the judgment in this state, in her personal capacity. She could have so brought this action. The recovery of the judgment left the debt due to her, not as administratrix, but as an individual. Strike from the bill the allegations relating to her appointment as administratrix, etc., and it states a good cause of action. But these allegations are mere *descriptio personarum*, and may be rejected as surplusage. This has frequently been done in analogous cases. Indeed, it is not easy to see how the complainants can obtain relief in any other form. *Biddle v. Wilkins*, 1 Pet. 686; *Bonafous v. Walker*, 2 Term R. 126; *Wilkinson v. Culver*, 23 Blatchf. 416; 25 Fed. Rep. 639; *Talmage v. Chapel*, 16 Mass. 71; *Nichols v. Smith*, 7 Hun, 580; *Bright v. Currie*, 5 Sandf. 433; *Murray v. Church*, 1 Hun, 49. So considered, the cause of action seems simple enough. The complainants have a judgment which is evidence that the railway company owes them as individuals the sum of \$16,048. This debt they have endeavored to collect of the company, but the execution issued upon their judgment has been returned unsatisfied. The laws of the state where the company was created provide that in such circumstances the shareholders shall be liable to contribute to a limited extent towards the payment of the debt. The action is in the nature of a creditor's bill to reach the money which, under the statute, should be contributed to the payment of the judgment. *Hatch v. Dana*, 101 U. S. 205; *Henry v. Railroad Co.*, 17 Ohio, 187; *Ogilvie v. Insurance Co.*, 22 How. 380. The second ground of demurrer is not well taken, for the reason that

the constitution and statutes of Ohio "are matters of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. Rep. 857; *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. Rep. 757. The demurrers are overruled. The defendants may answer within 20 days.

IRONS v. MANUFACTURERS' NAT. BANK *et al.*

(Circuit Court, N. D. Illinois. December 3, 1888.)

1. GUARANTY—RELEASE.

A bank guarantied the payment of notes executed by P., and discounted for the bank by defendant, which were secured by trust deeds. Upon the liquidation of the bank, dealings were had by which the real estate held as security was transferred to the president of the bank in liquidation, who assumed to act for the bank, and he executed his notes for the amount of P.'s indebtedness, and P., in consideration of a quitclaim deed, was released from all liability on the notes. *Held*, that his release operated to release the guaranty by the bank.

2. JUDGMENT—RES ADJUDICATA.

A judgment obtained by defendant on the bank's guaranty, after the bank had gone into liquidation, is not conclusive on the stockholders of the bank, who are shown to have had no knowledge of the release at the time the judgment was obtained.

3. BANKS—NATIONAL BANKS—LIQUIDATION—COSTS.

In proceedings against the stockholders of a national bank that has gone into liquidation, to ascertain and recover assessments for the indebtedness, the stockholders are liable for costs as if they were co-defendants in any ordinary action.

4. SAME.

Where the proceedings are being prosecuted by one creditor as representative of all, and the stockholders appeal from a decree against them, which decree is reversed, with costs, the costs incurred by appellee in defense of the appeal will be deducted before any dividend will be declared.

In Equity. On exceptions to report of master.

*D. J. Schuyler* and *Henry B. Mason*, for creditors and receiver.

*Harvey B. Hurd* and *Henry G. Miller*, for defendants.

*Charles W. Thomas* and *F. A. McConaughy*, for claimant.

BLODGETT, J. This cause was referred to one of the masters of the court to ascertain and report the amount of indebtedness owing by the defendant bank, and the amount of assessment to be made against the stockholders of the bank for the purpose of paying such indebtedness, in conformity with the opinion of the supreme court, when this cause was before that court on appeal, which is reported in 121 U. S. 27, 7 Sup. Ct. Rep. 788. The report of the master has been filed, and all parties seem satisfied with his findings, except the People's Bank of Belleville, who had presented a large claim against the bank, which the master has disallowed, and exceptions are filed by this claimant; the substance of these exceptions being that the master has erred in finding that the defendant bank is not liable on this claim. This claim of the People's Bank of

Belleville is based upon a guaranty of payment, made by the Manufacturers' National Bank, of eight notes of \$5,000 each, given by Henry E. Pickett, dated August 5, 1873, and due in one year from date, which were discounted for the Manufacturers' National Bank, soon after their date, by the People's Bank of Belleville. These notes were secured by a trust deed upon land in the vicinity of the city of Chicago. The Manufacturers' National Bank suspended payment, and went into voluntary liquidation on or about the 23d of September, 1873; and when these notes matured, about a year afterwards, dealings were had between the People's Bank of Belleville and Ira Holmes, then acting as president of the Manufacturers' National Bank, in liquidation, and assuming to act also for his bank, by which the title to the real estate held as security for the payment of these notes was transferred to Holmes, and Holmes thereupon gave his notes for the amount due on the Pickett notes, and also for a large amount of other indebtedness held by the People's Bank, on which the Manufacturers' National Bank, or Holmes, or both, were liable; and, as is found by the master, Pickett, in consideration of a quitclaim from himself and wife to Holmes, of the land covered by the trust deed securing his notes, was released from further liability on these notes. The master found that this release of Pickett from the notes which the Manufacturers' National Bank had guarantied, operated to release the guarantor, and hence the master rejected the claim.

I do not intend to go into an analysis or statement of the proof upon which the master made his finding, as it will be sufficient to say that I have examined these proofs, and am of opinion that they fully sustain the master's conclusions. It is urged, however, that as the proof shows that the People's Bank of Belleville brought suit on this guaranty now in question, and obtained judgment thereon, that such judgment is conclusive against the defendants in this case, who are stockholders in the Manufacturers' National Bank against whom an assessment is asked. Aside from the authorities cited, which satisfy me that the stockholders of the Manufacturers' National Bank are not concluded by this judgment, which was rendered after the bank went into liquidation, I think the facts shown in this record, that the dealings between the People's Bank of Belleville and Holmes and Pickett, by which Pickett was released, were unknown to the defendant stockholders at the time this judgment was rendered, should allow these stockholders to go behind the record of that judgment, and raise the question before the court in this suit whether the guaranty was released by the release of Pickett, the principal debtor, whose notes were guarantied. The exceptions to the master's report are therefore overruled, and the report confirmed.

Two other questions were suggested upon the final argument of the case, which it becomes necessary to say a word upon. The first is as to who is liable for the costs incurred in this case against the stockholders. After a careful consideration of that question, I have come to the conclusion that these defendant stockholders all stand in the condition of any ordinary defendants as common or joint defendants, and the costs must be borne by them as if they were co-defendants in any ordinary suit.

Another question that was raised was in regard to the costs of the appeal which was taken by the stockholders from the decree formerly entered in this case. The former decree was reversed on this appeal, and the appellants in that case recovered costs against the appellee. The appellee also incurred expenses in the printing of records and briefs, etc., upon this appeal, all of which it would be unjust to charge against Mrs. Irons, the complainant in this case, because she stands merely in a representative capacity, prosecuting this suit for the benefit of the creditors of the bank; and hence it seems to me that it is just, and I shall have it so provided in the decree, that, on the payment of the money assessed against the stockholders into the hands of the clerk of the court, the clerk first ascertain the amount of costs which were recovered against the appellee, and also tax the costs which the appellee incurred in the defense of that appeal, and deduct, before any dividend is made to the creditors, the expenses thus incurred. This will protect Mrs. Irons, I think, which should properly be done. A decree may also be prepared, directing the defendant stockholders to pay, and I presume it will be more convenient for them—(this is merely a suggestion of my own, and has not been made by their counsel)—and my suggestion is that an installment of 25 per cent. be paid in 30 days, an installment of 25 per cent. in 60 days, an installment of 25 per cent. in 90 days, and the balance in 120 days; making the decree all paid up in 120 days. If this is not desired by the counsel representing stockholders, a decree may be made for the payment of the whole amount in 60 days. The counsel may consult together about that. The clerk will, under the direction of the master, tax the costs that were necessarily incurred against the defendants in resisting the claim of the People's Bank of Belleville, and the decree will adjudge these costs to be paid by the People's Bank of Belleville; but the cost of the master's fees upon this reference may go into the general costs of the case, because it is impossible to divide it, and see how much of the labor done by the master upon this reference was given to the claim of the People's Bank of Belleville, and how much to the general adjustment against each stockholder.

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TEXAS & P. RY. CO. v. CITY OF BATON ROUGE *et al.*

(Circuit Court, E. D. Louisiana. June 8, 1888.)

**INJUNCTION—RIGHTS PROTECTED AND WRONGS PREVENTED.**

Complainant, having the right under its charter of transporting its passengers and freight across a river by means of its own boats, agreed, for a consideration, to use for such purpose only the public ferry operated by a private party under a lease. The ferry proving inadequate, complainant commenced running its own boats for purposes of transportation. *Held*, that equity would not protect complainant from the consequences of its failure to comply with the contract, by enjoining the operators of the ferry from interfering with the operation of complainant's boats.

\*Publication delayed by inability to obtain copy of opinion at time of delivery.



In Equity. On motion for an injunction.

The Texas & Pacific Railway Company entered into a contract with the city of Baton Rouge and Gebelin & Phillips, by the terms of which the said railroad company, in consideration of certain privileges granted by the city, agreed to transfer its freight and passengers from West Baton Rouge to the city of Baton Rouge, by means of the public ferry which had been leased by the city to said Gebelin & Phillips. The ferry being deemed inadequate, the company chartered other boats, and sought to exercise the privilege granted by its charter of transporting its freight and passengers by means of its own boats. A restraining order having been issued, the complainant company asks that an injunction issue, pending suit, restraining the said city of Baton Rouge, and Gebelin & Phillips from interfering with the conduct of its business in so transporting freight and passengers.

W. W. Howe, for complainant.

Farrar, Jonas & Kruttschmidt, and C. C. Bird, for defendants.

Before PARDEE and BILLINGS, JJ.

PARDEE, J. On the showing made we are of the opinion that the complainant under its charter, has the right to run, operate, and control transfer-boats to and from its rail terminus in West Baton Rouge to and from the city of Baton Rouge, for the transportation of its freight, passengers, and employes, (see *Harrison v. Railway Co.*, 34 La. Ann. 462; *Hepting v. Railway Co.*, 36 La. Ann. 898;) that, in landing its boats within the limits of the city of Baton Rouge, it is subject to the general police regulations and control of said city, and can only exercise special privileges therein by lawful grant of the said city, (see *Packet Co. v. Catlettsburg*, 105 U. S. 559;) that the right to operate such transfer-boats is not affected nor limited by the legislative grants to said city to operate or license public ferries to and from the west bank of the river, (see *Conway v. Taylor's Ex'r*, 1 Black, 603, 632;) that the complainant may exercise the right aforesaid by chartering or hiring boats and barges to perform the said service substantially as in the contract attached to complainant's bill; and that for so exercising the rights under its charter the complainant cannot be lawfully interfered with by the defendants, either by denying proper landing or by arresting and harassing employes.

We find, on the showing made, that within the last two years the complainant and the defendants, the city of Baton Rouge and Gebelin & Phillips, the latter being the lessees of the public ferry, entered into a contract to the substantial effect that, in consideration of a certain specified landing and wharf privileges granted by the city to complainant, the complainant would operate no transfer-boat for the transfer of passengers, but would transfer them by the public ferry. It is the impairment of this contract which gives rise to this suit. The complainant, alleging that the facilities furnished by the public ferry are of "very inadequate capacity and ineffective power, \* \* \* and which do not and cannot furnish the necessary accommodations" for complainant's largely increasing business, and that the public ferry-boat does not ply from and to

landings suitable to accommodate complainant's business, and does not cross between sunset and sunrise to meet complainant's passenger travel, has chartered boats to do all its transfer service. The defendants Gebelin & Philips allege their ability to perform all needful service, their willingness to run their boat at such times, and from and to such landings as will fully meet the wants of complainant's passenger traffic, and that they have not been put in default; and this last is conceded. The injunction asked for is to restrain the city of Baton Rouge and Gebelin & Philips from arresting and harassing complainant's employes in carrying on complainant's legitimate business. As the issues between the parties are presented to us, it seems that the controversy is one for the determination of a court of law in regular course, and that, while the defendants ought not to resort to police proceedings to enforce specific performance of the contract, the complainant ought not to have protection from a court of equity against the legitimate demands arising out of its failure to comply with its contract. On the case as made the injunction pending the suit is refused, and the restraining order heretofore issued is dissolved.

BILLINGS, J., concurs.

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HINTRAGER v. NIGHTINGALE *et al.*

(Circuit Court, N. D. Iowa, E. D. December 18, 1888.)

1. TAXATION—TAX TITLE—ACTION TO QUIET—LIMITATIONS—COMMENCEMENT OF ACTION.

Code Iowa, § 2599, provides that actions in a court of record shall be commenced by serving defendant with a notice. Title 17 of the Code, which is: "Of the limitation of actions," chapter 2, enacts the time within which actions of the various classes named, not including actions in regard to land, based on tax titles, may be brought; and section 2582, a part of the chapter, provides that the delivery of the notice to the sheriff with intent that it shall be served immediately, or the actual service by another person, is the commencement of the action. *Held*, that the latter provision as to what constitutes the commencement of an action applies only to those named in that chapter, and that the former provision, being the general rule, determines what shall be the commencement of an action on a tax title to quiet adverse claims.

2. SAME.

Where a purchaser at a tax sale brings an action to quiet title, under a city treasurer's deed, and afterwards amends the petition, setting up a deed from the county treasurer, the action as to the land in the latter deed is not deemed to have been commenced till such amendment, within the meaning of Code Iowa, § 902, requiring actions for the recovery of land sold for taxes to be brought within five years from execution and recording of the treasurer's deed.

3. SAME.

Under Code Iowa, § 897, providing that when a county treasurer's deed on a sale for taxes is executed and recorded the title shall vest, an action to quiet title by a purchaser who has neglected to complete his title by having his deed recorded, for the period of limitation during which defendants have been in possession, is barred.

**4. SAME—TAX DEED—DESCRIPTION—CERTAINTY.**

Under Code Iowa, § 821, requiring land to be assessed by a description sufficient to identify it, a sale for taxes describing the land as an undivided portion of the south middle 31 2-12 feet of a certain lot, the lot not being capable of fractional divisions of the size mentioned, is void for uncertainty of description.

**5. SAME—LIEN FOR TAXES PAID.**

Plaintiff being the actor, and defendant asking for no affirmative relief, a right to have taxes paid by plaintiff declared a lien on the land must be a legal right, and, the land sold being insufficiently described, the lien cannot be declared.

**6. SAME—QUIETING TITLE—RIGHT TO MAINTAIN—PART OWNER.**

The purchaser at a tax sale of an undivided interest in land may bring an action to quiet title against persons denying his right and title to any and all parts and interests; it not being necessary for him to turn out his co-owners in so doing.

*In Equity. On demurrer to bill.*

Bill by William Hintrager to quiet title, against Martha A. Nightingale and James H. Stout. Code Iowa, § 902, provides that actions for the recovery of land sold for taxes shall not lie unless brought within five years from the recording of the treasurer's deed.

*D. C. Cram, for complainant*

*Henderson, Hurd, Daniels & Keisel, for defendants.*

SHIRAS, J. This suit was originally brought in the circuit court of Dubuque county against Martha A. Nightingale alone, the original notice therein being delivered to the sheriff for service June 29, 1883. Service was made July 11, 1883, and the petition was filed October 11, 1883. The purpose of the suit was to quiet the title to the premises in the petition described, the petitioner claiming to be the owner thereof by virtue of a tax deed issued to him by the treasurer of the city of Dubuque. Subsequently the petitioner filed an amendment setting forth the execution and delivery to him of a tax deed by the treasurer of Dubuque county, Iowa, covering two sales,—one for the taxes of 1874, the sale being made December 6, 1875; and the other for the taxes of 1876, the sale being made November 5, 1877, the deed being dated December 6, 1883, and being filed for record December 7, 1883. On the 15th day of September, 1883, the defendant Nightingale conveyed the premises to James H. Stout, a citizen of Missouri; and on the 5th day of May, 1885, the petitioner filed an amendment making Stout a party defendant, who appeared in the cause, and thereupon the suit was removed to this court, and the pleadings were reformed to conform to the rules and practice of this court. The bill seeks, in the first place, a decree quieting complainant's title to the north 30 feet of the south 32 3-12 feet of lot 94 in the city of Dubuque, it being averred that complainant is the owner thereof in fee-simple by virtue of the two deeds already referred to and executed by the treasurer of the city and of the county of Dubuque, respectively.

Several questions are presented by the demurrers to the bill, and we will consider first the rights of complainant under the deed executed by the treasurer of the city. The defendants urge that it appears, on

the face of complainant's bill, that his rights thereunder are barred by the lapse of time, for the reason that the bill shows that the defendants are now and have been continuously in the actual possession of the premises ever since the sale thereof for taxes, and that the complainant did not bring any action to recover possession until more than five years had elapsed after his right had accrued, and that therefore the complainant is barred by the provisions of section 902 of the Code of Iowa. Complainant avers that the provisions of the several sections of the Code touching tax sales are applicable to sales made for the delinquent city taxes, and there is no question, therefore, that by section 902 of the Code the action for the recovery of the property will not lie unless brought within five years after the tax deed is executed and recorded. It is well settled by the decisions of the supreme court of Iowa that the tax purchaser cannot, by delaying to procure and record his deed, extend the time allowed by the statute for the bringing suit. There is no question, either, that a bill to quiet title, to be aided by a writ of assistance, is an action for the recovery of the property, within the meaning of the statute. The sole question for decision, therefore, is whether the action was brought within the five years after the tax purchaser became entitled to his deed. Upon the expiration of the three years allowed for redemption, or, as is claimed by defendants, of two years and nine months and ninety days, the five-year limitation begins to run, so that substantially the holder of the tax title must bring his action within at furthest eight years from the date of the sale, or the same will not lie against the owner of the premises. The sale upon which the deed from the city treasurer is based was made June 29, 1875. Was the action brought within the eight years therefrom? As already stated, the original notice was delivered for service to the sheriff June 29, 1883, but was not actually served on the defendant Nightingale until July 11, 1883. The general provision of the Iowa Code upon this subject is found in section 2599, which enacts that "actions in a court of record shall be commenced by serving the defendant with a notice," etc. The supreme court of Iowa holds that this section defines what shall in general be deemed to be the bringing or commencement of an action. *Parkyn v. Travis*, 50 Iowa, 438; *Foster v. Henderson*, 54 Iowa, 222, 6 N. W. Rep. 186; *Proska v. McCormick*, 56 Iowa, 319, 9 N. W. Rep. 289. If, therefore, its provisions are applicable to actions brought upon tax deeds for the recovery of the realty, such as is the present suit, then it is clear that this suit was not brought within the five years, as required by section 902, because in the bill itself the complainant admits that service of the notice was not had until July 11, 1883. On part of complainant, however, it is argued that the time when the suit was brought is to be determined by the provisions of section 2532 of the Code, which enacts that "the delivery of the original notice to the sheriff of the proper county, with intent that it shall be served immediately, \* \* \* or the actual service by another person, is the commencement of the action." This section forms part of chapter 2, tit. 17 of the Code, which is entitled "Of the limitations of actions." The five-year limitation affecting actions brought for the re-

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covery of lands sold for taxes does not form part of this chapter, nor do any of the limitations of the chapter apply to this class of suits. The chapter deals with a large variety of actions, and enacts the times within which actions of the various classes named in the chapter must be brought to be maintainable; but, as already said, the actions named do not cover suits of the present character. Should not, therefore, the provision that suit shall be deemed to be commenced by the delivery of the notice to the sheriff for immediate service be applied only to the classes of action named in the chapter? Counsel have not cited, nor have I been able to find, any decision of the supreme court of Iowa upon this exact point. That court has, however, decided that section 2599 gives the general rule for determining when an action is to be deemed to have been commenced, and that section 2532 applies only to the question of the limitations of time. It is, of course, a fair argument from this that this section is applicable to all limitations upon the time within which suits may be brought; but, in the case of *Proska v. McCormick*, 56 Iowa, 319, 9 N. W. Rep. 289, the court held, where a written contract provided that suit thereon must be begun by a certain time fixed, and the original notice was delivered to the sheriff within the time, but was not served until after the date fixed, that the general rule of section 2599 was applicable, and that section 2532 "had reference merely to the rights of the parties under the statute of limitations." In effect this decides that section 2532 is intended to apply only to the limitations provided for in chapter 2, tit. 17, and not to the limitations upon the right to sue found elsewhere. It must be held, therefore, that to prevent the limitation found in section 902 in regard to actions based on tax titles from attaching, suit must be brought by service of the notice upon the defendant within the five years provided for in that section. As it appears from the averments of the bill that this suit was not thus commenced within eight years from the date of the sale for taxes alleged to have been made by the city treasurer, it follows that complainant cannot maintain the suit relying upon that deed as evidence of his right or title to the land.

Complainant, however, relies also as evidence of his title upon the deed executed by the county treasurer, which, as already stated, covers two different sales. The sale last in date was had November 5, 1877, for the taxes of 1876, and the property sold, according to the deed, was the undivided 14-15 of the south middle 31 2-12 feet of lot 94 in the city of Dubuque. This sale, and the deed so far as it is based thereon, must be held void for uncertainty and insufficiency of description. Section 821 of the Code requires land to be assessed by "a description sufficient to identify it," and the sale, notice, and deed must also properly describe the property. *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. Rep. 740. If the premises had been described as the "South middle fifth or fourth of lot 94," it could be ascertained what part of the lot was intended to be sold. But it cannot be determined from the description actually found in the deed what part of the lot was assessed and sold. The official map of the city shows that lot 94 contains 94 6-12 feet, and no more. Dividing this lot, as is frequently done in de-

scribing lots in Dubuque, into fifths, and we have the north, north middle, middle, south middle, and south fifths, and each of these portions would contain only 18 54-60 feet, whereas the deed calls for the south middle 31 2-12 feet. Should the division be made into four parts, which is the least number that would include the description of south middle, and still the several portions would only have a frontage of 23 30-48 feet. The description actually found in the deed could only be met by showing that lot No. 94 contained either a north, north middle, south middle, and south 31 2-12 feet, or 124 8-12 feet in all, or a north, north middle, middle, south middle, and south 31 2-12 feet, or 155 10-12 feet in all; but, as already stated, the lot contains only 94 6-12 feet, and it is therefore impossible to apply the description to any defined or ascertainable portion of the whole lot, and consequently the deed is void as to the sale of 1877. At the sale made December 6, 1875, the premises sold are described as the "undivided one-fifteenth of the north thirty feet of the south thirty-two 3-12 feet of lot ninety-four," etc. The south 32 3-12 feet of the lot can be ascertained and definitely located, and, this being done, the north 30 feet of such location can in turn be ascertained and located, and this description is therefore sufficient.

It is, however, urged by defendants' counsel that complainant cannot seek relief in this cause touching the undivided one-fifteenth of said 30 feet, because he could, under this sale, be held only to have acquired an undivided one-fifteenth interest, and that the title thereto cannot be quieted, for the reason that complainant cannot, as the owner of an undivided interest, turn out of possession the owners of the other undivided interests, but complainant must have recourse to a proceeding in partition. The mere fact, however, that the court would not award a writ of possession to the owner of the undivided interest, does not prevent the complainant from ascertaining and quieting his title to the undivided interest claimed by him in the present action. The defendants are denying his right and title to any and all parts and interests in the premises, and this question can be heard and adjudicated in the present suit without reference to the question of the mere right of possession. Partition proceedings are primarily intended to bring about a division among several owners. A person who claims to be the owner of an undivided interest, but whose claim is contested, may desire to have this question settled without forcing a division of the property, and this he may certainly do by a bill to quiet his right to the undivided interest. It is therefore open to the complainant to establish his interest in and title to an undivided one-fifteenth of the premises in question in the present suit. As evidence of his title to the undivided one-fifteenth, complainant relies on the deed of the county treasurer dated December 6, 1883, and recorded December 7th, the sale having been made December 5, 1875. As already stated, under the statute the purchaser has at the utmost eight years, or at the least seven years, nine months, and ninety days from the day of sale to perfect his evidence of title and bring suit for the recovery of the property. If the purchaser permits this time to elapse without perfecting his title and bringing suit, if the owner of the fee-title is in

possession, he has by his own laches and neglect defeated the right he would otherwise acquire under the tax sale. Section 897 of the Code provides that "the deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds; and, when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner," etc. To vest the title in the tax purchaser the deed must be signed by the treasurer, be acknowledged by him, and be recorded in the proper record of titles. These are the essentials to give validity to the deed, and it is incumbent upon the purchaser to thus complete the evidence of his title within the eight years allowed him within which to bring suit for possession. Until the deed is signed, acknowledged, and recorded the title under the deed does not vest in the purchaser, and until it does so vest, he cannot maintain an action for possession. If the tax purchaser, through his own laches, permits the statutory limitation to expire without completing the requisite evidence of his purchase, and bringing the necessary suit for possession, he can derive no benefit from his purchase at the tax sale. In the present case the tax deed was not recorded until more than eight years after the date of the sale, even if it be admitted that it was signed within the requisite period; so that the evidence of title was not completed within the requisite time, and the deed did not vest the title in the purchaser within the time limited for the bringing suit against the fee-owner in actual possession.

As to the suit itself, it cannot be deemed to have been brought, so far as the title under the county treasurer's deed is at issue therein, until the supplemental petition setting up the execution and delivery of this deed was filed, which was in March, 1884, after the expiration of full eight years from the date of the sale. The suit as originally brought was not based upon this deed, nor upon the sale for county taxes, and until by the filing of the supplemental petition complainant counted thereon, it cannot by any possibility be held that there was an action pending thereon, within the meaning of section 902. The lapse of time must therefore be held to be a bar to complainant's suit upon the county treasurer's deed, so far as the same is based upon the sale of the undivided one-fifteenth, made December 6, 1875. If these views are correct, it follows that under the facts recited and set forth in complainant's bill, it appears that complainant cannot sustain his claim to be the owner of either the whole or any part of the premises in the bill described, and therefore, as the record stands, the defendants are entitled to have the bill dismissed, so far as the same seeks a decree quieting the title in complainant. The bill, however, prays that in case the question of title is adjudged adversely to complainant he may have a decree making the amount he has expended in the payment of taxes a lien upon the property, and the demurrer presents the question whether complainant shows himself entitled to relief in this particular. It will be remembered that the case is not one wherein the property owner appeals to a court of equity for relief against a tax sale. The defendants seek no affirmative aid from

the court, but simply deny complainant's claim, and pray to be dismissed. When the property owner appeals to a court of equity for aid in setting aside a tax sale or tax deed, it is then within the power of the court to require the complainant to do equity in the premises before granting him affirmative aid. When, however, the property owner does not appeal to equity, but stands upon his legal rights, then the party who seeks to compel him to pay the amount advanced for the taxes must maintain his claim upon his legal rights. In *Everett v. Beebe*, 37 Iowa, 452, it was held, construing section 784 of the Revision of 1860, which is re-enacted as section 897 of the Code, that the tax deed vests in the purchaser all the right, title, interest, and estate of the former owner in the land conveyed, and also all the right, title, interest, and claim of the state and county thereto, and this formed the basis of the right of the tax purchaser to recover the taxes paid by him in cases wherein the right to redeem was held to exist. In *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. Rep. 740, it was ruled that this principle could only be applied where there was a valid tax assessed, and that where the description in the deed and assessment was insufficient and void for uncertainty, then the sale transferred nothing to the purchaser, and that he could not recover the tax as the transferee of the state and county. Under the rule of this case the complainant herein cannot recover for the amounts paid on the defective sale of the 14-15 of the south middle 31 3-12 feet of lot 94, the description being void for uncertainty. The sale made December 6, 1875, of the undivided one-fifteenth, being a valid sale, would, if the purchaser had taken his deed and recorded the same within the proper time, have transferred to him the interest, right, and title of the owner, and of the state and county. Through his own laches the purchaser did not perfect the evidence of his title within the requisite time, so as to complete the transfer of the owner's title to himself, and the question arises whether the deed conveys the interest of the state and county. Assuming that it does, it is nevertheless true that complainant cannot, as against the defendant Nightingale, recover for taxes paid more than five years before the suit was brought. *Brown v. Painter*, 44 Iowa, 368; *Sexton v. Peck*, 48 Iowa, 250. Is complainant entitled to this relief against the defendant Stout? He was not the owner of the property when the taxes were assessed thereon, and he was not, either at law or in equity, under obligation to pay the same. The title of the property passed to him on the 15th of September, 1883, and to bind the property in his hands, assuming him to have been a purchaser for value, it must be shown that at that date the complainant had a lien on the land for the taxes paid by him. On the 15th of September, 1883, there was not pending any suit based upon the sales made by the county treasurer, and there was therefore no *lis pendens* affecting Stout, so far as the county and state taxes were concerned. If the taxes had not been paid by any one, the lien therefor in favor of the county and state would have followed the land, and bound the same when conveyed to Stout. Whether the failure of the complainant to perfect the evidence of his title by not procuring and recording his deed until after the expiration of the eight



years from the day of sale affects his rights as a transferee of the lien of the state and county cannot be determined upon the record as now presented. The rights of Stout in this particular, whatever they may be, are based upon the assumption that he is an actual owner by purchase of the premises, but the bill avers that the transfer to him is colorable only, and that he holds the title for his co-defendant, and the court cannot assume the contrary. This question of the actual ownership by Stout of the realty may have a bearing upon the right, if any, of complainant to recover for the city taxes alleged to have been paid by him, and the consideration thereof will not be entered upon at this time, the more especially that the court believes that the parties will now be enabled to reach an amicable adjustment on these questions touching the repayment of the sums paid by complainant for the real interest and benefit of the true owner of the property, whoever that may in fact be. Certainly it would seem that a fair compromise thereon would be to the best interests of all, rather than to incur the expense of prolonged litigation over the mere question of the amount to be repaid to complainant.

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### HAZZARD v. O'BANNON, Collector.

(Circuit Court, E. D. Missouri, E. D. December 12, 1888.)

#### 1. TAXATION—ASSESSMENT—ILLEGALITY—REMEDIES—INJUNCTION.

A bill to enjoin a levy on personalty under a tax-bill, pending *certiorari* proceedings against the board of equalization to correct the assessment, which alleges that the assessor illegally, willfully, and erroneously assessed complainant's land at a fictitious and speculative value, more than double the valuation of other like lands in the county, assessing wild lands and lands having no mineral, the same as improved and mineral lands, shows a fraudulent assessment, and, the writ under which defendant seeks to collect the tax not being void, and therefore protecting him against a suit for trespass, the injunction will be granted as to such an amount as is claimed to be excessive.

#### 2. SAME—PENDENCY OF ACTION TO CORRECT ASSESSMENT.

An injunction to restrain the collection of a tax alleged to have been fraudulently assessed, will not be refused on the ground that a proceeding by *certiorari* to correct the assessment is pending in the state court, since the motives which may have actuated the assessor in making the assessment are not open to review in the *certiorari* proceeding.

#### 3. SAME—FAILURE OF ASSESSOR TO CALL FOR STATEMENT.

The omission of the assessor to call at complainant's office for a statement of his taxable property, and to leave a notice as provided by the statute, does not affect the validity of the assessment; such provisions being merely directory.

**In Equity.** On motion for preliminary injunction.

Bill by Rowland Hazzard against Thomas O'Bannon, collector of Madison county, Mo., to restrain a levy under a tax-bill on certain personal property of complainant.

*John W. Noble and Johnson & Lentz*, for complainant.

*George D. Reynolds and R. A. Anthony, for defendant.*

THAYER, J. This case comes before the court on an application for a preliminary injunction to restrain the defendant, who is collector of taxes for Madison county, Mo., from making a levy under a tax-bill upon certain personal property belonging to the complainant. Complainant's property, situated in Madison county, was heretofore assessed for taxation for the year 1888 by the county assessor at the sum of about \$400,000. From the assessment so made complainant appealed to the county board of equalization, which reduced the assessment in the neighborhood of \$40,000. Thereafter complainant sued out a writ of *certiorari* in the circuit court of Madison county, Mo., to obtain a review of the action of the board of equalization, which proceeding is still pending. The defendant has recently served notice on the complainant of his intention to levy on the complainant's personal property to enforce the state and county taxes which are claimed to be due under said assessment.

The application for an injunction is based in part on the ground that the tax about to be enforced was illegally assessed, and that the proceeding already pending to test its legality is as yet undetermined, and that great injury may be done to the complainant if the threatened levy is made before the validity of the tax is determined. It has been held in this state that an injunction may be granted to restrain the collection of a tax that has been levied at a higher rate than the law permits, (*Arnold v. Hawkins*, 95 Mo. 470, 8 S. W. Rep. 718; *Overall v. Ruenzi*, 67 Mo. 206;) or to restrain the collection of a tax imposed on property that is not subject to taxation, because it lies outside of the taxing district, (*Ewing v. Board*, 72 Mo. 438;) or to restrain the collection of a tax imposed on personalty situated outside of the state, and not subject to taxation here for that reason, (*Valle v. Ziegler*, 84 Mo. 217.) These decisions are in harmony with the general rule that prevails elsewhere, that the collection of a tax may be restrained if it is based on an assessment that is clearly void. The rule is also recognized in this state, and it is so held elsewhere, that a tax founded on a fraudulent assessment may be enjoined. By a fraudulent assessment is meant an assessment that is purposely made too high, with a view of casting an undue proportion of the public burdens on a certain tax-payer, or an assessment made in pursuance of a rule of valuation adopted by the assessor that is designed to operate unequally in the distribution of taxation. *Cummings v. Bank*, 101 U. S. 154; *Hamilton v. Rosenblatt*, 8 Mo. App. 240, 241; *Pacific Hotel v. Lieb*, 83 Ill. 602; *Merrill v. Humphrey*, 24 Mich. 172; *Cooley, Tax'n*, (2d Ed.) 784, 785, and cases cited. But in the absence of actual bad faith, or of such an utter disregard of official duty as to amount to bad faith, on the part of the assessor or board of assessors, the collection of a tax-bill cannot be enjoined because through an error of judgment the assessment on which it is based is too high, either considered by itself or in comparison with other assessments on similar property; nor can a tax-bill be enjoined because the assessment was conducted irregularly or erroneously, unless the error is so far vital as to render the assessment void. *Hamilton v. Rosenblatt*,

*supra*; *Everitt's Appeal*, 71 Pa. St. 216; *Kelly v. Pittsburgh*, 104 U.S. 78, and cases cited; *Meyer v. Rosenblatt*, 8 Mo. App. 602; *Cooley, Tax'n*, (2d Ed.) 748, 775, and cases cited. It is also well settled that the sole remedy for an excessive or unequal assessment which has resulted merely from an error of judgment without the violation of any rule of law, is by an appeal to boards of review or equalization, when the state has created such boards for the purpose of correcting erroneous assessments; and it is generally held that the decision of such boards as to the value of property, and as to whether assessments are uniform in amount, are conclusive upon the tax-payer. *Cooley, Tax'n*, 748, and cases cited.

In view of these principles it becomes necessary to determine whether the bill shows the assessment involved in this case to be so far illegal or affected by fraud as to warrant a court of equity in interfering by injunction with the collection of the tax in question. It is first alleged that the assessor, before making the assessment, did not call at the complainant's office or residence and demand a correct statement of all his taxable property, or leave a notice at his office or residence requiring him to make out a sworn statement of such property, as the law directs him to do. I do not regard the omission of these acts as affecting the validity of the assessment. The provisions of the statute alluded to are directory, and, if not complied with, the assessment is to that extent irregularly made, but it is not invalidated. The next charge is that the constitution of the state of Missouri requires taxes to be "uniform on the same class of subjects," and further requires property to be taxed "in proportion to its value," but that in the present instance the assessor "arbitrarily, and without regard to equality or justice, affixed a fictitious and speculative value upon all the complainant's real estate" in Madison county, and did assess his land "in excess of its real value, and at values much larger proportionately than the assessed value of other real property in the county;" that the aggregate value of all complainant's property situated in Madison county is \$155,350, but that the assessor, "illegally and willfully \* \* \* did erroneously and unjustly assess said land at \$400,000, that is to say, at more than double a reasonable and just valuation, and much more than double the valuation of other and like lands in said county as assessed by said assessor." The bill also charges that the assessor grouped together lands situated in a town, and covered with buildings and other improvements, and mineral lands, and wild and unimproved lands, and, "without any discrimination between them as to value," assessed the whole at a sum largely in excess of their true value; that he grouped together about 2,200 acres of mineral land, 1,000 acres of improved farming land, and 11,800 acres of wild and unimproved lands having no value as mineral land, and "illegally and willfully treated all said lands as mineral yielding lands, and placed the improved farm lands and wild lands at values much in excess of any other lands in the county of similar quality and value, and much in excess of their real or actual cash value." I regard that portion of the bill to which I have last alluded (and only a portion of which is here quoted) as charging in effect that the county assessor, intentionally or by a reck-

less and willful disregard of his duty, placed a higher valuation on complainant's property than on similar and equally valuable property of other tax-payers, and that he also valued it for the purpose of taxation above its real or actual cash value. If that be true, he intentionally violated the duty imposed on him by law, and the assessment, so far as complainant is concerned, was fraudulent. In such cases, as has been before stated, it is held that a court of equity may restrain the collection of so much at least of the tax based on the fraudulent assessment as is excessive. It is insisted, however, that an injunction ought not to issue in the present instance, because the application is for an order to restrain a threatened seizure and sale of personalty, and not realty. There are several cases in this state, to-wit, *Deane v. Todd*, 22 Mo. 92; *Sayre v. Tompkins*, 23 Mo. 445, and *Lockwood v. St. Louis*, 24 Mo. 20, holding that an injunction ought not to issue to restrain the seizure and sale of personal property for taxes illegally assessed; but this rule applies, as I understand, in that class of cases where the tax-bill under which the levy is about to be made is so utterly void that it would not protect the collector against a suit for trespass. In that class of cases the remedy at law is deemed adequate. In the present case I have no doubt that the process under which the defendant proposes to proceed is so far valid that it would protect him against any suit for trespass which the complainant might bring. The complainant is therefore without an adequate remedy for the threatened wrong, unless a restraining order is granted. It should be further remarked that in a later case (*Valle v. Ziegler, supra*) the supreme court of this state has sanctioned the practice of granting an injunction to restrain the collection of an illegal tax levied on personal property. My conclusion is, therefore, that a temporary injunction ought to be awarded, to restrain for the present the collection of so much of the tax as is claimed to be excessive. It is not apparent to me that the granting of such an order will seriously embarrass the county, as it only affects a portion of the tax claimed to be due from one tax-payer, while it is apparent that, if the charges contained in this bill are true, the complainant is entitled to redress. Nor is it apparent that the pendency of the *certiorari* proceeding will be liable to lead to any conflict of jurisdiction, considering the narrow range of questions that may be reviewed in that proceeding. In that proceeding, as I understand the law, the motives which may have actuated the assessor in making the assessment cannot be inquired into, while in this proceeding that is the main subject for consideration. Furthermore, the fact that a levy has been threatened before the *certiorari* proceeding can be heard which may seriously embarrass complainant's business operations, is an additional reason for prohibiting such action. I shall accordingly enter an order restraining the defendant from levying upon or selling any of complainant's property with a view of enforcing the tax. This order will only continue in force for five days from this date, unless in the mean time complainant shall have paid to defendant on account a sum equal to the taxes at the rate fixed by law on a valuation of \$200,000, which was the assessment for 1886, as I understand, upon complainant's property in Madison

county. If such payment is made, the restraining order will continue in force until further directions be given. The defendant may at any time hereafter apply to have the injunction dissolved or modified.

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RICE v. RICE *et al.*<sup>1</sup>

(Circuit Court, D. Delaware. December 12, 1888.)

1. VENDOR AND VENDEE—VENDOR'S LIEN.

The English doctrine of the vendor's equitable lien for unpaid purchase money, upon an absolute conveyance of land, has not been generally adopted in the United States, and this court will not enforce the lien in a state where it has not been established by statute, or is not recognized as in force by the state tribunals. A secret lien is a dangerous one and not entitled to favor, especially in a state where every facility is afforded for the recording and preservation of liens, or of giving notice to the world of their existence.

2. SAME—WAIVER OF LIEN.

A vendor of land took from his vendee a note indorsed by a third party for an unpaid portion of the purchase money. The vendee mortgaged the land, which was afterwards sold at sheriff's sale under one of the mortgages to the mortgagee. At the time of the mortgage and sale the land was treated by all the parties, who were living in intimate relations, as unincumbered, and it was testified that the joint note was taken to secure the sum still owing, and that the vendor had given no notice to the mortgagee, until after the mortgage, of any claim against the land. *Held*, that the vendor had taken the security of a third person, and waived his lien on the land for the amount unpaid.

In Equity.

Bill by James H. Rice against John V. Rice and Josiah Morris, to enforce a vendor's lien on lands owned by defendant Morris.

George H. Bates and Edward G. Bradford, for complainant.

Wm. C. Spruance and Anthony Higgins, for defendant.

WALES, J. This suit is brought to establish and enforce a vendor's lien on certain lands, with an iron foundry erected thereon, in the city of Wilmington, now owned by the defendant Morris. James H. Rice, the complainant, and John V. Rice, one of the defendants, on the 10th of September, 1864, were copartners in the business of iron founders at the foundry aforesaid, and seized in fee of said lands; and on that day James H. Rice and John V. Rice, by an agreement and indenture in writing under their hands and seals, dissolved their partnership, and James sold to John the undivided part and share of James "in the joint trade and of all the property, goods, wares, merchandise, money, debts, and effects thereto belonging, or in anywise appertaining, or in which the said James H. Rice has any right, title, or interest by virtue of said copartnership, and all the right, title, and use of James H. Rice of, in, and to the said capital, joint stock, property, effects, money, and debts, and any and every part thereof, and all the profits, gains, and proceeds thereof."

<sup>1</sup>Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

By the agreement James appointed John his attorney to wind up the business, and covenanted not to interfere with John therein; and in consideration thereof John covenanted to pay James \$600 in each year for 10 years from said date, if James should so long live, in semi-annual payments of \$300 each; and \$5,000 at the end of the said 10 years if James were then living, but, if he were then dead, to pay to the personal representatives of James the \$5,000, less the sum of \$300 for each year after the date of said agreement until the death of James. In conclusion, John covenanted to pay all the partnership debts, and to indemnify James from all liability on account of them. On the same day, September 10, 1864, John gave to James the joint note of himself and Theodore Hyatt, of which the following is a copy:

"WEST CHESTER, September 10th, 1864.

"Ten years after date we promise to pay to James H. Rice five thousand dollars, without defalcation, for value received, subject, however, to the conditions expressed in the article of agreement between James H. Rice and John V. Rice, bearing this date.

"\$5,000.00.

[Signed]

J. V. RICE,

"THEO. HYATT."

Seven months afterwards, on the 10th of April, 1865, James conveyed the said real estate to John, by a deed of bargain and sale, for the consideration of \$5,000, the receipt of which sum is duly acknowledged. The complainant says that this deed was prepared for execution at the time of making the agreement of dissolution of partnership, and as part of that transaction, but was not in fact executed until the day of its date. Within less than two years and a half after the execution and delivery of this deed, the defendant John V. Rice borrowed from the defendant Morris several sums of money, to secure the payment of, which he gave to Morris three several mortgages on the foundry property, as follows: one dated February 6, 1866, for \$12,000; one dated September 22, 1866, for \$3,000; and a third, dated September 2, 1867, for \$10,000, all of which mortgages were duly recorded. On this last mortgage Morris recovered a judgment, on a writ of *scire facias*, in the superior court of Delaware, for New Castle county, at the November term, 1875, against John V. Rice and wife, and under a writ of *levari facias* to the May term, 1876, on said judgment, the sheriff sold the property described in the mortgage to the defendant Morris, for \$3,100, subject to the first two mortgages. The sale was confirmed by the court, and the sheriff, by deed, dated June 6, 1876, conveyed the property to Morris, who still owns it. The complainant alleges that Morris accepted the three mortgages, and afterwards became the purchaser of the real estate, with full knowledge and notice that the consideration money, and its interest, for which the complainant had conveyed the property to John V. Rice, had never been paid, and therefore took and holds the property subject to an equitable lien in favor of the complainant for the unpaid purchase money and interest; that John V. Rice is insolvent, and the complainant without remedy, except by enforcing said lien. The bill does not allege that the vendor's lien was expressly reserved, but claims that it exists

by the operation of law, from the fact that John V. Rice, the vendee, did not pay the consideration money, and that Morris knew this fact when he loaned the money, and also when he bought the property. Morris denies that he took the mortgages, or purchased the property, with any knowledge or notice that the complainant had not been paid the \$5,000. He also denies that any such lien can exist, because (1) the complainant took for the purchase money the promissory note of John V. Rice, with Theodore Hyatt as surety, and accepted the same in lieu of all liens or claims against the property, (2) that the said note has since been paid and satisfied by Hyatt; (3) that when Morris took the mortgages from John V. Rice, the latter assured him that the property was free and clear from all liens and incumbrances, and this was verified by searches made by Morris' counsel; (4) that the right of a vendor of real estate to an equitable lien thereon for the unpaid purchase money, has never been recognized or adopted by the courts of Delaware, and no such right exists under the laws of that state.

The English doctrine of the vendor's equitable lien for unpaid purchase money, upon an absolute conveyance of land, is adopted in some of the states, rejected in some, and remains undecided or doubtful in others. It is conceded that unless this doctrine is in force in Delaware this court cannot recognize and apply it in the present case. It is also admitted on the part of the complainant that, so far as judicial decisions have gone in Delaware, the question is an open one. In *Budd v. Busti*, 1 Har. (Del.) 69, the question of the existence of the lien was directly made to the court of appeals, and appears to have been the only one argued by the able and learned counsel who took part in the discussion. The whole law relating to the subject was brought under review, and, after a full consideration, a majority of the court were disinclined to accept the doctrine as a part of the law of Delaware. The court below had decidedly refused to recognize it. This was in 1833, and, so far as we are informed, no application to enforce this lien has been made to the court of chancery of Delaware from that day to this. In *Godwin v. Collins*, 3 Del. Ch. 199, to a bill for the specific performance of a contract for the sale of land, the defense was made that the payment of the purchase money was not in any manner secured to the vendor, to which it was replied that he was made secure by the vendor's lien. In referring to this, Chancellor BATES said:

"This, if true, would afford only a precarious security, since the vendor's lien does not follow land into the hands of a purchaser for value without notice. But whether what is known in England as the 'vendor's lien,' is recognized here, remains in doubt since the case of *Budd v. Busti*, in the court of errors and appeals. In that case, though the decision went upon other grounds, a majority of the judges expressed opinions decidedly adverse to the recognition in this state of a vendor's lien for purchase money. The policy of our law is against liens not of record, and the necessity for the vendor's lien is practically superseded by the long-settled and uniform habit of our people to take special securities for unpaid purchase money."

On appeal the decree in *Godwin v. Collins* was affirmed. 4 Houst. 28. This last case came down to the year 1869. It has been generally understood that the supreme court of the United States will not consider the

lien as existing in any state unless it has been previously adopted by the law, or is recognized by the courts of the state in which the land sought to be charged is situated. *Ahrend v. Odiorne*, 118 Mass. 267; *Brown v. Gilman*, 4 Wheat. 290; *Bayley v. Greenleaf*, 7 Wheat. 46; *McLearn v. McLellan*, 10 Pet. 640; *Chilton v. Braidon*, 2 Black. 458; *Cordova v. Hood*, 17 Wall. 1. It may be reasonably assumed that the court, in adopting this course, was governed by the consideration that it had no power to create or impose a lien growing out of the mere relation of vendor and vendee of real property, which had not already been recognized or established by the law of the state. In all matters relating to the execution and construction of deeds, wills and contracts for the sale and disposition of real property, the courts of the United States, in entertaining jurisdiction of controversies arising from any of these causes, will be guided and controlled by local laws and adjudications. Thus, in *Daniel v. Whartenby*, 17 Wall. 641, which was on a writ of error to the circuit court of the United States for the district of Delaware, in an action of ejectment, the contention of the defendants below being that, in the construction of a will under which both parties claimed title, the rule in *Shelley's Case* applied, the court expressly took notice of the fact that that rule was in force in Delaware, although it had been abolished in most of the states of our Union. So in *Cordova v. Hood*, *supra*, the court held that the vendor's lien was a part of the law of Texas, and decided accordingly. In view of what was said, as well as of what was left unsaid, in *Budd v. Busti*, and of the pregnant remarks of Chancellor BATES, above quoted, the question of vendor's lien in Delaware can hardly be said to be an open one. If such a lien was ever known to be in force there, of which there is much doubt, it has lain dormant, or become obsolete; and for the reasons already suggested we do not think that this court would be justified at this late day in reviving and applying it. A secret lien is a dangerous one, and is not entitled to favor, especially in a state where every facility is afforded for the recording and preservation of incumbrances, and of giving notice to the world of their existence. The enforcement of such a lien is fraught with danger to the innocent purchaser, since it may put it into the hands of a fraudulent vendor to fasten it on land which has been bought and paid for in good faith, when, after the lapse of time and the loss of evidence, the purchaser may be unable to prove the real history of the transaction. In the case at bar it is somewhat remarkable that, at the distance of nearly a quarter of a century from the date of the articles of agreement between the complainant and John V. Rice, all the material witnesses, with one exception, survived to testify concerning the actual terms on which the property was conveyed to John V. Rice, and the intention of both vendor and vendee at the time of the execution of the deed. Their testimony on the main issue is conflicting, but after a careful examination of the evidence we have had no difficulty in coming to a satisfactory conclusion on the facts.

Even admitting the law of England, respecting the lien of vendors for the purchase money after the execution of a deed, to be the law of Delaware,—a point we do not mean to decide,—we think it perfectly clear, on



the evidence, as did the court in *Brown v. Gilman*, *supra*, that no lien was retained, and none was intended to be retained, by the complainant in this case. We are also of the opinion that the lien did not attach by implication by operation of law, and that, if it could be said ever to have attached, it was waived by the act of the complainant in taking the security of a third person for the payment of the purchase money. The relationship of and between the parties to this suit,—that of brothers and brothers-in-law,—the qualified admissions of John V. Rice that he may have told Morris at the time the mortgages were given that the land was free and unincumbered, and the testimony of Hyatt and Carter that the joint note was taken by the complainant as security for the consideration named in the deed, so that John V. Rice would be better able to borrow money outside on mortgage, and the settlement of the action brought on the note, convince us that, under the broadest application of the law of vendor's lien, the proofs do not sustain the allegations of the bill. The complainant says that he mentioned his claim for the unpaid purchase money to Morris somewhere between 1873 and 1875,—long after Morris had loaned his money and taken the mortgages; while Morris denies that he ever had any notice, or knowledge of the claim, until shortly before the bringing of this suit. Morris was in California before and at the time when the Rice brothers dissolved their partnership, and did not return until after the negotiations for the sale of the foundry had been completed. All the parties, including the witnesses Hyatt and Carter, lived together under the same roof, at West Chester, for several months subsequent to the sale; and during many years thereafter John V. Rice and his family were supported by Morris, at whose house, in Salem, N. J., the complainant was also a frequent guest. The dissolution of the partnership, the transfer of the property and business of the firm to John V. Rice, and the conditions on which these changes were made, were more or less discussed in the family councils, and the witnesses are thus able to speak of them with some degree of certainty. John V. Rice is only a nominal defendant, and does not appear to advantage as a witness, while the complainant's testimony is outweighed by that of Hyatt, Carter and Morris. The complainant received some interest on the note from John V. Rice; and Hyatt swears that, when the action on the note was begun, he had, in various ways, paid to the complainant as much as \$4,500; and the proof is uncontradicted that that action, as far as Hyatt was concerned, was settled by his paying to the complainant the sum of \$500. Mr. Morris appears to have been a generous benefactor to the Rice brothers, and, if there was any deception practiced on the complainant, in the sale and transfer of the foundry property, it was caused by the complainant's own fault in neglecting to take a mortgage for the purchase money, and trusting to the security afforded by the note of his brother and Hyatt. A decree will be entered dismissing the bill with costs.

MERCANTILE TRUST & DEPOSIT CO. *et al.* v. RHODE ISLAND HOSPITAL TRUST CO. *et al.*

(Circuit Court, D. Rhode Island. September 29, 1888.)

1. WILLS—REVOCATION—BIRTH OF CHILD.

Under Pub. St. R. I. c. 182, § 12, which provides that a child born after the execution of his parent's will, "without having any provision made for him in such will," shall inherit as if the parent had died intestate, a will made by a married man, having no children, in which he gives his sister a certain legacy in case of his death leaving no children born of his wife, and a smaller legacy in case of his death leaving children born of said wife or their descendants, and in either event bequeaths all the residue of his estate to his wife, does not make such provision for after-born children as will bar them from inheriting.

2. EQUITY—PLEADING—DEMURRER.

A demurrer to a bill for want of equity will not lie when the complainant is entitled to part of the relief prayed for.

In Equity. On demurrer to bill of the Mercantile Trust & Deposit Company and others against the Rhode Island Hospital Trust Company and others.

*Miner & Roelker*, for complainants.

*Arnold Greene and Jas. Tillinghast*, for defendants.

COLT, J. This case was heard upon the demurrer of the Rhode Island Hospital Trust Company. The principal ground of demurrer is want of equity in the bill. The bill is brought by the trustee and *cestuis que trustent* under the will of Carlotta I. Whipple, deceased, to obtain from the Rhode Island Hospital Trust Company certain personal property alleged to be a part of the trust property under said will. It appears from the bill of complaint that Jeremiah Whipple, husband of Carlotta, made a will, having at the time no children, and that afterwards a daughter, Sarah, was born, and that he died leaving his wife and his daughter surviving. His wife proved his will, and was appointed executrix thereof. Afterwards she died, leaving a will which provided that all her residuary estate, real and personal, should go to her daughter, Sarah, and in case of the death of her daughter without children, the estate was devised to a trustee in trust for the children of her sister, Ellen L. Norris. Sarah died intestate, and without issue. The Mercantile Trust & Deposit Company has been appointed trustee under the will, and suit is now brought for the property claimed to be covered by the trust.

The property in dispute belonged originally to Jeremiah Whipple. The defendant the Rhode Island Hospital Trust Company has possession of the fund, claiming to hold it either as administrator of Carlotta, or guardian of Sarah, or in both capacities. The real dispute is between the complainants, who claim that the fund passed under the will of Jeremiah Whipple to his wife Carlotta, and by her will to themselves as devisees, and the administrator and next of kin of Sarah, who claim that the birth of Sarah, after the execution of her father's will, entitled her,

under the law of Rhode Island, to take the same share in her father's estate as she would have been entitled to had he died intestate, namely, two-thirds of the personalty and all the realty, subject to her mother's right of dower. Pub. St. R. I. c. 182, § 12. The statute reads as follows:

"Whenever any child shall be born after the execution of his father's will or mother's will, without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother, in like manner as if the father or mother had died intestate, and the same shall be assigned to him accordingly."

The second, third, and fourth paragraphs of the will of Jeremiah Whipple are as follows:

"(2) In case I die leaving no children born of my wife, Carlotta Isabel, nor any descendants of such children living at the time of my death, I give and bequeath to my sister, Sarah Smith Whipple, the sum of ten thousand dollars. (3) In case, however, of my having children born of my said wife, or their descendants living at the time of my death, then, instead of the bequest contained in the next preceding clause, I give to my said sister the sum of one thousand dollars. (4) I give, bequeath, and devise to my wife, Carlotta Isabel Whipple, all the rest and residue of my property and estate, both real and personal and mixed, of which I may be seized and possessed at the time of my death, to have and to hold the same to her and to her heirs."

Under the terms of this will no provision is made for the child or children of the testator. The statute says explicitly, and without qualification or limitation, that a child born after the execution of the will, without having any provision made for him in the will, shall have a certain interest in the estate of the parent. Unless a construction is to be put upon this will wholly at variance with its clear and unambiguous language, or unless a strained and unwarranted construction is to be given the words "provision made for him in such will," it cannot be said that Sarah Whipple was provided for in this instrument. All the property, with the exception of a legacy to his sister, is devised absolutely to the testator's wife. If the child receives anything, it must be from the bounty of the mother, and not by reason of anything contained in the will. If a will were to be drawn to which it was designed that the statute should apply, in case a child was born after its execution, it would be difficult to conceive of a much better form to follow than the will before us. Clauses 2 and 3, where the testator refers to the fact of his leaving children, have, it seems to me, no bearing upon the question before us, whatever bearing they may have under the statutes of some other states. By no possible construction do paragraphs 2 and 3 make any provision for any child, while paragraph 4 gives the whole residue of the property to the mother. The statute of Pennsylvania on this subject is quite similar to Rhode Island. *Walker v. Hall*, 34 Pa. St. 483, was the case of a will giving all the testator's property to the wife, in which the following language was used: "Having the utmost confidence in her integrity, and believing that should a child be born to us she will do the utmost to rear it to the honor and glory of its parents,"—and the court held that this was clearly no provision for the child. See, also, *Hollings-*

worth's Appeal, 51 Pa. St. 518; Willard's Estate, 68 Pa. St. 327. The statute has been twice construed by the supreme court of Rhode Island, and we agree with complainants' counsel that this court should follow the decision of the highest court of the state, and, as a general rule, the latest decision on the subject. In *Chace v. Chace*, 6 R. I. 407, the will contained no reference to any children, and the court observes:

"Upon the whole, we are of opinion that by the terms of the sixth section the legislature intended to and did prescribe a rule of law that, if an after-born child is not provided for at all in the will, he shall be let into his share of the inheritance, and that without regard to the will or intent of the parent; and that, therefore, no evidence of such intent is admissible to defeat the child."

It is contended by complainants that the later case of *Potter v. Brown*, 11 R. I. 232, is somewhat in conflict with *Chace v. Chace*. But I fail to discover any conflict in the two decisions. On the contrary, it would seem from the facts in the case that this last decision of the supreme court more strongly sustains the position of the defendants in this case than the earlier one. In *Potter v. Brown*, the testator, by his will, gave a bequest of \$2,000 in trust, the income to be used for his daughter until 20, or until married, but in case of her death under 20 or unmarried, the sum so held in trust, together with the accumulations thereon, was bequeathed in equal shares to her brothers and sisters then living. More than a year after the execution was made a son was born, for whom no provision was made in the will, except the above-described contingency. The court held that the provision was not such as was contemplated by the statute, and that the son was entitled to share in his father's estate as in case of an intestacy. Chief Justice DUFFEE says:

"Did the testator himself regard the bequest as a provision for any child or children which might afterwards be born to him? We find but little reason for thinking he did. Upon the whole, we think it safer, and more consonant with the design of the statute, to decide that the bequest over is too precarious to be regarded as a provision for the after-born child so as to defeat his right under the statute to share in his father's estate, as if it were intestate; and accordingly we do so decide."

Stress is laid by the complainants upon the following language used by the court:

"Doubtless the idea of the statute is to supply an omission which may be presumed to have been unintentional. A parent naturally wishes to provide for all his children. When, therefore, a parent makes a will without providing in it for an after-born child, it may be presumed that the omission to provide for him was not designed."

It is argued from this that in the *Jeremiah Whipple* will the second and third clauses show that the testator had in mind the possibility of after-born children, and that in providing so bountifully for the mother he intended in fact to make provision for any after-born child. The difficulty with this reasoning is that in providing for the mother he did not in fact make any provision in his will for his after-born child. As for the language of the court, it is undoubtedly true that the statute is intended to supply an omission which may be presumed to be unintentional, for the law would not presume that a parent would intentionally

omit to provide for an after-born child. But while this is the theory of the law, there is nothing in the opinion of *Potter v. Brown* which goes to show that the intent of the testator may be shown, and may control in violation of the express provision of the statute. The statute itself says nothing about the intent of the testator governing, like the statute of California for example, but it declares without qualification that, if no provision is made in the will, the child shall still be entitled to a certain share in the estate. It seems to me that the construction put upon the language of the court in *Potter v. Brown* by complainants' counsel is unwarranted, and I find no conflict between that case and the earlier case of *Chace v. Chace*.

The will of Carlotta Whipple gives all the residue of her estate to her daughter, Sarah, her heirs and assigns forever, and in the case of the death of her daughter without leaving children, the property is to go to a trustee in trust for the three daughters of her sister, Ellen L. Norris, the present complainants. The effect of a devise of this character is settled in Rhode Island, and the gift over must be held valid as an executory devise. *Barney v. Arnold*, 15 R. I. 78; *Morgan v. Morgan*, 5 Day, 517. The complainants therefore may rightfully claim the share of the personal property, which legally passed to Carlotta under the will of her husband, and which she devised by her own will. As for the other grounds of demurrer, I do not think they are well taken. The bill is not bad for multifariousness, nor for want of necessary parties. Upon the case stated in the bill, as the complainants may be entitled to a part of the relief prayed for, though not to the whole, the demurrer must be overruled.

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### WELLES v. LARRABEE *et al.*

(Circuit Court, N. D. Iowa, E. D. December 11, 1888.)

#### 1. BANKS—NATIONAL BANKS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—PLEDGES.

A pledgee of shares of stock in a national bank, who does not appear, by the books of the bank or otherwise, to be the owner, is not liable for an assessment upon the shares on the insolvency of the bank, under Rev. St. U. S. § 5151, rendering shareholders liable for the debts of the association to the extent of the par value of their stock.

#### 2 SAME—NAKED TRUSTEES.

One to whom the shares are assigned in trust as security for a debt due a third person, and following whose name on the stock-book of the bank is the word "trustee," is not liable for the assessment under section 5151, and is also within the provision of section 5152, exempting from such liability persons holding stock as trustees.

At Law. On demurrer to the answer.

Action by E. P. Welles, receiver of the Commercial National Bank of Dubuque, against Frank Larrabee and the First National Bank of McGregor, to recover an assessment on shares of stock of the insolvent bank. Plaintiff demurs to the answer.

*Thomas Updegraff and William Graham, for plaintiff.*  
*James O. Crosby, for defendants.*

SHIRAS, J. From the averments in the petition contained it appears that the Commercial National Bank was a corporation organized under the act of congress, doing business at Dubuque, Iowa; that on the 20th day of March, 1888, being insolvent, it ceased to do business, and the present plaintiff was duly appointed receiver thereof by the comptroller of the currency; that the liabilities were found to exceed the assets of the bank, and on the 25th day of July, 1888, the comptroller made an assessment upon the shares of the capital stock of said bank of 100 per cent. upon the par value thereof, the same to be paid by August 25, 1888; that on the 20th day of March, 1888, the defendant Frank Larrabee, as trustee for the defendant the First National Bank of McGregor, was the owner of 100 shares of the capital stock of said Commercial National Bank of the par value of \$10,000, wherefore judgment is asked against both defendants for said sum of \$10,000. To this petition the defendants answer, setting forth that previous to the 23d day of May, 1885, one J. K. Graves had become indebted to the First National Bank of McGregor in two loans of \$5,000 each, evidenced by two promissory notes, and secured by the pledge of 100 shares of the capital stock of the Commercial Bank, the certificates being in the name of R. E. Graves, trustee, and by him assigned in blank; that on said 23d day of May, 1885, with a view to the extension of said loans, and for the securing the same, with the consent and by the direction of J. K. Graves, who was the real owner of said 100 shares of stock, the certificates named were surrendered to R. E. Graves, trustee, who was also president of the Commercial Bank, and a single new certificate of said 100 shares was issued to Frank Larrabee, trustee of the McGregor bank; that J. K. Graves has never paid his indebtedness to said McGregor bank; that said Larrabee has no interest whatever in said stock, but holds the same in trust for said J. K. Graves, and as collateral security for the payment of said indebtedness to the McGregor bank due from J. K. Graves, who is the real owner of said stock; and that beyond said certificate of shares he has no estate or funds pertaining to said trust, or belonging to said J. K. Graves. To this answer the plaintiff demurs, and counsel have very fully argued the questions thereby presented for determination.

So far as the defendant bank is concerned, the question resolves itself into this: Can the pledgee of stock in a national bank, who holds the same solely as collateral security for a debt due it from the real owner of the stock, be held liable for the assessments thereon, when the name of the pledgee as owner or holder of the shares has never appeared upon the books of the bank, or even upon the certificates of stock? As to the defendant Larrabee the question is: Can a person who is not the owner of the stock, and has no beneficial interest therein, be held liable for the assessments thereon by reason of the fact that the shares have been assigned to him to hold in trust, it appearing upon the proper books of the bank that he holds the same as trustee.

It may perhaps aid in reaching the true solution of these questions to state briefly some principles which are fully recognized, touching the liability of stockholders and the grounds therefor. One of the purposes of a corporation is to enable those interested therein as shareholders to limit their liability for the indebtedness of the corporation. The statutes authorizing the creation of the particular corporation usually fix the limit of such liability. In the case of national banks, the shareholders, in addition to being required to pay in the full amount of the stock subscribed for, are further liable, in case of need, for an amount equal to the face value of the stock held by them. In enforcing this liability the first principle recognized is that the actual owner of the stock may be held liable for the assessment upon the shares owned at the time of the failure of the corporation. This is upon the principle that the parties, who by reason of being the actual owners of the stock are entitled to the profits and benefits of the business carried on by the corporation, must respond to the burdens and debts up to the statutory limit. In the enforcement of this liability against stockholders it is well established that the actual owners of the corporate stock cannot shield themselves against such liability by putting the title of the stock in the name of some irresponsible third party. Creditors have the right to call upon the actual stockholders for contribution, and this right cannot be defeated by a merely colorable transfer of the legal title to some third party, who in fact holds the same for the benefit of the real owner of the stock. *Thomp. Liab. Stockh.* § 215, *Johnson v. Laflin*, 5 Dill. 75; *McClaren v. Franciscus*, 43 Mo. 467; *Bank v. Seton*, 1 Pet. 302.

It is a further recognized principle that a party who permits himself to be held out upon the books of the corporation as a shareholder in fact will, in favor of creditors, be held to be such. Parties dealing with a corporation have a right to assume that all persons shown by the books of the corporation to be stockholders, are bound for the liabilities of the corporation in the manner provided by the statutes under which the corporation is organized. If, therefore, a person knowingly permits his name to appear upon the stock-books as a shareholder in fact, he will be estopped in favor of creditors from denying liability. *In re Bank*, 22 N. Y. 17; *Thomp. Liab. Stockh.* §§ 160, 161. These general rules, and others deducible from the adjudged cases, are all based upon the foundation principle that the parties really interested as stockholders in corporations, and who as such are entitled to control and manage the affairs of the corporation, and to receive and enjoy the profits of the corporate business, are bound to respond to the liability imposed by the statute, when the business of the corporation has ceased to be profitable, and the ordinary assets are inadequate to meet the just demands of creditors. The rights of creditors are fully met and protected if the statutory liability is enforced against all who are in fact stockholders in the insolvent corporation, and against all who have knowingly permitted their names to appear or continue upon the corporate books as stockholders in fact, under such circumstances as would justify third parties in assuming that they were stockholders. There is no principle of law or equity which justifies the

holding a person liable as a stockholder in a corporation if in fact he is not one, unless he has knowingly permitted his name to appear as a stockholder, and thereby presumably misled parties dealing with the corporation. The liability sought to be enforced is purely statutory, and the declaration of the statute is that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof," etc. Section 5151, Rev. St. To be liable, the party charged must be a shareholder, and by the construction placed upon these and similar provisions in other statutes it is held that the actual shareholder cannot escape liability by placing the legal title of his shares in the name of a third party, and that one who knowingly permits his name to be placed upon the corporate books as an owner of stock, or who permits it to continue thereon after he has in fact sold his stock, will be estopped from asserting that he is not a shareholder in favor of creditors who might otherwise be misled.

Applying these principles to the facts averred in the record of the present case, what is the result? So far as the defendant bank is concerned it is not averred nor claimed that its name ever appeared upon the books of the Commercial Bank as a shareholder, or that it ever held itself out in any way to be the owner in fact of the shares of stock upon which it is now sought to be made liable. There is nothing averred, therefore, that works an estoppel upon the bank, and it may be heard to assert that it is not the actual owner of the stock in question. On part of plaintiff it is argued that the facts averred in the answer show that the McGregor bank is the pledgee of the stock, and by reason of that fact must be held liable. If a person receives a transfer of stock, the legal title thereto being conveyed to him upon the corporate books, he becomes by his own act the apparent owner of the shares, and he cannot afterwards show, as against creditors, that in fact the transfer was by way of security only. *Hale v. Walker*, 31 Iowa, 344; *Wheelock v. Kost*, 77 Ill. 296; *Bank v. Burnham*, 11 Cush. 183; *Adderly v. Storm*, 6 Hill, 624; *Pullman v. Upton*, 96 U. S. 328; *Bank v. Case*, 99 U. S. 628. Some of the cases go to the extent of holding that, even if it appears on the corporate books that the stock is held in trust, and not absolutely, nevertheless the party in whose name it thus stands will be held liable. These cases seem to be based upon the assumption that the courts will disregard the addition of the word "trustee," and will hold the party to be on the face of the record the apparent legal owner of the stock. If this assumption is well taken, then the conclusion of liability is inevitable, under the rule that one who knowingly permits himself to appear as the legal owner of the stock upon the books of the corporation is estopped, in favor of creditors, from denying such ownership and the consequent liability. In these cases, however, the corporate books showed an assignment or transfer of the stock to the pledgee, and the true ground of liability in such cases, where it exists, is not because the pledgee is the owner in fact of the stock, for he is not, but the fact that the pledgee has received a transfer



of the stock in such form that the legal ownership appears to be in him, and by thus holding himself out as apparent owner he is estopped from showing the contrary. It will be borne in mind, however, that the shares of the stock pledged as a security for the debt of J. K. Graves to the McGregor bank were never carried on the books of the Commercial Bank in the name of the McGregor bank. The rule to be applied in such a case is found in *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. Rep. 525, in which it is held that where stock in a national bank was transferred in good faith as security for a debt, and the legal title was placed in the name of an irresponsible third party, the pledgee could not be made liable for assessments upon such stock; it being held that the pledgee had a perfect right to thus take the stock as security for the debt due it, without making itself liable as the apparent owner thereof. In the case at bar, therefore, as the facts averred in the answer and admitted by the demurrer are that the McGregor bank never owned the stock of the Commercial Bank, and that its only interest therein was by way of security for a debt due from the actual owner of the stock, and it not appearing that the McGregor bank was ever held out or represented to be the owner of the stock in question, and as the legal title thereto never passed to the bank, it must be held that the answer, read in connection with the petition, presents a good defense to the action, and is not assailable by demurrer.

There is left, then, for consideration the question whether the facts appearing in the answer and petition constitute a defense for the defendant Larrabee. These facts are that he never was the beneficial owner of the shares of stock in question; that the same were assigned to him in trust by the actual owner, J. K. Graves, to be held as security for the debt due the McGregor bank; and that, when the transfer on the books of the Commercial Bank was made to him, the character of the title and interest transferred to him was indicated by the addition of the word "trustee" thereto. Notwithstanding the ruling in some of the cases that such an addition is to be disregarded, the weight of authority accords with what on principle appears to be the common-sense construction of such a subscription. The word "trustee" is one of significance. It is constantly made use of, not only in legal phraseology, but in common speech, to indicate that one holds the title to property, not in his own absolute right, but for the benefit of some other party or parties. The fair and reasonable conclusion that all would reach, upon noticing the fact upon the stock-book of a corporation that certain shares of stock were held by A. B., trustee, would be that he held the same, not in his own right, but for the benefit of some other party. If the subscription upon the stock register was in the name of A. B., administrator or executor, could it be fairly said that persons dealing with the corporation would be justified in assuming that stock thus held was held by A. B. in his own right, and not in a representative capacity? Such words as trustee, administrator, and executor have a well-understood meaning, and, when attached to a name appearing upon the corporate books, are certainly sufficient to notify all that such shares of stock are held by the subscriber, not in his

own right, but in a representative capacity, thus putting those dealing with the corporation upon inquiry. Thus in *Shaw v. Spencer*, 100 Mass. 382, it is said that it is an erroneous assumption that the word "trustee" alone has no meaning or legal effect; that "the law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice, and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist." In *Duncan v. Jaudon*, 15 Wall. 165, the supreme court cite this case of *Shaw v. Spencer* approvingly, saying:

"And the supreme court of Massachusetts in a recent case, in its essential features like the case at bar, decides that, if a certificate of stock expressed in the name of A. B., trustee, is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put upon inquiry as to the character and limitations of the trust, and, if he accepts the pledge without inquiry, does so at his peril. In that case the *cestui que trust* was not named in the certificate, and the court remarked that, if it were so, the duty of inquiry would hardly be controverted. If these propositions are sound,—and we entertain no doubt on the point,—the liability of the appellants for the conversion of the stock belonging to Mrs. Jaudon cannot be an open question."

It is not necessary to cite further authorities in support of the proposition that the addition of the word "trustee" to the name of Frank Larrabee upon the stock certificate was sufficient to charge parties with notice that he held the stock, not as his own, but as a trustee. Indeed, counsel for plaintiff in their argument do not controvert this proposition, but argue that the word "trustee" only notified parties dealing with the bank of the real facts, to-wit, that Larrabee held the stock as pledgee, and as such is liable for the assessments. The facts, as pleaded in the answer, however, show that in fact J. K. Graves was the pledgeor, and the McGregor bank was the pledgee, and Larrabee was merely a trustee. There was no debt due him, nor could he in any way derive any benefit or advantage from the pledge. If Graves paid the debt due the bank, then it would become the duty of Larrabee to return the stock to Graves. If the debt was not paid, and the stock was sold for the payment thereof, then it would be his duty to pay the proceeds, or so much thereof as should be necessary to pay the debt, to the McGregor bank, returning the surplus to Graves. Larrabee is neither the actual owner of the stock, nor has he any beneficial interest therein as a pledgee or otherwise. His sole connection with the stock, according to the averments of the answer, was the taking and holding the title in trust for the real owner, Graves, subject to the claims of the McGregor bank as a creditor of Graves, and according to the averments of the petition he was a trustee for the benefit of the McGregor bank. Thus it appears that in fact Larrabee held the title of the stock as trustee only, and such fact appeared upon the face of the stock certificate; and by the express terms of section 5152 of the Revised Statutes it is declared that "persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable," etc. Counsel for plaintiff argue that the trustees intended to

be exempted by this section are such only as, having funds in their hands for investment, have invested the same in stock of national banks, and that the exemption does not apply to cases where the trustee holds the naked legal title in trust for some third party; and in support of this proposition counsel cite *Thomp. Liab. Stockh.* §§ 179, 180; *Howe's Case*, 2 Johns. & H. 229; *Stover v. Flack*, 30 N. Y. 64; *Wheelock v. Kost*, 77 Ill. 296; *Johnson v. Laflin*, 5 Dill. 75. These authorities are dealing with cases wherein the trust was a secret one, growing out of the relations of the parties. If, however, the trust is an express trust, and the fact that a trust exists appears upon the corporate books, what ground exists for holding that the statutory exemption does not apply? The statute provides that parties holding stocks as trustees shall not be personally liable, and, if the party has not estopped himself from showing that he holds the stock only as trustee, by permitting himself to be held out upon the corporate books as an owner of the stock in his own right, then it would seem clear that one who in fact holds the stock as trustee only is expressly exempted from personal liability. All that is necessary to be done to bring one within the terms of the statute is to show that the party holds the stock as trustee, and, this being shown, the exemption attaches. What good reason can be urged for holding that a person in whom the naked legal title of the stock is vested in trust merely, and who derives no benefit therefrom, and who has no funds or estate in his possession or under his control to which he might look for reimbursement, should be held personally liable for the assessments upon the stock thus held by him, when a trustee who has an estate or funds in his possession or under his control is expressly exempt from personal liability. If any distribution is to be made, it would be more in consonance with just principles to hold the trustee, having an estate or funds in possession, to which he might look for reimbursement, liable for the assessment; rather than one who holds merely a naked title.

If, however, the view taken by plaintiff's counsel of the meaning of section 5152 is correct, it does not follow that the defendant Larrabee is liable. The statutory liability does not attach to him unless he is a shareholder, and upon general principles it must be held that a mere naked trustee, who has no beneficial interest in the stock, but holds the title for the benefit of the real owner and parties in interest, the existence of such trust appearing upon the corporate books, cannot be held to be a shareholder within the meaning of section 5151 of the Revised Statutes. In the cases of administrators, executors, and trustees of that character, that there is no principal back of them, it might be argued with much force that they should be held liable as the owners of the stock, because the title vests in them, not as agents for some responsible principal, but as owners of the title, though bound to account for the proceeds thereof. To prevent liability from attaching to such administrators, executors, guardians, and trustees, section 5152 was enacted, but it is not a fair inference that, by enacting the exemption therein provided for, it was the intent to make liable as shareholders in fact parties who are not the real owners of shares, and who do not and cannot participate in the manage-

ment of the corporation, nor in the benefits and profits derived from the corporate business. As to such parties, the fundamental reason for liability to creditors fails. If it be sought to hold the defendant Larrabee liable because by a technical construction of the word "shareholder" he may be included within the same, as found in section 5151, then he has the right to insist that a similarly technical construction be placed upon the word "trustee," as used in section 5152, in which case he would be exempt simply because he comes within the language of the section. But, looking beyond the mere language used in these sections, or rather construing the same according to the true meaning and purpose thereof, it must be true that Larrabee can not be held liable under the provisions of section 5151, unless it appears that he is a shareholder in the defunct bank, or has held himself out as such. According to the averments of the answer he did not own the shares of stock assigned to him as trustee, and had no beneficial interest of any kind therein, nor could he derive any benefit therefrom. He had assumed the duties of a trustee for the owner or pledgor, Graves, and for the creditor or pledgee, the McGregor bank, but beyond the duties of such trusteeship he has no interest in the stock. He represents, on the one hand, the real owner of the stock, to whom creditors may look for the payment of the assessments; and on the other, the pledgee and creditor, and, occupying this position, he cannot be fairly or properly said to be a shareholder in the bank within the meaning of section 5151 of the Revised Statutes. Not being then a shareholder within the meaning of that section, or, if he be such, then being a trustee within the exception enacted in section 5152, he cannot be held liable for the assessments upon the stock held by him as trustee. The demurrer, therefore, to the answer must in favor of both defendants be, and the same is hereby, overruled.

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FLYNN v. EDWARDS.

(Circuit Court, W. D. Missouri, W. D. December 10, 1888.)

1. JUDGMENT—RENDITION AND ENTRY—AMOUNT—COSTS.

Under the Missouri practice of not expressing the amount of costs in a judgment, and Rev. St. Mo. § 1019, requiring the clerk to make an itemized statement of the debt and costs on the back of the execution, a judgment for a certain sum, and costs of the action, declaring a lien on the land therefor, and directing that the land be sold in satisfaction thereof, is a sufficient judgment in fact awarding costs.

2. SAME—COSTS—TAXATION.

In ejectment by the former owner of land sold for taxes, the fact that the transcript of the record of the tax suit shows only an *alias* writ of summons is not sufficient evidence that no original writ was issued to show that the fees for issuing and serving the original writ were improperly charged.

3. SAME—WAIVER OF OBJECTION.

Plaintiff, having made a payment on the judgment and costs insufficient to cover such fees, and having been notified of the deficiency by the collector,

and neglected to exercise his right to move for a retaxation of the costs, given by Rev. St. Mo. § 1011, cannot be heard to say that the unpaid balance was inconsiderable, and that the land should not have been sold.

4. **TAXATION—COLLECTION BY SUIT—SALE—COLLATERAL ATTACK.**

Where land is sold under a judgment for taxes, by virtue of Rev. St. Mo. § 6836, providing for the enforcement of the payment of taxes by suit, the neglect of the sheriff to sell only such subdivision as might have been necessary to satisfy the judgment, is not available in a collateral action of ejectment by the former owner against the purchaser.

5. **SAME—ESTOPPEL—IN PAIS.**

Plaintiff, having obtained satisfaction of the judgment by a sale of the land, and received and held the balance of the proceeds for a period of five years, cannot question the validity of the sale as against subsequent purchasers in good faith, who have made valuable improvements thereon, though he pays the sum so received into court; such payment being unavailing in a mere possessory action at law, and any equitable rights he might have had having been lost by his laches.

**At Law.**

Ejectment by William Flynn against J. P. Edwards to recover possession of certain land formerly owned by plaintiff, which had been sold for taxes.

*George H. English*, for plaintiff.

*A. Comingo*, for defendant.

**PHILIPS, J.** This is an action of ejectment for the recovery of the possession of 40 acres of land situated in the county of Bates, ouster laid in 1883. The plaintiff is recognized as a common source of title. The defendant claims title by mesne conveyances, under a tax deed. The evidence in the case shows that this land was returned as delinquent for taxes unpaid by the plaintiff thereon. Pursuant to the statute (section 6836) suit was instituted in 1879 against the plaintiff in the circuit court of Bates county, Mo., in the name of the state, at the relation of the county collector, to enforce, by judgment, the collection of said tax against said land. There was a personal service upon the defendant, and a judgment was duly rendered against him therein on the 5th day of August, 1880, enforcing the lien of the state for the taxes and costs, and directing a special *fi. fa.* for the enforcement thereof. Special execution issued thereon on the 11th day of September, 1880, under which the land, after due advertisement, was sold on the 11th day of November, 1880, and Benjamin B. Canterbury and W. A. Scott became the purchasers thereof at the sum of \$76, which sum was then paid to the sheriff; and the sheriff, in due time, made his report of sale thereof, and on the day following executed, acknowledged, and delivered a deed therefor to the said purchasers. Afterwards, on the 29th day of March, 1881, the said Canterbury and Scott, by deed of warranty, duly conveyed the said land to the defendant herein in consideration of the sum of \$200. At the time of the sale the land was unimproved and unoccupied, and was of very indifferent quality. The defendant took possession after his purchase, and has ever since remained in possession. He has inclosed the same with a fence, and put valuable improvements thereon, using the ground principally for feeding and herding cattle. The plaintiff assails

the validity of defendant's title on various grounds, which will be considered in their order.

1. It is claimed, first, that, after the rendition of said judgment, and before the sale under the execution, the plaintiff paid to the collector the whole amount of debt and costs then due. It may, for the purposes of this opinion, be conceded to plaintiff that if, as a matter of fact, he did so pay to the collector the amount of said judgment and costs, that any subsequent sale of the land under said judgment was unauthorized, and no title would pass thereunder. The principal and interest found due by the judgment on the 5th day of August, 1880, amounted to \$34.70. This debt by provision of the statute, and the direction of the judgment, bore 10 per cent. interest. On the day of the issuance of the execution the interest amounted to 34 cents, making principal and interest then due \$35.04. The judgment shows that, after the rendition of the judgment, the plaintiff did send to the collector the sum of \$47.12. There is some controversy as to the date of the receipt of this money. Looking at the whole evidence, written and parol, the best conclusion at which I can arrive is that this money was received by the collector on or about the 29th of September, 1880, which would make the amount of principal and interest then due \$35.20. On the date last above named the collector wrote a postal card to the plaintiff, in which he stated that the \$47 and some cents had just been handed to him in a draft, and notifying him that it lacked \$7.74 of paying the judgment, and that if he would send the money within five or six days, that would satisfy the claim; otherwise the land would be advertised for sale, incurring additional costs. On the back of the execution the clerk indorsed an itemized statement of the debt and costs, as by statute in such case made and provided, (section 1019, Rev. St.) The aggregate amount of such costs were \$18.49, which, added to the debt, and interest, would make an aggregate of \$55.53; so that, if the amount of costs were correct, the sum paid by plaintiff to the collector was short about \$6.40. Plaintiff's counsel first contends that there was no judgment in fact awarding costs. Without conceding that such award was essential to be expressly made in the judgment, it is sufficient to say that the judgment, in express terms, after ascertaining the amount of the debt, and declaring the lien on the land, says:

"The court further adjudges that the sum of thirty-four dollars and seventy cents, together with interest, fees, and commissions, and costs of this action, constitute and are a lien against said parcel of land."

The judgment then further directs that the land be sold under special *fi. fa.*, "in satisfaction of said sum of money, together with all costs, interest, fees, and commissions adjudged herein to be due thereon." As a matter of practice, under the Missouri statutes, the amount of the costs are never stated in the judgment. "The judgment is, for the debt so much, and damages so much, and costs, without specifying what exact sum; and on the execution the costs are indorsed, and this has ever been considered in this state sufficient authority to make the costs." *McKnight v. Spain*, 13 Mo. 538. The clerk, as a matter of fact and prac-

tice, taxes up the costs after judgment, and enters them in a fee-book kept therefor, and when he issues execution he simply enters an itemized amount of these fees upon the back thereof. "Such a judgment for costs, being a final disposition of the case, is like any other final money judgment of the circuit court, and constitutes a lien for the costs \* \* \* in favor of the party prevailing." *Beedle v. Mead*, 81 Mo. 304. The costs "are fixed by law, and the sum is a mere matter of calculation," to be made, of course, by the clerk. *Bobb v. Graham*, 15 Mo. App. 296.

The next contention of plaintiff is that among the items of costs so stated by the clerk are the following, which he claims are improperly charged, to-wit:

"Alias writ & copy, \$1.50; copy of petition, seal, &c., \$1.25; fee-bill and execution, \$1.00; original writ, copy of petition, copy of writ, \$2.00; also a return of the sheriff of Cass county, 50 cents,—aggregating \$6.25."

It is claimed by plaintiff's counsel there was never an original writ of summons, copy of petition, etc., and but one *alias* writ, so called, issued by the clerk, and that was the one served on the plaintiff in Jackson county, Mo. For proof of this he relies upon a certified transcript of the record and proceedings had in the tax suit, from the circuit clerk's office of Bates county, which transcript only gives a copy of what purports to be an *alias* writ of summons sent to Jackson county, on which service was had. It is not satisfactory to my mind that the general certificate, in the usual perfunctory style, attached by the clerk to the transcript, is sufficient evidence to justify the court, in this collateral proceeding, in holding that there was but one writ of summons issued in the case. The transcript of the record shows that the petition in the tax suit was filed on the 10th day of September, 1879, and it would be fair to presume that the writ of summons went instantly, and this presumption is confirmed by the subsequent entry of record made by the court at the March term, 1880, to which term an original writ of summons would have been returnable. This record recites: "Now, at this day, it is ordered that an *alias* writ issue to Jackson county, Mo." The presumption, therefore, must be indulged, in favor of this action of the court, that an original writ had been issued and returned *non est*; and, if so, the charge of \$2.00 was properly made by the clerk; and this would most probably account for the item of 50 cents charged in favor of the sheriff of Cass county, which would be the sheriff's fee for a return of *non est*. This would leave only to be accounted for the two items of \$1.50 and \$1.25 for one *alias* writ, copy of petition, etc., amounting to \$2.75, and the item of \$1.00 for fee-bill and execution. I am unable to account for said second *alias* writ; but the item of fee-bill and execution is evidently nothing more than the special *fi. fa.* issued by the clerk, as that is nowhere else charged for, and the prefix of the "fee-bill" to the word "execution" would not, I presume, be seriously claimed to invalidate that charge; so that, giving the plaintiff every reasonable advantage of his criticism on this bill of costs, there is a charge of only \$2.75 not accounted for; from all of which the fact remains that the sum sent by the plaintiff to the collector fell short \$3.65 of satisfying the judgment and

costs. And, after having been expressly notified by the collector that the sum sent by him was insufficient, his failure to give further attention to the matter was at his own peril; and the collector, acting in his official capacity as the representative of the state and the instrument of the law for the collection of the debt and costs, not only had the right, but it was his duty, in obedience to the command of the writ, to proceed to advertise and sell to make the residue thereof. The plaintiff cannot now be heard to say, in justification of his own negligence and dereliction, that the money he sent to the collector was sufficient to satisfy the judgment for the principal debt, and that the officer was not justified in proceeding further to collect so inconsiderable a balance for costs. As a matter of practice the costs are first to be paid out of any sums collected by the officer. *Ror. Jud. Sales*, § 1448; *Shelly's Appeal*, 38 Pa. St. 210; *McNeil v. Bean*, 32 Vt. 429; *Fry's Appeal*, 76 Pa. St. 82; *Herm. Ex'ns*, § 278. Under this view the sum so paid by plaintiff to the collector left the principal debt unsatisfied, after deducting the \$15.74 of costs herebefore demonstrated to have been properly charged. Under such a state of facts, as disclosed by this record, after the plaintiff was notified that the sum sent by him did not satisfy the judgment, and that the land would be advertised and sold for the residue, it was plainly his duty to look after the matter of costs, and if there were any errors claimed by him to have been committed by the clerk in his auditing of the fees he should have availed himself of the provision of section 1011, *Rev. St. Mo.*, which authorizes any person aggrieved by the taxation of a bill of costs to make application to the court from which the execution issued to retax the costs. "In such retaxation all errors shall be corrected by the court." See *Freem. Ex'ns*, § 381.

2. It is next insisted by plaintiff's counsel that it was the duty of the sheriff, in conducting the sale under the execution, to have sold the land in the least possible quantity that would have satisfied the judgment, and not to sell the whole 40-acre tract without first having offered a less subdivision, and that his report of the sale should show this fact to justify his action in selling the whole. It is unnecessary to discuss the provisions of the statute in this respect, or to review the authorities cited by counsel from other jurisdictions touching this question, as it has been expressly held by the supreme court of this state, in *Wellshear v. Kelley*, 69 Mo. 344, that "the neglect of the sheriff to sell the land by its smallest legal subdivision did not invalidate the sale in a collateral proceeding." This decision was predicated of a tax sale under the very statute in controversy. This, being the construction placed on this statute by the highest judicial authority of the state, should be followed in this jurisdiction. This rule applies peculiarly as to third purchasers under the vendee at the execution sale. *Freem. Ex'ns*, § 296; *Mixer v. Sibley*, 53 Ill. 61.

3. There is still another objection to plaintiff's right to maintain this action. The evidence shows that within the year after the sheriff's sale the plaintiff engaged the services of W. T. Johnson, Esq., a competent attorney at law of Kansas City, to proceed to Bates county and make in-



vestigation of the regularity of the judicial proceedings leading to the judgment and sale thereunder of the land in question; and, if satisfied of the validity of the sale, to draw the balance of the money in the hands of the sheriff arising from the sale, after satisfaction of the judgment and costs. Johnson accordingly went to the county seat of Bates county, made the examination, and, being satisfied thereby that plaintiff had lost his land, drew from the sheriff the said balance in his hands, amounting to \$41.10, and, after returning to Kansas City, explained to plaintiff the situation, and gave him his opinion, informing him after the satisfaction of the judgment and costs in the tax suit there remained in the hands of the sheriff the sum of \$51.90; that the sheriff held in his hands another execution against the plaintiff in favor of one George Hale for the sum of \$10.80, to which he had applied that sum in satisfaction; and that he had drawn from the sheriff the remaining sum of \$41.10. This sum Johnson, on the 28th day of September, 1881, paid over to plaintiff, taking his receipt therefor, which is here in evidence. This sum the plaintiff retained in his possession, as his money, at the time of the institution of this suit, on the 5th day of November, 1885, and until the 17th day of October, 1887, when, at the instance of Judge Kregel, before whom the cause was then on trial, he paid it into court as the condition of any judgment herein in his favor. I am unable to perceive how such act of paying this money into court can avail the plaintiff in the action of ejectment. It is a naked possessory action at law, and as such the right of the plaintiff to maintain his action must be determined by the facts and the law as they stood at the time of the institution of suit. No equitable principle is involved. The plaintiff could not strengthen his cause by any subsequent act. If he was estopped or barred of his right of action at the time of the institution of suit at law, it so remains to the end of the litigation. And even if the character of the action were such as to permit of such after restitution, the plaintiff has not done complete equity. He has reaped the benefit of the sale in having a judgment and execution against him satisfied out of the proceeds in favor of said Hale. He yet enjoys the fruit thereof, and has offered no restitution. He also held and enjoyed the residue, \$41.10, for over six years, and then paid into court the principal sum, without interest. This is not equity, if the case is to be decided on equitable principles. It may not be technically correct to call it an estoppel, but, be it estoppel, election, or ratification, I undertake to say, both on reason and authority, that where a party, with full knowledge, such as the plaintiff unquestionably had, of the fact that his land had been taken under execution in a judicial proceeding, and sold by the sheriff, and after he has made examination into the facts and particulars thereof, with all the facts open and accessible to him then as now, takes from the sheriff the balance of the proceeds of sale, appropriates and enjoys it, as did the plaintiff in this case, he has made his election to abide by the result. He has completely ratified the proceeding, and it does not, after the lapse of five years, lie in his mouth to question its validity, especially as against a third party, who has since, in good faith, made last-

ing and valuable improvements thereon. The authorities are all one way on the question. *Vallette v. Bennett*, 69 Ill. 632; *State v. West*, 68 Mo. 229; *Kelly v. Hurt*, 74 Mo. 562; Big. Estop. 574-579; *Pendleton Co. v. Amy*, 13 Wall. 305, 306. So Freeman on Executions (§ 307,) says:

"When defendant, having knowledge of a sale, permits it to stand unquestioned for a long period, his inaction affords a very strong presumption that he acquiesced in the sale. This acquiescence cannot be withdrawn after several years, and when the property has probably passed into the hands of a stranger to the original sale."

The rule is thus stated in 2 Pom. Eq. Jur. § 965:

"When a party, with full knowledge of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains, for a considerable length of time, from impeaching it, so that the other party is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though originally impeachable, becomes unimpeachable in equity. Even where there has been no act or language properly amounting to an acquiescence, a mere delay, a mere suffering of time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of active and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands. Laches are often a defense wholly independent of the statute of limitations."

Viewed either at law or in equity, plaintiff's action must fail. Judgment will go for defendant, with leave to plaintiff, after satisfaction of the costs herein, to withdraw the sum of \$41.10 heretofore paid into this court.

## MISSOURI PAC. R. CO. v. TEXAS & PAC. R. CO., (LABOY, Intervenor.)<sup>1</sup>

(Circuit Court, E. D. Louisiana. June 16, 1888.)

### CARRIERS—OF PASSENGERS—INJURIES—BOARDING MOVING TRAIN.

No recovery can be had from a railroad company for injuries received while attempting to board a moving train without the advice or direction of defendant's agents.<sup>2</sup>

### On Exceptions to Master's Report.

The intervenor, William Laboy, sought to recover of the Texas & Pacific Railroad Company damages for injuries received while attempting to board the defendant's train, operated by the receivers of said road. The master reported adversely to the claim, and the intervenor excepted.

<sup>1</sup> Publication delayed by inability to obtain copy of opinion at time of rendition.

<sup>2</sup> On the general subject of negligence in alighting from and boarding moving trains, see *Covington v. Railroad Co.*, (Ga.) 6 S. E. Rep. 593, and note; *Watson v. Railway Co.*, (Ga.) 7 S. E. Rep. 354 and note.

*Charles O. Lauve and C. S. Kellogg, for intervenor.*  
*L. De Poorter, for the receiver.*

PARDEE, J. The evidence establishes, as the master reports, that the intervenor received the injuries of which he complains in attempting to get on the passenger train of the Texas & Pacific Railway Company while the same was in motion, and before it stopped at a regular station on the line; that in so getting on the train he was neither advised nor compelled by the agents of the company; and that the intervenor's said attempt contributed directly to his injuries. It is the settled jurisprudence of Louisiana, whose laws control as to the responsibility in this case, that no person can recover damages for injuries received where he has himself contributed to the negligence which caused the injury. See *Knight v. Railroad Co.*, 23 La. Ann. 462, and cases there cited. Attempting to mount a moving railroad train without the advice and direction of the railroad's agents, is negligence, according to all respectable authorities, text-books, and adjudged cases. See *Shear. & R. Neg.* § 283; *Hutch. Carr.* § 641; 2 *Ror. R. R.* 1111. The case of *Knight v. Railroad Co.*, above cited, was directly on the point. The exceptions to the master's report will be overruled, and the report will be confirmed.

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#### AMERICAN WELL-WORKS v. RIVERS.

*Circuit Court, D. Louisiana. June 14, 1888.)*

#### CONTRACTS—CONSTRUCTION.

A written contract, by which plaintiff agrees to sink an artesian well for defendant, supplying a given quantity of water, does not require that the water should be potable and fit for washing and for making steam, though plaintiff knew defendant was a hotel keeper, and desired water of that character for hotel purposes.

**At Law.** On motion for new trial.

Action by the American Well-Works against Robert E. Rivers to recover for sinking an artesian well. Verdict for plaintiff, and defendant moved for a new trial.

Before PARDEE and BILLINGS, JJ.

*A. C. Lewis, for plaintiff.*

*Gibson, Hall & Montgomery and Rouse & Grant, for defendant.*

PARDEE, J. On the original pleadings in this case the plaintiff was entitled to judgment. The answer admits the contract sued on, admits plaintiff's compliance with all the specified stipulations of the contract, and rests the defense upon a claimed construction, not justified by the

<sup>1</sup>Publication delayed by inability to obtain copy of opinion at time of rendition.

letter of the contract, which would in effect add to the guaranties already stipulated an additional and onerous one wholly out of proportion to the consideration named in the contract. The contract is one to sink artesian wells. The plaintiff assumed the risk of and guarantied the quantity of water to be furnished. The defendant says that as he was a hotel keeper and the plaintiff knew he wanted the water for hotel purposes, that in addition to the quantity of water expressly guarantied the plaintiff impliedly guarantied that the water should be potable and fit for washing and to make steam. The subject of the contract was necessarily an experiment. If successful, particularly in obtaining pure water, the advantage was to be wholly the defendant's, and the value of the wells would naturally be 10, if not 20, times the consideration to be paid the plaintiff for doing the work. The experiment was necessarily twofold, i. e., as to quantity and quality of water supply. The parties expressly stipulated in writing that the plaintiff should assume all risk as to quantity. To construe the contract so as to charge him with the risk as to quality is to change the character of the contract from one for the sinking of wells to one for the supplying a hotel with water, and bind the plaintiff to a contract he never made. The trite maxim, *expressio unius est exclusio alterius*, or *expressum facit cessare tacitum*, decides the case. See Broom, Leg. Max. 505. "If there be several things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this, even if the law would have implied all if none had been enumerated." 2 Pars. Cont. 28; Chit. Cont. (9th Amer. Ed.) 25. In the contract in question the parties considered the guaranties to be given by the plaintiff, and they expressly stipulated for the guaranty as to quantity, and thereby it is manifest they excluded the more hazardous one as to quality.

On the pleadings, as amended, setting up a subsequent parol contract on the part of the plaintiff to guaranty the quality of the water, the case seems to have been submitted to the jury on the evidence, and there is no substantial complaint that the finding was not in accordance with the law and the evidence.

The affidavit of newly-discovered evidence is not sufficient to warrant a new trial. It does not show the diligence used. The evidence as set forth is cumulative, and if true and in the case it ought not to affect the verdict. That the plaintiff as well as the defendant hoped to get good water may be conceded, but that he contracted with the defendant to guaranty the quality of the water cannot be proved from conversations, however explicit, after the contract between two of the plaintiff's agents as to the hopes, expectations, undertakings, and agreements to get good water, as long as the matter concededly did not take the form of a contract with a consideration. According to what information I have as to the evidence on the trial, I am well satisfied that what defense there is in the case wholly arises under the construction proper to be given to the written contract sued on. The construction given by the trial judge in his charge to the jury was correct, and the charge requested by the defendant was properly refused. The verdict was in accordance with the charge

and the evidence adduced, and ought not to be disturbed. The motion for a new trial is therefore refused.

BILLINGS, J., concurs.

### GILES v. PAXSON *et al.*

(Circuit Court, N. D. Iowa, E. D. December 8, 1888.)

**1. DEPOSITIONS—DEDIMUS—CERTIFICATE—DISINTERESTEDNESS OF COMMISSIONER.**

Depositions taken for use in the federal courts of Iowa under Rev. St. U. S. § 866, by virtue of a *dedimus* to a commissioner need have no certificate that the commissioner is disinterested, as the section provides that the depositions shall be taken according to "common usage," which means the statutory provisions of the state; and under the Code of Iowa such certificate is unnecessary, sections 863-865, providing for taking depositions before a disinterested commissioner upon notice, without a *dedimus*, not applying to testimony taken under section 866.

**2. SAME—REDUCTION TO WRITING.**

For like reasons the commissioner need not certify that the testimony taken by a clerk was reduced to writing in his presence, as provided in section 864.

**3. SAME—SIGNATURE OF WITNESS—JURAT.**

Where, in accordance with Code Iowa, § 3737, the commissioner certifies that the deposition was subscribed and sworn to by the deponent at the time and place mentioned, it is unnecessary to follow the signature of the witness with a jurat.

**4. SAME—WRITING ANSWERS SEPARATELY FROM INTERROGATORY.**

While under Code Iowa, § 3735, the answer of a witness should be written under the interrogatory, it is sufficient that the interrogatories are numbered, and the answers thereto are written down separately, with corresponding numbers, when the certificate shows that both the interrogatories and answers were read over to the witness before signing, as under section 3741 an unimportant deviation from the statutory directions will not vitiate the depositions where no prejudice can result from such deviation.

**5. SAME—IDENTITY OF WITNESS.**

Where a commission issues to take the testimony of "W. E. F., of A.," and the caption recites that it is the "deposition of W. E. F., taken at A.," the deposition is properly signed, and the certificate shows that pursuant to the commission the notary caused the witness to come before him, etc., and that he subscribed and swore to the deposition, the deposition sufficiently appears to be that of the person mentioned in the commission.

**6. SAME—RETURNING EXHIBITS.**

It is proper to return with the deposition of a witness a copy of a deed referred to by him, whether the deed is admissible in evidence at the trial or not.

**At Law.** On motion to suppress depositions.

Action by William A. Giles against Charles Paxson and others. Defendants filed exceptions to certain depositions taken by plaintiff.

*Adams & Mathews*, for plaintiff.

*Ed. P. Seeds* and *Henry C. Noyes*, for defendants.

**SHIRAS, J.** The defendants move to suppress the depositions of Joseph W. Martin and other witnesses on several grounds, the first being

that the commissioner does not certify that he had no interest in the case, as required by the provisions of section 863, Rev. St. U. S. There are two general methods for taking depositions to be used on the trial of law cases provided for in the Revised Statutes; the one being the mode pointed out in section 863, and the other in section 866. When taken under the provisions of the former section, a commission to the officer is not sued out from the court in which the cause is pending, but the party desiring to take the testimony gives notice to the opposite party or his attorney of the time and place when and where the testimony is to be taken, and selects as the commissioner any one of the parties named in the section. When depositions are thus taken, no opportunity is afforded to the opposite party to be heard upon the matter of the selection of the commissioner. Hence it is required of the party taking the deposition that he shall select a disinterested commissioner, and the statute requires the party selected to certify that he is not of counsel for either party, nor interested in the event of the suit. If, however, the depositions are not taken under section 863, but under the authority granted in section 866, then, by the express terms of the latter section, the provisions of sections 863, 864, and 865 are not applicable thereto. Section 866 provides for the court granting a *dedimus*, and in so doing it is presumed that the court will select a proper person to act as the commissioner, and the parties can be heard upon the question of the appointment before the commission issues. The authority conferred by section 866 is the granting a *dedimus* to take depositions according to common usage. In *McLennan v. Railroad Co.*, 22 Fed. Rep. 198, it was held:

"When, however, the facts are such in a given case that, under the provisions of statutes of the United States, the right to take the testimony of witnesses by deposition exists, then, as to the mere mode of procuring the deposition, parties may follow, at their election, either the provisions of the state law or of the act of congress."

In other words, if the right to take depositions existed, then the party desiring to take the same might do so under the provisions of section 863 or according to common usage, which, in an action at law, would be deemed to be in accordance with the mode provided for by the statutes of the state. An examination of the depositions moved against shows that the same were not taken under the provisions of section 863, but that a *dedimus* was issued under the seal of the court directed to Ralph L. Goodrich, clerk of the circuit court of the United States for the Eastern district of Arkansas. The requirements, therefore, of sections 863, 864, and 865 do not apply to these depositions. The Code of Iowa does not require that the commissioner shall certify that he is not of counsel, or is not interested in the suit. The fact that, when notified that a commission would be sued out from the court on a given day, directed to a party named as commissioner, the defendants did not object thereto, and the fact that the person named was selected and appointed in the commission issued as a proper person to act in the premises, certainly makes out at least a *prima facie* presumption that he was a proper party to act as commissioner; and, in the absence of proof to the con-

trary, it cannot be held that he was interested in the suit, or otherwise disqualified to act as commissioner.

It is also urged as objections to the depositions that the same were reduced to writing by a clerk employed by the commissioner, and that it is not certified that the same were reduced to writing in the presence of the commissioner. These objections are based upon the provisions of section 864 of the Revised Statutes, which, as already stated, are not applicable to depositions taken under a *dedimus*. It is further objected that the deposition is not sworn to by the witness, because no jurat is attached immediately beneath the signature of the witness. Section 3735 of the Code of Iowa provides "that the answer must be in the language, as nearly as practicable, of the witness, if either party requires it. The whole, being read over by or to the witness, must be by him subscribed and sworn to in the usual manner." This directs what must be done at the time of the taking of the deposition. The mode of proving what was done is provided for by section 3737, which enacts that "the person taking the deposition shall attach his certificate thereto, stating that it was subscribed and sworn to by the deponent at the time and place therein mentioned." The certificate attached to the deposition fully meets these requirements. The addition of a jurat, which is only an abbreviated certificate, is wholly unnecessary. The further objection is made to the deposition of Joseph W. Martin that the interrogatories attached to the commission were not written out by the commissioner and the answer inserted beneath each question, as provided for by section 3735 of the Code of Iowa. The certificate of the commissioner shows that each of the interrogatories was read over to the witness, and his answers were taken down, and then the whole was read over by the witness before he signed the same. The interrogatories are numbered, and the answers show by number the interrogatory to which each answer is intended to apply. Section 3741 of the Code of Iowa, provides that "unimportant deviations from any of the above directions shall not cause the depositions to be excluded, where no substantial prejudice could be wrought to the opposite party by such deviation." What prejudice can be wrought to the defendants by the mode in which the deposition is written out? The form is not so convenient, but the substance of the deposition is just the same. The motion does not suggest that defendants are or can be prejudiced by this deviation from the statutory direction, and the court is therefore justified in holding it to be a deviation, but not one prejudicial to the defendants, and therefore not sufficient cause for excluding the deposition.

Objection is made to the deposition of William E. Ferguson on the ground that the certificate of the commissioner fails to show who it was that testified before him. A commission was duly issued to Alexander W. Jones, a notary public, authorizing him to take the deposition of W. E. Ferguson of Augusta, Ark. The caption to the deposition recites that it is "the deposition of W. E. Ferguson, circuit clerk, etc., taken at Augusta, Ark., on the 5th day of November, 1888, to be used as evidence, etc." The deposition bears the signature of W. E. Ferguson, and the

notary certifies that "I, Alex. W. Jones, a notary public in and for said county and state, do hereby certify that in pursuance to the annexed commission I caused the said witness to come before me at Augusta, in said county, \* \* \* and he subscribed and swore to the same before me," etc. Can there be any doubt that the witness named in the certificate is the one who signed the deposition? The fair meaning of the certificate is that the notary caused the witness named in the commission to appear before him, to give his testimony, and to sign and swear to the deposition when reduced to writing, and the name appended to the deposition is that of the witness named in the commission, so that it fully appears who it was that testified.

Defendants also ask the suppression of the deposition of William Manning, because the officer taking the same has attached to the deposition a copy of a deed referred to and produced by the witness on the examination; it being claimed that it was not offered in evidence. The introduction of papers in evidence cannot be had before a mere commissioner for the taking of depositions. Section 3736 of the Code of Iowa requires that "all exhibits produced before the person taking the deposition, or proved or referred to by any witness, or correct copies thereof, must be appended to the depositions and returned with them, unless sufficient reason be shown for not so doing." The deposition shows that the witness referred to the deed in question, and therefore it was entirely proper for the notary to return a copy thereof attached to the deposition. Whether it is admissible in evidence on the trial is another question, the decision of which did not belong to the notary. The plaintiff may not offer the deed in evidence, but that does not require the suppression of the deposition. Finding, therefore, no substantial merit in any of the objections taken on the several depositions herein filed, the motion to suppress the same is overruled.

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GRIFFIN v. MACON COUNTY.

(Circuit Court, E. D. Missouri, N. D. December 5, 1888.)

**LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—COUNTY BONDS—INTEREST COUPONS.**

When an installment of interest due on a municipal bond cannot be recovered by a suit on the coupon by reason of lapse of time since the coupon matured, the same installment of interest cannot be recovered along with the principal debt in a suit on the bond.

At Law. On submission.

Action by Bradley A. Griffin against Macon county, Missouri, on county bonds.

*Cunningham & Elliot*, for plaintiff.

*R. G. Mitchell*, for defendant.



THAYER, J Plaintiff brings suit on six bonds, executed by Macon county. They bear date January 1, 1870, and matured January 1, 1882. In the body of the bond it is recited that the county will pay interest "at ten per cent. per annum, which interest shall be payable semi-annually, on the presentation of the coupons hereto annexed." All of the coupons originally attached to the bonds have been detached, except those which matured on and after July 1, 1878. In the first count of the petition plaintiff demands judgment for the principal sum due on the six bonds, and also interest thereon at 10 per cent. per annum, from January 1, 1870, to January 1, 1878, and from January 1, 1882, to the date of rendition of judgment. The coupons that matured after January 1, 1878, and up to the maturity of the bonds, are sued on in the second count of the petition. This suit was filed on April 20, 1888. It will be observed, therefore, that all the coupons on the bonds in question which matured on and prior to January 1, 1878, were more than 10 years overdue when the said suit was filed, and for that reason an action on the coupons is barred by limitation. By suing on the bonds, and demanding judgment for the principal sum, together with all interest that accrued thereon up to January 1, 1878, the plaintiff seeks to avoid a plea of the statute of limitations, which could have been successfully interposed if he had declared on the coupons. *Huey v. Macon Co.*, 35 Fed. Rep. 481, and cases cited.

The point to be determined is whether such overdue interest can be recovered by declaring for it in a suit on the bonds, notwithstanding the fact that it could not be recovered by a suit on the coupons? The point is novel, and, so far as I am advised, has never been expressly determined. In several well-considered cases it has been held that, when money due on a note or bond is made payable by installments, the statute of limitations begins to run against each installment from the time it matures. *Bush v. Stowell*, 71 Pa. St. 208; *Burnham v. Brown*, 23 Me. 400; *Estabrook v. Moulton*, 9 Mass. 258; *Heywood v. Perrin*, 10 Pick. 228. But Mr. Wood in his work on "Limitation of Actions" says that, "with singular inconsistency" it has been held in some cases that interest made payable annually is not subject to the same rule; that the statute does not run against interest installments payable annually, until the principal debt matures. Wood, Lim. § 126, p. 296. In my opinion, there is no distinction in principle between a debt payable by installments and interest payable annually or semi-annually in installments. If the statute begins to run in the former case as soon as an installment of the debt matures, for equally good reasons it ought to run against interest installments as soon as they become payable. It is worthy of note that the few cases cited by Mr. Wood as holding that the statute of limitations will not run against interest installments until the principal matures, were suits upon notes or bonds to which no interest coupons were attached. Separate contracts to pay installments of interest at stated intervals were not annexed to the obligation to pay the debt. *Vide Bank v. Doe*, 19 Vt. 463; *Henderson v. Hamilton*, 1 Hall, 314; *Ferry v. Ferry*, 2 Cush. 92. The rulings made in the cases last mentioned appear to have

been based on the ground that interest is a mere incident of a debt, and is so inseparably connected therewith that it may be recovered in connection with the debt when it matures; no matter for how long a period it has been overdue. By this was meant, I suppose, that the stipulation with reference to interest in the cases then under consideration formed an inseparable part of the promise or obligation to pay the principal debt. But if, as in the present case, the parties to a note or bond make independent stipulations as to interest, and put such stipulations in the form of negotiable coupons, which may be detached from the bond, and are intended to be detached and negotiated, no reason is perceived why the statute of limitations should not run, as soon as they mature, against all such installments of interest as are represented by such interest coupons. It appears to me that it would be extremely technical, as well as illogical, to say that the statute of limitations runs against the promise contained in a coupon from the date of its maturity, but does not run against the same promise contained in the bond until the bond matures. In view of the fact that it has been held that the same period of limitation applies to a coupon that applies to a bond,—that they are contracts of equal dignity,—the true doctrine is no doubt that, when an action to recover a given installment of interest cannot be maintained on a coupon by reason of lapse of time, such installment cannot be recovered by a suit on the bond. *City v. Lamson*, 9 Wall. 482; *City v. Butler*, 14 Wall. 296. The views here expressed are incidentally confirmed by the decision in *Clark v. Iowa City*, 20 Wall. 586, although it is true that the precise question now before the court was not involved in that case. It was there held that coupons, when severed from municipal bonds, are negotiable, and pass by delivery, and that, when so severed, they cease to be mere incidents of the bonds, and become independent claims. It was further held that, though bonds are canceled or paid before maturity, such coupons as are at the time outstanding in the hands of third parties do not lose their validity, but may be collected by the holder for value. If outstanding unpaid coupons are not extinguished by the cancellation, payment, or surrender of the bonds to which they pertain, it is manifest that the interest which accrues from time to time on bonds with interest coupons annexed is not a mere incident of the debt, and is not so inseparably connected therewith that it may be recovered along with the principal debt in a suit on the bond, as distinguished from a suit on the coupon, regardless of the length of time such interest may have been overdue. The question submitted to the court as to whether the interest installments which fell due more than 10 years before the suit was filed may be recovered in an action on the bonds, is accordingly decided in the negative. Such interest installments are barred, unless the statute can be avoided by a plea of some of the exceptions which suspend its operation.

UNITED STATES *v.* GABRIEL *et al.*<sup>1</sup>

(Circuit Court, E. D. Louisiana. May 26, 1888.)

## CUSTOMS DUTIES—DUTIES OF APPRAISERS—ESTIMATE OF VALUE.

Rev. St. U. S. § 2902, directing appraisers of imports to ascertain the actual market value and wholesale price of the goods in the principal markets of the country whence they are imported, regardless of the invoice, is unaffected by act U. S. March 3, 1883, § 7, which repeals Rev. St. §§ 2907, 2908, and act June 22, 1874, providing that certain costs of transportation, etc., shall be added to the price of goods, or by section 7, of the act of March 8d, which modifies the oath to be taken upon the entry of goods, with respect to said costs of transportation, but leaves the oath otherwise unchanged, and the dutiable value of goods is to be estimated from their market value in the principal markets of the country whence they are imported.

At Law. On motion for new trial.

Action by the United States against Gabriel & Schall upon a bond given for duties upon cement entered at the port of New Orleans. Verdict for plaintiff, which defendant moved to set aside.

J. W. Gurley, Asst. U. S. Atty., for the United States.

Howe & Prentiss, for defendant.

Before PARDEE and BILLINGS, JJ.

PARDEE, J. The defendants imported, through the port of New Orleans, a lot of cement from Holzminden, Germany. Their agent made the proper entry at the custom-house; filed the necessary oath and sworn and certified invoice from the manufacturers at Holzminden; paid duty on the valuation given by the invoice, gave the requisite bond, and took order for delivery of the goods. The local appraiser valued the goods for duty higher than the invoice value, and the importers were notified. Dissatisfied with such higher valuation, the importers called for a reappraisement by merchant appraisers under section 2930, Rev. St. The merchant appraisers were appointed, and made an appraisement of the dutiable value of the said goods, substantially the same as the local appraiser had previously done. The defendants, still dissatisfied, appealed to the collector and secretary of the treasury, but obtained no relief. Suit being brought on the bond, on the trial, the defendants offered to prove that the merchant appraisers, in their appraisement, through error or mistake, ignored the valuation of the goods at Holzminden, and based their finding on the value of such goods at Bremen, a place also in Germany, and that the actual dutiable value was the value at Holzminden, and that the same was correctly shown by the invoice filed with entry of the goods. This evidence was excluded by the trial judge, and such exclusion is the real base of the motion for a new trial.

It is claimed that the act of March 3, 1883, (22 St. at Large, 488 *et seq.*) has modified and repealed section 2902, Rev. St., so far as therein the dutiable value of imported goods is to be determined by the true and

<sup>1</sup>Publication delayed by inability to obtain copy of opinion at time of its rendition.

actual market value and wholesale price in the principal markets of the country whence the same has been imported, and that since said act of 1883 the law requires that the dutiable value shall be determined by the actual market value and cost of the goods at the place where manufactured or purchased. If this claimed construction of the act of 1883 be correct it is doubtful whether, in a case where the merchant appraisers were duly and legally appointed, and where neither neglect of duty nor fraud is alleged, the court can go behind the finding, which is declared by the statute to be final. See *Oelbermann v. Merritt*, 123 U. S. 362, 363, 8 Sup. Ct. Rep. 151. But such construction is not correct. The act of 1883 (7th section) repeals sections 2907 and 2908, Rev. St., and section 14 of an act approved June 22, 1874, all of which refer to the addition to the cost or actual wholesale price, in the principal markets of the country, of certain charges and expenses of transportation, shipment, etc.; and the eighth section of said act modifies the oaths to be taken on the entry of goods, so that the consignee, importer, or agent need not swear, as formerly required, to the amount of such charges and expenses, otherwise the oaths are left as before. There is nothing in the said act that modifies, even by implication, the duties of appraisers, as declared in section 2902, Rev. St., and therein appraisers are required, "by all reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise, at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States," etc. We notice that the obligation taken by the appraisers in this case was "to examine and inspect said lot of ———, and truly to report the actual market value or wholesale price thereof, at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was imported into the United States." And their report purports to show their finding of "the actual market value, etc., in the principal markets of the country from whence," etc. To give the evidence offered by the defendant its fullest effect would be to consider that it would show that the merchant appraisers found erroneously, and against the fact that Bremen was a principal market for cement in Germany. In *Stairs v. Peaslee*, 18 How. 524, it was expressly decided that the finding of the merchant appraisers, on appeal, as to the principal markets of a country from which goods were imported is conclusive. See, also, *Belcher v. Linn*, 24 How. 508. The verdict in this case is manifestly correct. The motion for a new trial is denied.

BILLINGS, J., concurs.

UNITED STATES *v.* MILNER *et al.*

(Circuit Court, N. D. Alabama, S. D. September 3, 1888.)

## 1. CONSPIRACY—AGAINST UNITED STATES—INDICTMENT.

An indictment under Rev. St. § 5440, relating to conspiracies to commit an offense against or to defraud the United States, followed by an act of one or more of the conspirators to effect the object of the conspiracy, charging an intent to defraud the United States by obtaining the dismissal of certain suits which by law might be brought by the United States to recover certain lands "alleged to have been fraudulently and unlawfully obtained" from the United States, does not charge a conspiracy to defraud the United States, since the use of the word "alleged" renders the fraud an open question.

## 2. SAME.

An indictment charging a conspiracy with intent to defraud the United States by obtaining the dismissal or discontinuance of certain suits which by law might be brought by the United States, cannot be considered as charging a conspiracy to commit an offense against the United States, to-wit, bribery; there being no specific hint of such an offense, except in the allegations of acts done to effect the object of the conspiracy.

## 3. SAME—DESCRIPTION OF OVERT ACT.

An allegation that defendants tendered an agreement to pay money to certain federal officials, to-wit, the officers of court of the United States acting under the authority of the government of the United States for the Southern division of the Northern district of Alabama, is bad as a description of an act of one or more of the conspirators to effect the object of a conspiracy to defraud the United States under Rev. St. § 5440, being too indefinite to identify either the agreement or the tender, even were it clear whether the agreement was tendered to the officials or to somebody else.

## 4. SAME.

An allegation that defendants entered into an agreement which was corrupt, and with a bad intent, does not sufficiently describe the act done to effect the object of the conspiracy, since it fails to show whether the agreement was written or oral, active or passive, and leaves uncertain the matter and persons concerned.

## 5. SAME—TIME AND PLACE OF ACT.

The indictment must allege the time and place of the act done to effect the object of the conspiracy, so as to identify the act, and show that it post-dated the conspiracy, and was not merely a part of it.

## On Demurrer to Indictment.

Rev. St. U. S. § 5440, under which defendants Willis J. Milner and others were indicted, is as follows:

"If two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not more than two years."

PARDEE, J. The indictment contains two counts, and is based on section 5440, Rev. St. U. S., under which the offense consists in the conspiracy, which must be clearly and sufficiently charged, and, as charged in the indictment, cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *U. S. v. Britton*, 108 U. S. 199, 2 Sup. Ct. Rep. 531. The two counts, so far

as any offense is charged, are identical, with the exception that in the first the conspiracy was with the intent to defraud the United States by obtaining the dismissal of certain suits, etc., and in the second the conspiracy was with the same intent by unlawfully obtaining the dismissal of certain suits, etc. In the light of *U. S. v. Britton*, *supra*, the offense charged in both counts is a conspiracy to defraud the United States. A claim was made in argument that the charge might be considered as conspiracy to commit an offense against the United States, *i. e.*, bribery, but there is in the indictment no specific hint of such an offense, except in those parts of the indictment charging acts done to effect the object of the conspiracy.

Considering, then, both counts as charging a conspiracy to defraud the United States, the question is first presented whether such conspiracy is sufficiently set forth. It has been decided in this circuit upon reason and authority that an indictment for a conspiracy should charge the object of the conspiracy, but need not charge the means to be employed. *U. S. v. Goldman*, 3 Woods, 187. Of course, in a conspiracy to effect a lawful purpose by unlawful means, the unlawful means constitute the object of the conspiracy to such an extent that they should be as fully set out as the nature of the case will permit. The object of the conspiracy, as charged in the two counts, is the intent to defraud the United States by obtaining the dismissal and discontinuance of certain suits which by law might be brought by the United States against certain parties to recover certain lands alleged to have been fraudulently and unlawfully obtained from the United States. Can a conspiracy with this object be said to be a conspiracy to defraud the United States? It depends upon whether the United States owns the certain lands, or whether the certain lands have been fraudulently and unlawfully obtained from the United States. If the United States does not own the certain lands, and they have not been fraudulently and unlawfully obtained from the United States, then it is difficult to see how the United States could be defrauded in any manner or for any purpose by a successful conspiracy to obtain lawfully or unlawfully the dismissal of certain suits to recover the certain land. In other words, unless the certain lands belong to the United States the conspiracy could not have defrauded the United States. The word "alleged" apparently vitiates each count. While the offense under section 5440, Rev. St., consists alone in the conspiracy, as held in *U. S. v. Britton*, yet by the terms of the statute that offense is not punishable unless one or more of the conspirators did some act to effect the object of the conspiracy. An act to effect the object of the conspiracy therefore becomes a material matter, and it must be alleged and proved with the usual certainty required in criminal pleading. See 1 Chit. Crim. Law, 169; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Walsh*, 5 Dill. 58; *U. S. v. Martin*, 4 Cliff. 156.

It is with regard to the act done to effect the object of the conspiracy that there exists a difference between the two counts in the present indictment, and this renders it necessary to consider the counts separately as to the sufficiency of this charge. In the first count the "overt" act is

ambiguously charged; a reading of the same leaving a doubt whether it is meant that an agreement to pay money was tendered to certain federal officials, or an agreement to pay money to certain federal officials was tendered to said officials, or to some other person or persons. If this point were clear, then the count is objectionable, because it does not within the knowledge of the grand jury specify sufficiently to be the subject of proof, either the agreement or the persons or person to whom it was tendered. "Certain federal officials, to-wit, the officers of court of the United States acting under authority of the government of United States for the Southern division of the Northern district of Alabama," is a description too indefinite to identify either the agreement or tender, and to inform the defendant of the nature of the charge against him. Neither the matter nor charge is certain. In the second count the act to effect the object of the conspiracy is charged as the entering into a certain agreement by the conspirators. This agreement is charged as corrupt, and with a bad intent, but it is not specifically described. It is not charged as written or oral, active or passive, and is left uncertain as to matter and persons; all of which is of more importance, as the grand jury seems to have been fully advised of all the facts relating to the alleged act. In neither count is there any averment of time or place of the alleged "overt" act, which would seem to be necessary to identify the act, and to show the court and jury that the same post-dated the conspiracy, and was in fact an act, not a part of the conspiracy, but done to effect its object. I am clear that the demurrer to the indictment should be sustained, and judgment to that effect will be entered, but said defendants may be ordered held until the discharge of the grand jury at this term, to allow the case to be again considered.

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### UNITED STATES *v.* MATHIAS

(*Circuit Court, D. South Carolina. December 1, 1888.*)

#### 1. POST-OFFICE—OFFENSES AGAINST POSTAL LAWS—OBSCENE MATTER—PRIVATE COMMUNICATIONS.

Sending a written communication of a personal and private nature from one person to another, under cover of a sealed envelope, is not sending obscene matter through the mails, within the meaning of Rev. St. U. S. § 8893, though the letter contains indecent or obscene matter.<sup>1</sup>

#### 2. SAME—EVIDENCE—PROOF OF HANDWRITING—COMPARISON.

On the trial in the federal court in South Carolina of an indictment for sending an obscene letter through the mails, an expert in handwriting may be

<sup>1</sup> For full discussions of the offense of mailing obscene matter under Rev. St. U. S. § 8893, see note to *U. S. v. Gaylord*, 17 Fed. Rep. 438, cited in opinion; *U. S. v. Thomas*, 27 Fed. Rep. 682, and note; *U. S. v. Bebout*, 28 Fed. Rep. 522, and note; *U. S. v. Wightman*, 29 Fed. Rep. 636, and note; *U. S. v. Slenker*, 32 Fed. Rep. 691.

asked to compare the letter charged in the indictment with one already in evidence for another purpose, acknowledged by defendant to have been written by him, and to say if in his opinion they both came from the same hand.<sup>1</sup>

8. SAME—EXPERTS—QUALIFICATION—BIAS.

But it is not proper to call as such expert an officer detailed by the post-office department to collect the facts in the case, and who had hunted up the testimony, and busied himself in the inception and prosecution of the case.

At Law. On indictment for sending obscene matter through the mails.

*L. F. Youmans*, Dist. Atty., *C. M. Furman*, and *H. A. De Saussure*, Asst. U. S. Attys., for the United States.

*S. W. Melton* and *Clark & Muller*, for defendant.

SIMONTON, J. The defendant is on trial under an indictment for violating section 3893, Rev. St., in sending an obscene letter through the mail. The letter was sent from Leesville, in this state, to the Holly Card-Works, Meriden, Conn. In the progress of the case a letter had been put in evidence, acknowledged by the defendant to have been written by him, and to have been sent through the mail by him from Leesville, addressed to the same company, at the same place. The district attorney has put upon the stand as a witness an expert in handwriting. He proposes to place in his hands this letter, and to ask him to compare it with the obscene letter charged in the indictment, and to say whether in his opinion the two letters came from the same hand. Counsel for the defendant object. There seems to have been great confusion in the rulings of the English courts on this question. *Rex v. Cator*, 4 Esp. 146; *Mudd v. Scuckermore*, 5 Adol. & E. 703. Finally, all doubts were settled by the statutes 28 & 29 Vict. The decisions of state courts in this country vary very much on the point. The supreme court of the United States, in *Strother v. Lucas*, 6 Pet. 763, affirmed in *Rogers v. Ritter*, 12 Wall. 317, laid down the general rule that comparison of handwriting will not be admitted as evidence. The case however admits that there are exceptions to the rule. In *Moore v. U. S.*, 91 U. S. 270, it was held that evidence by way of comparison of handwriting could not be admitted, unless there was in the case already admitted in evidence for another purpose,—and we may add “or in the record,”—a paper admitted to be in the genuine handwriting of the party, with which the disputed paper could be compared. Where these circumstances exist, the two papers could go to the jury, and be compared by them. This being the law of this court, the question now is, will the examination of experts before the jury be allowed to aid them in making this comparison between the acknowledged letter, in evidence already for another purpose, and the obscene letter? There has been called to our attention no ruling of the supreme court on this point. It was suggested in argument in *Moore v. U. S.*; but, as its decision was not necessary in that case, nothing is said of it in the opinion. In South Carolina the rule is to admit evidence

<sup>1</sup>On the subject of proving handwritings by comparison, see *Fuller v. Fox*, (N. C.) 7 S. E. Rep. 589, and note; *Snider v. Burks*, (Ala.) 4 South. Rep. 225, and note.



from comparison of handwriting in aid of doubtful testimony. The practice in that state is that, where such comparison is admitted, the jury are assisted by the evidence of experts; indeed, of non-experts. *Bird v. Millar*, 1 McMul. 125; *Bennett v. Mathewes*, 5 S. C. 478; *Benedict v. Flanagan*, 18 S. C. 508. In the absence of a decision of the supreme court of the United States, the decisions of the courts of this state will be used as a guide. If the papers must go to the jury to be compared by them, — a practice recognized and approved in this country and in England, — (*Mudd v. Scuckermore*, *supra*; *Moore v. U. S.*, *supra*; *Boman v. Plunkett*, 2 McCord, 518,) then it is the duty of the court to aid the jury in making the comparison. Although this kind of testimony, resting on opinion, is not of a high order, and cannot control the jury, yet it may give them valuable aid in coming to their conclusion. The value of the testimony depends upon the character, experience, and skill of the experts. Non-experts can afford little or no aid to a jury of intelligence. The testimony upon this point will be confined to experts. The exception is overruled.

The government then offered as a witness M. V. Moore, post-office inspector. He was called as an expert, for the purpose of comparing the writing heretofore proved in the case with the obscene letter, to the end of testifying as to his opinion regarding the latter. The counsel for defendant interposed, and he was cross-examined as to his qualifications. See 1 Whart. Ev. § 709. It appeared that the witness had been detailed by the post-office department to go to Leesville, examine into, and collect the facts of this case; that he had hunted up the testimony, and had busied himself in the inception and prosecution of this case. Defendant thereupon objected to his competency for the purpose for which he was called.

SIMONTON, J. It has been ruled that, inasmuch as these papers are in the hands of the jury, and will be compared by them, the court can aid the jury in coming to their conclusion by the testimony of experts. This testimony is only to aid the jury, showing them the opinion of experienced and skillful men. It can in no sense control them. Where the person called to testify as an expert is one occupying the relation to the case which this witness does, — saturated with bias against the defendant, honestly convinced of his guilt, and, in the conscientious discharge of his duty, seeking to bring him to punishment, — he can afford the jury no efficient aid in coming to a fair and impartial conclusion. His evidence as an expert to the point indicated will not be admitted.

The testimony having closed, all points of law and of fact were discussed by the counsel. Thereupon the judge charged the jury as follows:

SIMONTON, J. The defendant is indicted for violating section 3893, Rev. St., in sending an obscene letter through the mail. The whole of

the evidence is in. By this it appears that the letter in question was mailed at Leesville, S. C., addressed to the Holly Card-Works, Meriden, Conn., and that it was duly delivered to this address. The defendant submitted to the court certain requests to charge. The sixth is in these words:

"*Sixth.* Written communications of a personal and private nature from one person to another, sent under cover of a sealed envelope, are not within the terms of section 3893 of the Revised Statutes of the United States, and amendments thereto, even though they contain obscene or indecent matter. If, therefore, the jury believe that the letter in question was sent under cover of a sealed envelope, they must find defendant not guilty."

This request raises a question to be determined by the court. It has been made before several district and circuit courts of the United States, and these differ in the construction of the section. It is now pending before the supreme court of the United States, awaiting a hearing. The most elaborate discussion of the question on one side is in *U. S. v. Williams*, 3 Fed. Rep. 484, 491, followed by *U. S. v. Loftis*, 12 Fed. Rep. 671. On the other is the decision of Judge DRUMMOND in *U. S. v. Gaylord*, 17 Fed. Rep. 438. It came up again in *U. S. v. Chase*, 27 Fed. Rep. 807, (circuit court Mass.,) Mr. Justice GRAY sitting with the district judge; and, the court being divided, it has gone to the supreme court. In this unsettled condition of the law on this point, with the prospect of a final decision at no distant day in the supreme court, I must give the defendant the benefit of every reasonable doubt in the solution of the question. *U. S. v. Whittier*, 5 Dill. 39, 42. Is a sealed letter addressed to a particular person, sent by mail, and delivered to the person to whom it is addressed, within the prohibition of section 3893, Rev. St.? The section may be divided into three parts. The first declares certain things to be unmailable matter. The second forbids any of these from being conveyed in the mails; or, if perchance they are so conveyed, they must not be delivered from the mail. The third makes it an offense for any one to deposit in the mail for delivery, or to receive from the mail any matter so declared to be unmailable, for the purpose of circulating or disposing of the same. What is declared to be unmailable matter? There are five classes: (1) Any publication, obscene, lewd, or lascivious, in the shape of a book, pamphlet, picture, paper, writing, print, or in any other form of an indecent character; (2) every article or thing designed or intended for the prevention of conception or procuring abortion; (3) every article or thing intended or adapted for any indecent or immoral use; (4) every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, how, or of whom, or by what means, any of the above-named matters, articles, or things may be obtained or made; (5) every letter upon the envelope of which, or postal-card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed. Such unmailable matter shall not be conveyed in the mails, nor be delivered from any post-office, or by any letter-carrier. The offense is defined thus:

"Any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared to be unmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mail, for the purpose of circulating" [in the case of the books, pamphlets, etc.] "or disposing," [in the case of the other things,] "or of aiding in the circulation or disposition of the same."

It will be seen that the matter declared unmailable is matter intended for or within reach of the public or a part of the public, the character of which can be ascertained by inspection. It must be a publication or an article or thing intended for the prevention of conception, or to produce abortion; or an article or thing intended or adapted for an indecent or immoral use; or a written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information where, how, of whom, by what means, any of these articles may be obtained or made; or a letter on the envelope of which, or postal-card upon which, the objectionable terms, language or delineations may appear. So, also, it is forbidden to carry such matter in the mail, or to deliver it. How can this prohibition be obeyed unless the matter is such as can be inspected, and, upon inspection, can be seen to be unmailable? So, also, the offense is mailing or receiving from the mail for the purpose of circulating or disposing of such unmailable matter. Apply the above. A sealed letter is not a publication. *Barrow v. Lewellin*, Hob. 62; *Fonville v. McNease*, Dud. (S. C.) 303; *Odger, Sland. & Lib.* 150; *Townsh. Sland. & Lib.* §§ 101, 108. Its character cannot be discovered on inspection, except by breaking the seal, which a post-master cannot do. It is not intended for the public. It does not, in itself, show a purpose of circulation. Its seal shows that it is intended to be private, and to be confined to the person to whom it is addressed. In my opinion the evidence does not bring this case within the section of the revised statutes. The jury will find defendant not guilty.

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UNITED STATES *v.* COOK *et al.*<sup>1</sup>

(*District Court, S. D. California.* October 15, 1888.)

PUBLIC LANDS—OFFENSES—FENCING—INDICTMENT.

An indictment for fencing public lands in violation of 23 St. U. S. p. 322, § 3, need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense.

Indictment for Fencing Public Lands.

*The District Attorney*, for the United States.

*Stephen M. White*, for defendants.

Ross, J. In his brief filed in this case the district attorney concedes that, if it is necessary that the indictment should negative the proviso

<sup>1</sup> *Contra*, see *U. S. v. Felderwald*, 36 Fed. Rep. 490.

contained in the section of the statute upon which it is founded, the demurrer of the defendants should be sustained, inasmuch as the averments in that behalf are insufficient; but he insists that such negation is not necessary, and that therefore the averments respecting that matter should be disregarded as surplusage, and the demurrer be accordingly overruled. The indictment is based upon section 3 of the act entitled "An act to prevent unlawful occupancy of the public lands," (23 St. U. S. 322,) and reads as follows:

"That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine or confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: provided, this section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

The real question is whether the proviso is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts which constitute it. If it is, it is necessary that the indictment should negative the proviso; otherwise the latter is matter of defense to be shown by the defendant. *U. S. v. Cook*, 17 Wall. 168. Looking at the statute it is seen that the section to which the proviso is appended defines the acts which constitute the offense, and defines them completely, without any reference to the proviso, or to any matter contained in it. There is nothing in the proviso that enters into the offense condemned, but its sole office is to exempt from the operation of the section those persons who have gone upon, improved, or occupied such public lands under the land laws of the United States, claiming title thereto, in good faith. That that is a matter to be shown in defense seems to me to be clear. If the defendant comes within the exemption it is an easy matter for him to show it; whereas if the prosecution should be required to allege, and consequently to prove, that defendant did not go upon, improve, or occupy the land under the land laws, claiming title thereto, in good faith, it would be casting upon the government the burden of proving a difficult negative, and I think the statute was wisely so framed as to leave it to the defendant, if he falls within the exemption, to show the fact. As the averments in respect to the matter referred to were unnecessary, they may be disregarded as surplusage. It is not claimed that the indictment contains any other defects. Demurrer overruled.

HATCH *et al.* v. YOUNG.

(Circuit Court, D. Massachusetts. December 4, 1888.)

## PATENTS FOR INVENTIONS — INFRINGEMENT — MACHINES FOR MAKING HEEL-STIFFENERS.

Letters patent No. 132,849, granted to S. Moore and H. Rogers, November 5, 1872, for improvements in machines for making heel-stiffeners for boots and shoes, the specification for which recites the use of "a stationary heel-shaped former-block; \* \* \* a sliding bender, or follower, that presses the leather-board or blank around this block; and an under-slide, that presses in or crimps the bottom edge of the blank, to form the lip or flange, the follower moving up against the blank, and pressing it upon and around the former-block, and gripping the bent blank thereto, and the under-slide then moving against the bottom edge of the bent blank, \* \* \* and pressing the edge under the bent blank to crimp it," are not infringed by machines made under letters patent No. 850,907, granted to William J. Young, October 12, 1886, in which the lip-turner is bolted to the frame, and in which the weighted arm or spring or crimper-slide of the former device is not found.

In Equity. Bill for infringement of patent.

Bill brought by Jesse W. Hatch and others against William J. Young.

*W. A. Macleod*, for complainant.

*J. E. Maynadier*, for defendant.

COLT, J. This suit is brought on letters patent No. 132,849, dated November 5, 1872, granted to S. Moore and H. Rogers, for improvements in machines for making heel-stiffeners for boots and shoes. The specification says:

"Our invention relates to the manufacture of heel-stiffeners from leather-board, and particularly to the method of forming the lip or flange upon each stiffener, and of producing a stiffener having a body contracting from the bottom to the top. In making such stiffeners we use a stationary heel-shaped former-block, (set so as to leave a space beneath it,) a sliding bender, or follower, that presses the leather-board or blank around this block, and an under slide, that presses in or crimps the bottom edge of the blank, to form the lip or flange, the follower moving up against the blank, and pressing it upon and around the former-block, and gripping the bent blank thereto, and the under slide then moving against the bottom edge of the bent blank, (such edge not being gripped,) and pressing the edge under the former-block, to crimp it."

The claims in controversy are the first and third:

"(1) The combination of the stationary former-block, *b*, the slide-follower, *e*, and the crimper-slide, *g*, the follower and slide moving in right lines, and operating substantially as described."

"(3) The process herein described, of automatically, and by a continuous movement of the prime motor, shaping and setting to shape heel-stiffeners, by first gripping the body and then crimping the bottom edge, substantially as described."

The defendant's machine is found described in his patent of October 12, 1886, No. 350,907. In this machine the blank is operated upon by two sets of dies. The blank is partially formed in what is called the "preliminary machine," and then completed by the auxiliary machine, or finisher.

Without giving a breadth of construction to the Moore and Rogers patent which I do not think warranted, I am unable to find any infringement on the part of the defendant. In view of the prior Hatch patent of August 1, 1871, the Moore and Rogers patent must be limited to the improved mechanism therein shown. A comparison of the two machines discloses a marked difference in construction and mode of operation. I do not find in the Young machine the crimper-slide found in the Moore and Rogers patent. In the Young machine the lip-turner, which turns the flange of the stiffener, is bolted to the frame, which is firmly fastened to the stationary table or bed; the lip-turner constituting a part of the frame or box in which the female mould is encased. Neither in the first nor in the second process of the Young machine do I find the weighted arm or spring or crimper-slide of the Moore and Rogers device. It may be said that both machines clamp and grip a stiffener between a male and female mould, and afterwards turn a flange, but the construction and operation of the machines are quite different. In my opinion the defendant's machine does not embrace the combination of devices covered by the first claim of the Moore and Rogers patent; nor do I think, in view of the prior state of the art, that the third or process claim of the Moore and Rogers patent, even if it is held to be valid, should be construed to cover either the first or second process of the Young invention. Bill dismissed.

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ROYER v. KING *et al.* SAME v. RICHMAN *et al.* SAME v. RUSSELL.

(*Circuit Court, D. Indiana. November 28, 1888.*)

**PATENTS FOR INVENTIONS—INVENTION—THRESHING-MACHINES.**

Patent No. 259,264, issued June 6, 1882, to Louis C. Royer, as assignee of Christopher Blinn, covering the combination, in a threshing-machine, of a cylinder, a concave and grate below, a revolving beater arranged sufficiently near the cylinder to deflect the straw downward, a revolving rake and beater in the rear of the first beater, a vibrating shaker and carrier below, involves no invention; the J. A. Throp patent of April 18, 1876, those to complainant of September 7, 1875, and June 20, 1876, and the model made by Westinghouse & Co. during 1877-80, all contain substantially the same elements in the same combination as in the Blinn machine; the improvements made by Blinn in the incline of the grate, and the location of the beater, being only such as a skilled mechanic could have made with the others before him.

At Law. Action for infringement of patent.

These actions are brought by Louis C. Royer against John King and others, George W. Richman and others, and Allen A. Russell, respectively. The plaintiff is the assignee and owner of letters patent No. 259,264, issued June 6, 1882, to him as assignee of Christopher Blinn, for an improvement in threshing-machines. There were three claims in the patent, which cover the general combination, in a threshing-machine, of a threshing cylinder, a concave and grate below, a revolving beater arranged sufficiently near the cylinder to deflect the straw downward, a re-

volving rake and beater in the rear of the first beater, and a vibrating shaker and carrier, located below beaters, all constructed, arranged, and operated as shown. By stipulation the cases were submitted to the court for trial without the intervention of a jury. It was further stipulated that the decision of the court should be final and binding upon both parties, and that neither of them should appeal therefrom; and that, if the decision was adverse to the plaintiff, no other suits should be brought against Russell & Co., or the sellers or users of machines made by them. On the trial the defendants insisted that no invention was displayed by the device shown in the Blinn patent, on account of the previous state of the art as disclosed in letters patent No. 176,282, issued to J. A. Throp, April 18, 1876, and the patents issued to the plaintiff Louis C. Royer, Nos. 167,570, dated September 7, 1875, and 179,064, dated June 20, 1876. These, with a number of patents, and a model of a threshing-machine made by Westinghouse & Co., of Schenectady, N. Y., during the years 1877-80, were offered in evidence; the latter chiefly as anticipating the device of Blinn. The machines used by the defendants were made by Russell & Co., of Massillon, Ohio, which company defended these suits.

*Mr. Stone, George E. Baldwin, and Jos. B. Kealing, for plaintiff.*

*M. D. Leggett and C. P. Jacobs, for defendants.*

GRESHAM, J., (*orally, after stating the facts as above.*) I read from the Blinn specification:

"The great desideratum in all threshing-machines and separators is to arrest the straw after it leaves the threshing cylinder as speedily as possible, and to deliver it over to the grain separating devices in order to prevent it being thrown through or nearly through the machine, in order to effect perfect separation."

Blinn thus speaks of the then state of the art. He must be held to have had in mind the Westinghouse device, the Throp patent of April 18, 1876, and the Royer patents of September 7, 1875, and June 20, 1876. A skilled mechanic, with the Westinghouse machine and these patents before him, could have made the improvement which is described in the Blinn patent. The old machines contained a cylinder, a concave plate, and a grate, two beaters, one in front and one in rear, and a vibrating carrier, acting in co-operation, substantially as the same elements are combined and act in the Blinn machine. Neither the slight change that Blinn made in the incline of the grate, nor in the location near it and the cylinder of the beater, involved invention. Indeed, Blinn did little more than take the beater as he found it in the Throp machine, and put it in the Royer machine. While the latter, thus improved, is perhaps superior to the Throp and other machines, the improvement involved no invention. Finding and judgment for defendants.

McMURRAY *et al.* v. EMERSON.

(Circuit Court, D. Massachusetts. November 21, 1888.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—MEASURE OF DAMAGES.

The measure of damages for infringement of a patent is to be ascertained by considering the amount of profits or savings made by defendant by the use of the infringing device, beyond what he could have made by the use of tools free to the public.

At Law. Action for damages.

This was an action brought by Louis McMurray and others against George R. Emerson for infringement of reissue patent No. 8,781, dated July 1, 1879, for an invention of Abel Barker, and reissue patent No. 10,672, dated December 15, 1885, for an invention of Jabez A. Bostwick, each invention being for an improvement in tools for soldering the caps or covers on tin cans, and both patents being owned by the plaintiffs as assignees.

*Causten Browne and Benjamin Price*, for plaintiffs.

*A. H. Briggs*, for defendant.

NELSON, J., (*charging jury.*) In this suit the plaintiff seeks to recover damages for the infringement of two patents of which he is the owner, the Barker patent and the Bostwick patent. These patents relate to improvements in tools for soldering tin cans. There does not seem to be any dispute between the parties as to the ownership of the patents, nor as to their validity. The defendant concedes that the plaintiff owns them, and that they are valid, and also that he has infringed them by the use of a tool in his tin-canning establishment; and that tool has been produced and exhibited to the jury. The defendant also concedes, and the plaintiff accepts the concession as true, that the tool embodying the improvements has been used by the defendant in soldering 50,000 tin cans. In regard to the rule of law applicable generally to the case as to the construction which the jury are to give to the patents, it is not necessary for the court to make any extensive or elaborate explanation, because they will not be troubled with the consideration of any question as to their validity, or as to the defendant's infringement; and it is only necessary for the court to read to the jury two prayers which the plaintiff has requested the court to give upon this branch of the case, and to say that the court adopts these prayers as containing a correct exposition of the law. The defendant concedes also that these prayers state the rule of law correctly.

In regard to the Barker patent, the plaintiff requests the court to give, and the court does give, this instruction: That the fifth claim of the Barker reissue patent is for a soldering apparatus consisting of a disc to melt and spread the solder, which disc is formed with a recess in its under side to give room for the convex lid of the can and confine the soldering process to the outer edge of the lid; this disc being in combination with



and mounted upon a rod movable independently of the disc, which rod holds the can-cap in place while the disc is moved down to the solder, and back and forth upon the solder, to melt and spread it evenly around the edge of the can-cap; and if the jury find that the defendant's soldering apparatus contains substantially such a disc, mounted upon substantially such a rod, the disc and rod operating substantially in the same manner as described in plaintiff's patent, and producing substantially the same results, the verdict must be for the plaintiff.

The second prayer is in regard to the Bostwick patent, and the plaintiff requests the court to give, and the court does give, this instruction: That the claim in the Bostwick patent is for a hollow soldering iron, having a handle, and having its lower rim beveled, in combination with a rod, located centrally within the hollow soldering iron, to guide the soldering iron properly to the cap to be soldered, and to hold the cap firmly till secured by the solder; and if the jury find that the defendant has used substantially such a soldering iron and rod, combined and operated substantially as described in the Bostwick patent, and producing substantially the same result, the verdict must be for the plaintiff. So, upon the question of the validity of the patent, and also to the question of infringement, the jury will find a verdict for the plaintiff.

The more important question is the question of damages; it has been stated by the counsel that this is one of a number of cases, and that it is to be treated as a test case for the purpose of obtaining a judicial determination by a jury of a fair measure of damages for the infringement of the patents, in order that the verdict of the jury and the judgment of the court in this case may be used in obtaining settlements with other infringers, and for ending other legal proceedings. Therefore it is necessary for the jury to consider very carefully what the damages are in this case, remembering that the public generally have some interest in the decision of the jury. The jury will notice that the only evidence in the case upon the subject of damages is proof of what saving results in that part of the process of manufacturing canned goods which consists in fastening the cover by solder, from the use of these ingenious inventions over the old process of using a soldering iron. The plaintiff has produced evidence from persons familiar with the business, and skilled in this manufacture, from which it appears that by the new process there is a saving of labor; that where, by the old process, a skilled workman could solder only 1,500 cans a day, under the new process a laborer less skilled can solder 4,000 cans a day, so that the actual saving resulting from diminished labor by the use of the new process over the old, amounts, according to the plaintiff's computation, to \$1.20 per thousand cans. There is also evidence that by the patented operation there is a saving of solder, and less waste; and that where, under the old process, a pound of solder would be sufficient to seal or fasten only 80 cans, by the new process the same amount of solder will seal or fasten 150 or 160 cans. The plaintiff figures out, on this evidence, a saving of 75 cents per 1,000 cans in the quantity of solder used. Both together amount to \$1.95 per 1,000 cans.

The only evidence in the case is that which I have called your attention to, and that is all the evidence before you from which you can compute the damages to which the plaintiff is entitled for the infringement. It is frequently the case that a license fee is established by the owner of a patent for the use of his invention, and that is ordinarily the basis upon which a jury estimate its verdict. But there is no evidence in this case of a license fee ever having been established by the plaintiff for these patents, or fixed by a court; and therefore the jury has no such evidence of that character to guide them. The jury have simply the saving which results from the use of the patented devices over the old process. Upon this evidence the jury are justified, if they see fit, in finding a verdict of \$1.95 per 1,000 or \$1.75 per 1,000, which was the amount suggested by the counsel for the plaintiff. There is no claim here that this amount should exceed \$1.95 per 1,000 cans; and the jury therefore will be justified in finding that sum, or any other less sum which they think would be a fair compensation to the plaintiff for the infringement of his rights as the owner of the patents. I will read to you the prayer which the plaintiff has asked the court to give. I am requested to instruct you that the jury are to award the plaintiff a sum equal to the actual damage caused by the infringement; and in forming their estimate of damages they are to consider as evidence of such damages the amount of profits or savings made by the defendant by the use of the infringing device over what the defendant could have made by the use of tools free and open to the public use. And I instruct you that in accordance with that prayer you are to award the plaintiff an amount equal to his damage, and you are to consider as evidence the gains or savings made by the defendant by the use of the patented device. You are also to find the amount of the plaintiff's damages per 1,000 cans. The verdict which the clerk will hand to you will contain a memorandum of the number of cans on which the device has been used by the defendant,—50,000; and you are to fill the blank with the amount which you find the damage to be per 1,000 cans.

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LOW v. BARSTOW STOVE Co.

SAME v. MAGEE FURNACE Co.

(Circuit Court, D. Massachusetts. December 10, 1888.)

**1. PATENTS FOR INVENTIONS—PATENTABILITY—ORNAMENTAL TILES.**

The claim in letters patent No. 336,242, issued February 16, 1886, to John G. Low, for "an improvement in the art of decorating surfaces, consisting in applying thereto, by pins or screws passing through holes in the tile, ornamental tiles of appropriate patterns," is void for want of invention, though limited by the specifications to rosette tiles, perforated through their geometrical center, attached with round-headed screws, which harmonize with the rosette.

**2. SAME.**

Letters patent No. 336,243, issued the same day to the same patentee, for "a medallion tile, formed with a rabbet upon its edge, and glazed into the rabbet," is void for want of invention, though limited by the specifications to a tile having a rabbet upon its edge, and glazed into the rabbet.

bet, in combination with a perforated plate suited to the contour of the projecting medallion, and with suitable backing to the tile attached to said perforated plate," are also void for want of invention.

**In Equity.** Bills for infringement of patents.

*T. W. Clarke*, for complainant.

*David A. Burr*, for defendants.

COLT, J. These suits are brought on two letters patent, granted February 16, 1886, to the complainant, John G. Low, for improvements in the art of tile decoration. The claim in patent No. 336,243 is as follows:

"As an improvement in the art of decorating metallic or other surfaces, a medallion tile, formed with a rabbet upon its edge, and glazed into the rabbet, in combination with a perforated plate suited to the contour of the projecting medallion, and with suitable backing to the tile attached to said perforated plate, substantially as and for the purposes described."

The claim in patent No. 336,242 is as follows:

"An improvement in the art of decorating surfaces to be ornamented, consisting in applying thereto, by pins or screws passing through holes in the tile, ornamental tiles of appropriate patterns, and glazed to their bases, substantially as and for the purpose described."

The main defense to these patents is want of invention. I have carefully considered all that has been urged in support of the validity of these patents, and I am unable to find any invention in them, in view of the prior state of the art. Both of the patents may describe tiles which present a very pleasing and artistic appearance to the eye, but it does not follow from this that it required, in the sense of the patent law, the exercise of the inventive faculty to produce them. The improvement described in patent No. 336,243 consists in making the tile medallion in form, with a rabbet upon its edge, and glazed into the rabbet, in combination with a perforated plate and backing to attach the tile to the plate. Now, it is proved beyond question that a square tile, formed with a rabbet, and glazed into the rabbet, in combination with a perforated plate and suitable backing, was in use at the time Low made his alleged invention. It may also be said that a round medallion without the rabbeted edge was old at this time. Under these circumstances, the changing of a square tile with a rabbeted edge to a round or medallion tile with a rabbeted edge, involved no such exercise of the inventive faculty as entitles the party to a patent under the law. As for patent No. 336,242, the claim appears to be broad enough to cover any ornamental tiles glazed to their bases through which are applied pins or screws, but the complainant contends that this claim is limited by the specification and drawings to rosette tiles, perforated through their geometrical center, attached with round-headed screws or pins, which harmonize with the rosette. But, as thus limited, the claim is manifestly void for want of invention. It was old in the art to attach porcelain or earthen knobs, and shields of various forms, glazed to their base, to articles by means of screws or pins passing through holes in their center or upon their sides.

In view of this there was no inventive skill required to decorate a surface by applying thereto a perforated rosette tile, glazed to its base, and secured by a pin or screw passing through a hole in its center or elsewhere. For these reasons, and without entering upon the other defenses raised, the bills should be dismissed.

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EAGLE MANUF'G CO. v. CHAMBERLAIN PLOW CO.

(Circuit Court, N. D. Iowa, E. D. December 13, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CULTIVATORS.

Letters patent No. 242,497, to E. A. Wright, for an improvement in cultivators, the object of which is to assist in raising the beams, by means of a combination of a wheeled frame, and vertically rotating beams, with lifting springs so attached that a greater lifting effect is produced as the beam is elevated, without having the springs exert any material lifting strain while the cultivator is in operation, are infringed by a device consisting of a spiral spring connected with an arched axle, and with a shoulder upon the sleeve, to which the drag-beam is attached, so that when the beam is in its operative position the spring exerts no lifting effect, but, when the same is elevated, the shoulder is rotated forward, and the spring operating on the shoulder as a lever assists in raising it.

2. SAME—PRELIMINARY INJUNCTION.

On a bill to restrain the infringement of a patent for an improvement which constitutes but a small part of the machine, when the question of infringement is open, and defendant avers that he had no knowledge of complainant's patent before suit brought, and that he obtained no aid from the invention specified in it, and for some years has manufactured the improved machines, a preliminary injunction will be refused on condition that defendant files periodical statements of the number manufactured since suit brought, and deposits with the clerk a reasonable royalty for each, and files a bond for performance and for payment of damages.

In Equity. On motion for preliminary injunction.

Bill by the Eagle Manufacturing Company against the Chamberlain Plow Company to restrain the infringement of letters patent No. 242,497, issued to E. A. Wright, June 7, 1881.

*Nathaniel French*, for complainant.

*Powers & Lacy*, for defendant.

SHIRAS, J. The complainant corporation is the owner of letters patent No. 242,497, issued to E. A. Wright, for an improvement in walking cultivators, and in the bill herein filed avers that the defendant corporation is manufacturing and selling cultivators containing the improvement covered by the Wright patent in violation of the rights of complainant, and, in aid of the relief prayed in the bill, a motion is made for the granting of a preliminary injunction. In the cases of *Manufacturing Co. v. Bradley*, and *Same v. Moline, M. & S. Co.*, 35 Fed. Rep. 295, 299, the Wright patent was sustained as valid, and the defendants were restrained from infringing the same. In the light of these decisions it is not nec-

essary to reinvestigate the validity of the patent against the allegation of want of patentable novelty therein.

On the question of infringement, an examination of one of the cultivators manufactured by the defendant company shows that it utilizes the conception of exerting a lifting effect upon the drag-beams of the cultivator, through the operation of a spring connected with the arched axle, and with a shoulder upon the sleeve to which the drag-beam is attached. The spring is in the form of a spiral, and when the drag-beam is in its operative position the shoulder and spring are substantially in a right line above the horizontal end of the axle, and consequently the spring, though then at its greatest tension, does not exert any lifting effect upon the drag-beam. When the drag-beam, however, is lifted, the shoulder to which the spring is attached at its lower end is rotated forward, and the pressure of the spring operating on the shoulder as a lever, tends to raise the drag-beam. In the case of *Manufacturing Co. v. Moline, M. & S. Co.*, *supra*, the patent issued to William Evans, No. 266,123, was considered, and held to be an infringement of the Wright patent. In the Evans combination is found a spiral spring attached to the upright of the arched axle, the lower end being attached to an arm or shoulder upon a rock-shaft placed either in front or in rear of the main axle, the lock-shaft being fastened to or connected with the drag-beam. In both the Evans combination and in that of defendant, we find a spiral spring attached to the upright of the arched axle, operating upon a projecting arm or shoulder which, acting as a lever, when the free end of the drag-beam is lifted, aids in raising the drag-beam. In the Evans combination the arm through which the spring acts is attached to the rock-shaft because the drag-beam is connected therewith. In defendant's combination the arm or shoulder through which the spring acts is attached to the sleeve through which the axle operates, because the drag-beam is attached thereto. These differences are simply modifications in the mere mode of attaching the lower end of the spring, the resulting effect being the same. If the Evans combination is an infringement of the Wright patent, it is impossible to avoid the conclusion that the combination used by defendant is likewise an infringement.

On behalf of defendant it is asked that, in case the court should be of opinion that the cultivators manufactured by defendant are an infringement, the defendant be allowed to give security, and be permitted to continue its business until the final hearing. It cannot be said that the fact of infringement is established beyond question. The case is not one wherein the defendant admittedly is using the device or invention claimed by complainant, but denies liability on the ground alone of the invalidity of complainant's patent. Admitting the validity of complainant's patent to be fairly established by the prior decisions, still the question remains whether the defendant's combination is the same as complainant's in such sense as to be an infringement. This question has not been passed upon in any of the prior decisions, and it cannot be finally determined until the hearing upon the merits. In the answer filed the defendant avers that it had no knowledge of the existence of the patent to Wright until

this suit was brought, and in the affidavits filed it is shown that the defendant entered upon the manufacture of its cultivators without aid from the Wright invention. These facts of course do not change the fact that such manufacture may be an infringement, but the same have weight upon the question whether the preliminary injunction shall at once be issued. It furthermore appears that the Wright patent was issued June 7, 1881, and by the affidavit of E. P. Lynch, the president of the complainant company, it appears that the defendant has been for some years past engaged in the manufacture of the cultivators which it is now claimed are infringements on the rights of complainant. It may well be urged, therefore, that the defendant company was not bound to know or assume that the complainant objected to the manufacture of the cultivators of the style made by defendant, until this suit was brought. The patented improvement forms but a small part of the cultivator, and to enjoin the defendant now from the sale of those it has manufactured, would entail a very serious loss upon the defendant, out of all proportion to the damage to complainant. Under the circumstances of the case, part of which are above suggested, and in view of the fact that defendant offers to account for all cultivators now on hand or manufactured containing the alleged infringement, and to deposit the sum of 50 cents for each machine as a reasonable royalty thereon, the order will be that, if the defendant will, within 15 days from the 13th day of December, 1888, file a written statement showing the number of cultivators having the infringing device attached thereto, which it had on hand or belonging to it on the 9th day of August, 1888, the day this bill was filed, together with the number it has since manufactured, and shall deposit with the clerk of this court 50 cents for each of said cultivators, and shall also file a bond in the sum of \$2,500, with good and sufficient surety or sureties, to be approved by the clerk of this court, conditioned that the defendant will well and truly perform all the conditions of this order, and also pay all damages and costs that may be awarded against it, if any, upon the final hearing of this cause, then the writ of preliminary injunction shall not issue until further order of the court or judge thereof; but should the defendant fail or refuse to give said bond and file said statement within the time fixed herein, said writ of injunction shall issue as prayed for. It shall further be the duty of defendant, as one of the conditions of this order and bond, to file with the clerk of this court, every three months, beginning with the 15th day of March, 1889, a statement in writing showing the further number of cultivators by it manufactured, containing the device alleged to be an infringement of the Wright patent owned by complainant, from and after the date of the last statement filed, and further to deposit with the clerk of this court the further sum of 50 cents for each machine so manufactured; such statements to be filed until the final hearing of this cause. The sums of money so deposited shall be held by the clerk in the registry of the court, to be disposed of according to the rights of the parties as finally adjudged by this court.

## MARVIN v. GOTSHALL.

(Circuit Court, D. Minnesota. December 24, 1888.)

## PATENTS FOR INVENTIONS—COMBINATION—NOVELTY—DRAUGHT EQUALIZERS.

Letters patent No. 172,756, issued January 25, 1876, to Richard M. Marvin, for a draught equalizer used in the attachment of three horses to harvesters and other machinery, describe a combination, some of the elements of which were to be found in the device described in letters patent issued December 19, 1865, to Edwin J. Toof for the same purpose, while others were to be found in the device described in letters patent No. 68,673, issued September 10, 1867, to H. J. Wattles for a similar contrivance. It did not appear that the exact combination of the Marvin patent had been known prior to his invention, but it was clearly shown that it was one of merit, and that its results were beneficial. *Held*, that it was not void for want of patentable novelty.

At Law. On motion for new trial.

For former hearing and statement of case, see 36 Fed. Rep. 314.

*Charles S. Careins*, for plaintiff.

*Woods, Hahn & Kingman*, for defendant.

SHIRAS, J. Upon the hearing of this cause in September last, a judgment for damages was awarded against defendant for a nominal amount, the effect thereof being a holding that a patent issued to plaintiff on the 25th of January, 1876, for an improvement in draught equalizers when used in harvesters and other like machines, was a valid patent, and not void for want of patentable novelty. The motion for new trial is upon two grounds: *First*, that the conclusion reached upon the case as presented at the hearing is erroneous; and, *second*, that defendant has since the trial discovered the fact that on September 10, 1867, there was issued to H. J. Wattles a patent, No. 68,673, the specifications of which disclose a combination which shows that Marvin's alleged invention had been anticipated and made public. Counsel have reargued the question of patentable novelty or the lack of it in the Marvin combination, not only as the same was presented by the evidence on the hearing, but in the light of the matters appearing in the drawings and specifications attached to the Wattles patent. The opinion of the court upon the hearing will be found in 36 Fed. Rep. 314, to which reference can be made for a description of plaintiff's combination and the uses and purposes thereof.

In the Wattles combination is found an evener and a spreader. The former is not connected with the pole or tongue of the machine, but is attached by hooks directly to the axle of the machine. As a whole, the combination therein presented does not resemble the Marvin combination as nearly as does that found in the patent issued to Edwin J. Toof, which was fully considered in the opinion originally filed herein. If the latter does not anticipate the Marvin combination, then certainly the Wattles invention does not. But counsel for defendant argue that the Wattles machine shows a spreader attached to the tongue, and that, by taking it out of the Wattles combination and combining it with the Toof invention, we would have the Marvin combination, and that to do this

would not require the exercise of inventive skill. Herein lies the pivotal question of the case. It is not necessary, to secure patentability, that the elements or any one of them entering into a given combination shall be new. The several elements may be well known, but if the combination be novel, and the several elements co-act in producing the result, and the result be beneficial, then the combination will be patentable, if it required inventive skill to conceive of the idea of making the combination. It was not shown upon the hearing of this cause, nor is it now claimed, that the exact combination appearing in plaintiff's patent had been known before his invention. It was claimed that the essential features thereof were found in the Toof patent, and that it did not require inventive skill to make the changes appearing in the Marvin combination. It is practically, therefore, admitted that there is novelty in the combination, but it is asserted that it is mechanical novelty or improvement, and not the product of invention. That the several elements in the Marvin combination co-operate in producing the result is not questioned, nor can it be successfully denied that the result obtained is beneficial. The fact that plaintiff's rights are stubbornly contested, and that defendant seeks to continue the complained of infringement, clearly demonstrates that the Marvin combination is recognized to be one of merit, and its results to be beneficial. Thus we find that the decisive point in the case is the one already stated, to-wit, whether it required inventive skill to combine the several elements found in the Marvin combination in the mode they are therein combined, admitting the fact that the tongue, the evener, the spreader, and the levers forming the combination were old. As was stated in the opinion already given, the question thus presented is one not free from doubt. The plaintiff, however, has the presumption in his favor, arising from the fact that the patent-office has granted him a patent upon the combination, and the court cannot set this aside unless it is made to appear with reasonable clearness and certainty that there is a lack of patentable novelty in the combination. The various devices appearing in the Wattles, Thomas, Graham, and Toof patents had been made public, and yet, so far as has been made to appear in this cause, no one, even with the aid these prior patents afforded, had produced the combination found in plaintiff's invention, although it pertains to a class of machines that are widely used, and which are manufactured by many rival establishments. If the improvement found in plaintiff's combination is mechanical only, why was it not availed of at an earlier day? It may be, and doubtless is, true, that the several elements found in the Marvin patent were well known, and that each had been used for its own specific purpose in many other machines; and it is also true that others before Marvin had produced combinations of some of these elements; with a view to producing results obtained by Marvin; but it is no less true that none had hit upon the exact combination produced by him, and that, when his combination became known, its superior merits had brought it into use. These facts tend to show that it required inventive skill to produce the combination, and it was upon these facts, combined with the legal presumption in favor of the



validity of the patent, that judgment went for plaintiff in the trial of the cause. The presentation of the petition for a new trial has only tended to make more clear the fact that the sole question involved is that of inventive skill in producing the combination, yet upon this, the pivotal point, no new light has been shed upon the case. It was a doubtful question when the original hearing was had. The earnestness and zeal with which counsel for defendant have re-presented their views may have accentuated the doubt, but nothing has been adduced which satisfies the court that upon a new trial a different result would be reached. Consequently the petition for a rehearing must be denied.

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### THE NEWPORT.

**HATCH *et al.* v. THE NEWPORT, (NEW YORK & C. S. S. Co., Claimant.)**

(*Circuit Court, S. D. New York.* October 15, 1888.)

#### **COLLISION—EVIDENCE—SUFFICIENCY—MATHEMATICAL DEMONSTRATION.**

Upon a libel for collision the direct testimony was that claimant's steamer, at the moment of collision, was from seven to eight miles off shore, and that the schooner with which she collided sank within half a mile. Libelants urged that the schooner thus collided with was one they had lost, but the wreck of their schooner was found within four or five miles from shore. They undertook, however, to show, by mathematical demonstration, from certain bearings which had been taken, that the steamer could not have traversed the lines subtended by the angles thus formed, within the time allowed by her logs, upon any other course than one which was different from that shown by the direct testimony, but there was a variance of five minutes between the engineer's and steamer's logs, as made a short time before the collision. *Held*, that the demonstration based on these logs was not sufficient to break the force of the direct testimony, and that the schooner collided with was not that of libelants.

**In Admiralty.** On appeal from district court, 28 Fed. Rep. 658.

Libel by Alfrederick S. Hatch and others against the steam-ship Newport, the property of the New York & Cuba Steam-Ship Company, claimant. From a decree for claimant, libelants appeal.

*Findings of Fact.* (1) The libelants' schooner John K. Shaw left Newport News about noon on the 21st of February, 1884, bound for New Haven, with a cargo of 324 tons of coal and 110 tons of pig-iron, the iron being on deck. (2) On the afternoon of February 24th some wreckage floating in the ocean off the Jersey coast was found by the tug-boat Maggie Moran, which was known to be part of the John K. Shaw by its having on it the bell of the Shaw. This wreckage was part of her deck, with steering gear, on which deck was the taffrail and a portion of the rail on each side, there being no break where the rail joined the taffrail, and on it was also the starboard davit uninjured. (3) At daylight on the morning of Sunday, February 24, 1884, the masts of wreck were seen standing out of the water at a point about four and a half miles off

shore, between Deal Beach and Long Branch, N. J., at a place where the lights of the Navesink bore N. by W.  $\frac{1}{2}$  W., and Long Branch pier N. W., about 12 miles south of Scotland light-ship. (4) On the 23d of February the steamer Newport left the city of New York bound for Cuba. She was an iron vessel of 2,875 tons register, and one of a regular line of steamers running between New York and Havana. As she went down the bay the weather became foggy and stormy, and the steamer anchored in the lower bay about 4:25 or 4:30 P. M. At about 5:15 or 5:20 she got under way again. At about 5:40 Sandy hook was bearing W., and at about 5:50 she was abreast of the Scotland light-ship, passing it a half mile to a mile to the eastward. (5) After passing Scotland light-ship, she took a course of S. by E., on which she ran about 40 minutes, and then took a course of S. half W. After she passed the Scotland light-ship, she was going at a speed of about 14 knots an hour. (6) At about 6:40 P. M. of February 23d, the Newport had a collision with a schooner. She was then between six and seven miles off shore. (7) The Shaw, in the ordinary progress of her voyage, could have reached the point where the steamer and the schooner were in collision, or the point where the wreck referred to in the third finding was found, by 6:40 P. M. of that day. (8) The schooner with which the Newport so came in collision was not the John K. Shaw.

*Geo. A. Black*, for appellants.

*Robert D. Benedict*, for claimant and appellee.

LACOMBE, J., (*after stating the findings as above.*) On February 21, 1884, the libelants' schooner John K. Shaw sailed from Newport News, Va., bound for New Haven. Since then, except as a wreck, she has not been heard from. At daylight, on February 24th, masts were seen standing out of water at a point about four and a half miles off shore, between Deal Beach and Long Branch. Wreckage identified as coming from the Shaw was, on February 24th and subsequent days, found floating in the water or stranded at different places on the beach. On February 23, 1884, the steamer Newport, bound from New York to Havana, was in collision with an unknown schooner. The log states the time of the collision as 6:40 P. M., and adds that apparently no damage was done. These facts are undisputed. Libelants undertake further to show that the unknown schooner was the Shaw; that the collision occurred wholly through the steamer's fault; that it took place within half a mile of the place where the masts of the wreck, above referred to, were subsequently found; that the collision resulted in the starboard bow of the Newport breaking open the Shaw, and causing her to sink; that she did so sink within a few minutes after collision, at the place where the wreck was found; and that such wreck was in fact the Shaw. This case presents solely questions of fact; and to the careful and elaborate discussion of the testimony, which is found in the opinion of the learned district judge, little need be added by this court. As to certain points more or less relied upon by him,—such as the comparative heaviness of the Shaw's load, and the presence or absence of a deck-load on the schooner

with which the Newport was in collision,—the proofs in this court tend strongly to modify his opinion. But upon the whole case, as it now stands, there seems to be no sufficient reason to dissent from his conclusion. As one branch of the libelants' case, however, is fortified in this court by an argument, apparently not advanced before the district judge, a brief consideration of such argument will not be inappropriate. It is shown by direct evidence that the wreck, which libelants claim to be that of their vessel, lay probably about four and a half miles, certainly not more than five miles, off shore. They also contend that the schooner with which the steamer was in collision sank within a few minutes, and before she had sailed half a mile. In fact, the only theory upon which they undertake to maintain their contention that the colliding schooner was seriously injured is found in the statement of the two or three witnesses, who speak of her as listing over and going down within a few lengths. Unless, then, it can be shown that the steam-ship, at the time of the collision, was within half a mile of the place where the wreck was afterwards found, the claim that the steamer was in collision with the Shaw cannot be sustained. The weight of the direct testimony in the case is clearly to the effect, as the district judge found, that the Newport was from seven to eight miles off shore at the moment of collision; and that she passed Scotland light at such a distance, and thereafter followed such a course, at such a speed, as to bring her to that point at 6:40 p. m. The force of this evidence libelants seek to break by an acute and elaborate mathematical argument. Taking the compass bearings of Sandy Hook and of the Scotland light-ship as recorded in the logs, and laying down on the chart the angles formed thereby, counsel undertakes to show that the lines which subtend those angles could not have been traversed by the steam-ship within the time allowed by the logs upon any course other than the one which (contrary to the weight of the direct evidence) he assumes to be the one she followed, and certainly not on the course which the weight of the direct evidence shows her to have taken. This argument would no doubt have all the conclusiveness of a mathematical demonstration if its premises were as certain as those from which the mathematician reasons. Such, however, is not the case. The libelants rely upon these entries in the logs: "5:35 p. m., Sandy hook abeam, [engineer's log;] 5:40, Hook west, [steamer's log;] 5:50, passed Scotland light-ship, [steamer's log.]" Both the logs state the time of collision as 6:40 p. m. This is explainable either upon the supposition that the respective recording officers correctly noted the time, and that the time-pieces to which they referred agreed; or upon the supposition that some mutual agreement as to the time of this unusual, and possibly important, occurrence was arrived at before the entries were originally put down on the slate, or finally entered in the logs. On the same afternoon, however, the steamer had anchored for several minutes, and subsequently got under way. These occurrences are thus recorded in the logs: "4:25, thick weather, snow, came to anchor lower quarantine, [steamer's log;] 4:30, anchored, [engineer's log;] 5:20, clearing up, got under way, [steamer's log;] 5:15, started again, [engineer's log.]" The

discrepancy in these entries may be explained either upon the supposition that the time-pieces referred to by the recording officers did not agree, or upon the supposition that these officers did not note the time with absolute accuracy. Under either assumption we must be prepared to find similar variances in other similar entries made by the same officers at about the same time. When a margin of error so great as this [five to ten minutes] is to be allowed for, the entries as to the bearings of the hook and the light-ship cannot be trusted to support an argument so closely reasoned as that of libelants' counsel. The force of the direct testimony not being thus broken, and its weight supporting claimant's contention that the collision occurred at least more than six miles off shore, it follows that the unknown schooner which the Newport encountered was not the Shaw. The decision of the district court is affirmed, with costs.

## ON REHEARING.

(December 28, 1888.)

LACOMBE, J. The reargument in this case has covered so wide a range that I have felt it necessary to review the greater part of the testimony. No substantial change, however, has been thus wrought in the conclusions announced in the original opinion. I was not then able from the testimony to indicate upon the chart the exact position of the Newport at 6:40 P. M., nor am I now. The testimony as to the courses taken by that vessel after passing Scotland light-ship is not sufficiently positive to support the precise statement contained in the fifth finding, which was not as carefully drawn as it should have been, and should therefore be now amended by stating that she took a course of about S. by E., on which she ran about 40 minutes, and then took a course of about S. half W. The same finding should further be amended so as to state her speed after she passed the Scotland light-ship at over (instead of about) 14 knots an hour, as I feel satisfied, from a re-examination of the testimony, that I did not allow enough for the action of the wind, and entirely overlooked the operation of the tide. While unable to locate the precise position of the Newport at 6:40 P. M., my re-examination of the case has not changed the opinion heretofore formed that she was more than six miles off shore, and hence could not have sunk the wreck afterwards found four and a half miles off shore. The bearing testified to by Johnson was not overlooked upon the first examination of the case, nor was it doubted that he took the bearing accurately. It does not follow, however, that his unaided recollection of what that bearing was, and of the time and place at which (relatively to the steamer's prior movements) it was taken, should be accepted as controlling of the case, unless upon a weighing of his testimony in comparison with all the evidence considered as a whole the fair preponderance of probability is that the Newport and the Shaw were at the same place at 6:40 P. M. My former opinion as to the preponderance of proof on this point is unchanged by the reargument. With the alterations above suggested, the findings and conclusions may stand.

## THE LUDVIG HOLBERG.

## THE LEONARD RICHARDS.

THE F. O. MATTHIESSEN & WIECHERS SUGAR REFINERY CO. v. THE LUDVIG HOLBERG and THE LEONARD RICHARDS. STAFFORD v. SAME.

(District Court, S. D. New York. November 26, 1888.)

## 1. COLLISION—FOG—SIGNALS—CONFLICTING TESTIMONY.

The small steamer L. H., bound out from New York, on May 24, 1887, collided in the lower bay at about 4:25 P. M., near buoy No. 11, with an inward bound bark, towed by the tug R. Upon extremely conflicting testimony the court found that for at least 15 minutes before collision there was so much fog between the Narrows and buoy No. 11, 3 miles below, as to prevent vessels seeing each other for more than a short distance. *Held*, that fog-signals were then required to be sounded.

## 2. SAME—TUG AND TOW—FOG-SIGNALS.

A tug which tows a bark on a long hawser astern in fog, should indicate the presence of her tow astern by signals. *The City of Alexandria*, 31 Fed. Rep. 427, followed.

## 3. SAME—CASE STATED—SPEED—NEW YORK TIDAL CURRENTS.

A steamer going "dead slow" in fog, met a tug a little on her starboard bow, and starboarded her helm, and passed her in safety, having received two blasts of the tug's whistle, but no signal to show a tow astern. The tug had a bark in tow on a hawser over 70 fathoms long, which was not seen in the fog. The bark was not in line, but to starboard of the tug, and her wheel was ported as soon as she was seen from the steamer. The latter being unable to clear her by going to port, ported so as to go between the tug and bark, and reversed full speed, and hailed to cast off the hawser, which was not done. The tug and bark did not stop, and the steamer's starboard bow struck and parted the hawser, swinging the steamer's stem to port, and striking the bark's port quarter at an angle of about three points. In actions for this collision on behalf of the bark and cargo against the steamer, (to which the tug was not made party, owing to her arrest in another district,) *held*, that the steamer was free from fault; that the collision was due to lack of proper fog-signals to show a tow astern, and to not casting off the hawser. *Also held*, that the steamer's testimony as to her speed was confirmed by coast survey reports of the tidal currents in New York harbor. See abstract in note to opinion, (page 917.)

In Admiralty. Libels for damages.

Libels by the F. O. Matthiessen and Wiechers Sugar Refinery Company and by owners of the bark against the steam-ship Ludvig Holberg, impleaded with the steam-tug Leonard Richards, for damages resulting from collision.

*Sidney Chubb*, (Geo. A. Block, of counsel,) for refinery company, libellant.

*Owen & Gray*, for libellant, Stafford.

*Wing, Shoudy & Putnam*, for the Ludvig Holberg.

Brown, J. On the 24th of May, 1887, as the bark Quickstep was coming up the lower bay in tow of the tug Leonard Richards, upon a hawser from 70 to 100 fathoms long, she came into collision with the steam-ship Ludvig Holberg on her way out to sea. She was struck on her port quarter, a little aft of the mizzen chains, by the steamer's port bow or stem, at an angle of about three points, and a large hole stove in, through which she speedily filled with water. Before sinking she was towed by the tug a few lengths only, to the flats on the west bank, about

one-quarter of a mile below buoy No. 11. The above libels were filed to recover \$87,000 for the loss of ship and cargo. The collision took place about 4:25 P. M. The testimony is extremely conflicting whether at that time, or shortly before, there was enough fog to interfere with ordinary navigation, and to require fog-signals. Most of the libelants' witnesses affirm that there was not; and no fog-signals were given by them. The respondents' witnesses maintain that the fog had set in from 15 to 30 minutes before, and became so dense that neither the tug nor the bark could be seen over 400 feet distant; that the steamer was going dead slow, not over  $3\frac{1}{2}$  knots speed, and was regularly sounding her fog-whistle. The witnesses from the tug and the bark testify that at and before the collision, though the weather was hazy, vessels could be seen half a mile distant; that the steamer was seen at that distance; that no fog-whistles were sounded, and that none were needed. Witnesses from other vessels were called to substantiate the account of each on this point. For the libelants, officers from the Old Dominion and the Wyanoke, which were going out to sea at about the same time with the Holberg, and ahead of her, testified that they met no dense fog until they reached the entrance of the Swash channel, at buoy No. 8, about a mile and a half below the place of collision; the former at 4:26 P. M., the latter at 4:32. The latter, however, in her log noted that it was foggy at 4:20, and, though buoy No. 8 was seen by her officers before it was reached, it could not be seen when passed very near. Both those vessels saw the tug and bark when they passed them from 300 to 500 yards distant. The master of the St. Johns, which runs on schedule time between pier 8 and Sandy Hook, and passed the tug and bark still nearer the time of collision, and a little to the westward of them, testifies that he found it densely foggy from the Narrows downwards; and the officer in charge at Fort Tompkins light, whose duty it was to observe and enter the weather, testified that a dense fog came on at 4 P. M., and was so noted in his record; and another witness, from the earthworks of Fort Wadsworth above, testified to the same effect.

Upon repeated consideration of this most embarrassing testimony, I must find that during a period of at least 15 minutes before the collision there was so much fog between the Narrows and buoy No. 11, as to prevent vessels being visible to each other for more than a short distance; such as to require the sounding of fog-signals under the rules; and that such signals were sounded by the Holberg, as her witnesses state; that these signals were heard by the St. Johns, as testified to; that the Holberg was at that time going "dead slow," not over  $3\frac{1}{2}$  knots; that the tug became first visible only a few hundred feet off, a little on the steamer's starboard bow; that neither the bark nor the hawser was then visible, and that no signals indicated to the steamer that the tug had a tow some 400 or 500 feet behind her; that the steamer rightly starboarded on receiving a signal of two whistles from the tug when she was first seen, and passed at a safe distance from the latter, starboard to starboard; that through the want of any signals from the tug to indicate, as required by the rules, that she had a tow behind her, the steamer was unable to avoid the bark, which she might, and undoubtedly would, have avoided, had

such signals been given; that the bark was not following directly after the tug, but was to starboard of her, and, by putting her wheel hard a-port, threw her head somewhat more to starboard, seeing which, the steamer properly ported, in order to go between the tug and the bark, at the same time hailing the tug to cast off the hawser; that if the hawser had been cast off promptly, the steamer would probably have gone safely between the two; that the hawser was not cast off, and the steamer, running against it with her starboard bow, parted it; and at the same time her bow was swung to port, resulting in collision with the bark's port quarter; that the steamer reversed as soon as danger from the bark was apparent, and was nearly stopped at the collision; that the tug and bark did not stop, and that the force of the blow arose mainly from the forward motion of the bark. The following considerations have led me to this conclusion:

1. It is to be noted, though I do not lay great stress upon this circumstance, that although the channel-way was three-quarters of a mile wide, these vessels at the time of the collision were very near the westerly side. This is the more peculiar as respects the tug and bark, inward bound, since, if there was no fog, and both shores could be seen, as they allege, their direct and natural course was apparently on the easterly side of the channel. I do not find any explanation, other than foggy weather, of their shaping their course to the left, almost to the limit of the channel-way; while the courses of both the tug and the steamer would be natural enough, if they were feeling their way in a fog along the line of the buoys, which, as seen from time to time, would give them assurance of their positions.

2. The general narrative of the steamer's witnesses is in the main straightforward, intelligible, and consistent. The story of the pilot of the bark is so confused, and, as it seems to me, so inconsistent, as to be scarcely intelligible. The bark's testimony that the steamer was seen half a mile distant, and that the bark was almost directly in line behind the tow, allows no rational explanation of the collision. As the steamer went well clear of the tug, and to the eastward of her, after the exchange of two whistles, it is incredible, if the bark, being from 450 to 600 feet behind the tug, was in line, or nearly in line, with the tug, and in plain view, that the steamer could have run into her, unless it were done deliberately. The pilot of the bark, moreover, gave five different orders for a change of helm, four of which were obeyed; the fifth being just at the moment of collision. The wheelsman, Ludden, who gives the clearest account of these particulars, states that they were all given in quick succession, and that the steamer was first seen a little on the port bow. The other wheelsman says she was a quarter of a point on the port bow. The first order was hard a-starboard. As soon as the helm was hard over, came the order hard a-port; next, hard a-starboard; then hard a-port, as the steamer was just on the point of striking the hawser, or afterwards,—I cannot make out with certainty whether before or after; and again hard a-starboard, after the hawser was parted, and at the moment of collision. The evident confusion and hurry of these orders, and the express testimony of the witness Ludden, show that they were given within a very short

interval. No reliance can be placed on his estimate of eight minutes. The change of heading on the first two orders he estimates at only half a point. The first order, hard a-starboard, was given when the signal of two whistles was exchanged; and the rapid succession of the orders shows that the steamer could have been then only a short distance from the tug, as the steamer's witnesses assert. Nothing but fog can rationally explain these hurried and confused orders. Her changes were more numerous and much nearer together than those of the *Harvest Queen*. *The Adriatic*, 107 U. S. 512, 518, 2 Sup. Ct. Rep. 355.

3. Unless there was such fog as to require the fog whistles to be sounded in the judgment of the master and pilot of the steamer, and unless they did sound their fog-signals, and reduce their speed first to "half speed," and next to "slow," their narrative is a sheer fabrication. There is not sufficient evidence to warrant finding their testimony a fabrication. Their evidence is in no way impeached, and they are sustained by several witnesses, wholly disinterested.

4. The steamer's time from her wharf to the place of collision, to which reference has been made by counsel, rather confirms than weakens her witnesses' statement as to her slowing on account of fog. Taking the libelants' estimated time of getting under way, after turning, at 3:15 p. m.,—the latest that the testimony will reasonably admit,—we find a little over  $9\frac{1}{2}$  nautical miles to the place of collision, run in an hour and ten minutes. It was low water that afternoon at Governor's island, according to the government tide-tables, at 2:32 p. m.; but the current runs ebb out of the East river 1 hour 16 minutes after low water, and out of the North river, and through the Narrows, for over  $2\frac{1}{2}$  hours after low water; so that the steamer had the benefit of the outward current all the way, at the average rate of about a knot an hour.<sup>1</sup> Practically, therefore, the distance from abreast of Bedloe's island (where the steamer was under full speed of at least 9 knots, at about 3:25 p. m.) was only about  $8\frac{1}{2}$  knots; and, had she not slowed at all, she would have been at 4:25 p. m. half a mile below the place of collision. She had probably been running "slow" about 5 minutes before collision, and at "half speed," viz.,  $6\frac{1}{2}$  to 7 knots, from below Craven's shoals, as the pilot at first stated,

<sup>1</sup>The well-known difference between the rise and fall of the tides and the flood and ebb currents in the harbor of New York, have been carefully observed and tabulated in the reports of the coast survey. Independent of the effects of freshets, or of high winds, it appears that (1) the mean interval of high water at Sandy Hook, after the moon souths, is 7 h. 35 min., varying from this about half an hour each way during each lunar period, i. e., about half an hour earlier, roughly speaking, towards the middle of the moon's first and third quarters, and a half hour later about the middle of the second and fourth quarters. At Governor's island the mean interval is 32 min. greater, or 8 h. 7 min. after the moon souths, with similar variations. (2) The slack before flood and ebb lasts about 20 min.; in the East river, 10 min.; in North river, 35 min. (3) Between Governor's and Bedloe's islands the current begins to run ebb 2 h. 35 min. after high water there; continues ebb 7 h. 07 min., i. e., till about 3 h. 10 min. after low water, when it becomes slack for 20 min.; and then runs flood for 4 h. 33 min., or 2 h. 15 min. after high water. In the main channel off the West bank the current changes only about a half hour earlier each way. (4) Between Governor's island and the Battery the current begins to run ebb 1 h. 46 min. after high water; continues ebb for 6 h., or till 1 h. 16 min. after low water; then after 10 min. slack it runs flood for 6 h. or until 1 h. 26 min. after high water. (5) At the Narrows the ebb current begins 1 h. 40 min. after high water at Governor's island; the flood, 2 h. 20 min. after low water at the same place. (6) During the last two hours of the ebb current in the North river and at the Narrows, there is a flood current of salt (heavier) water 15 ft. below the surface; and



for some 10 minutes preceding. The place of collision was probably very near buoy 11, the south-westerly current carrying the bark afterwards more southerly to the point where she grounded.

5. The discrepancies between the outside witnesses, as regards the density of the fog, may be accounted for in part by the difference in location, and the fact, which several mention, that the fog was variable, lifting up at one time and settling down at another; and in part by the different judgments that different persons would form as to the density of the fog, the distance at which they could see objects, and the degree of density that make fog-signals necessary, as well as the different habits of different masters in regard to sounding fog-signals. It is certainly significant, considering that the weather had been thick and hazy before, that the chief officer of the Wyanoke noted in his log that the weather was "foggy" at 4:20 P. M. If the Wyanoke did not reduce speed until she reached the Swash channel, she must have been, at 4:20, above buoy 11, and found it "foggy" there; and that would agree with the time when the Holberg changed to "slow," five minutes before collision. Some further explanation of the discrepancies between the witnesses of the bark and the Ludvig Holberg may be found in the fact, often testified to before me, that objects cannot be distinguished so easily, or so far, in looking towards the fog as in looking away from it. The bark's witnesses may therefore have been able to distinguish the steamer before the latter could distinguish the bark. A number of the bark's witnesses, moreover, estimate the distance at which they could see the steamer at a half a mile, or "inside of half a mile." This indicates the presence of very considerable fog. As regards signals, the mate of the tug and the pilot of the bark differ. There is no question that the steam-tug gave one or two single blasts of the whistle, and afterwards a signal of two blasts. The first blasts were understood by the steamer as fog-signals; and, on looking sharply, when the first whistles were heard, the tug could not be seen. Presently, and as soon as she could be seen, the tug was observed a little on the steamer's starboard bow, and signals of two blasts were immediately exchanged. I think it was then that the bark put her helm hard a-starboard, and that that was her first order. I

the same in first hour of the ebb in the North river. (7) Off the Battery the current runs ebb in the North river 1 h. 54 min. later than in the East river; and runs flood 38 min. later. (8) In Buttermilk channel the flood current commences 47 min. earlier than between the Battery and Governor's island, the ebb current 82 min. earlier. (9) The average time the currents run is as follows: In the main channel off Sandy Hook, flood, 4 h. 56 min.; ebb, 6 h. 44 min. Off the West bank, flood, 4 h. 25 min.; ebb, 7 h. 15 min. At the Narrows, flood, 4 h. 21 min.; ebb, 7 h. 19 min. Between Bedloe's and Governor's islands, flood, 4 h. 38 min.; ebb, 7 h. 27 min. Between the Battery and Governor's island, flood, 5 h. 51 min.; ebb, 5 h. 49 min. Buttermilk channel, flood, 6 h. 06 min.; ebb, 5 h. 34 min. (10) The ebb and flood currents reach their maximum velocities about the end of the current's second hour; the flood a little earlier than the ebb. The average maximum of the ebb current at the Narrows is about 1.5 knots; of the flood, 1.2 knots. At Thirty-Ninth street, North river, maximum ebb, 2.7 knots; flood, 2 knots. East river and Twenty-Third street, ebb, 2 knots; flood, 1.8 knots. Off the Battery, in both the North and East rivers, about 2 knots, both flood and ebb. In the first and last hours the currents are about half these rates. All the above are only proximate statements and mean averages, as near as ascertainable; there being minor differences at different times and places, and daily fluctuations, with other variations under extraordinary circumstances. See Coast Survey Reports for 1865, pp. 167-169; for 1883, bulletin No. 3; Tide-Tables of 1883, pp. 216, 217; Charts, Army Building, N. Y., High Water, as per government tide-tables. Others differ.

doubt whether any previous signal of two blasts was given. The mate of the tug states that only one signal of two blasts was given by the tug. Upon all this testimony, I think the claimant's account of the matter the most rational and probable; that the primary fault was in the tug for using so long a hawser, and for giving no fog-signals indicating the presence of a tow. These faults are the same as in the case of the *City of Alexandria*, 31 Fed. Rep. 427. Upon these facts I cannot find the Ludvig Holberg in fault. She was going dead slow. She properly went to the left, under a signal of two whistles, and a starboard wheel. Had the bark maintained her own starboard wheel as at first, the wheelsman of the latter says they would "decidedly have gone clear, starboard to starboard." Both vessels were comparatively small,—the bark but 170 feet long, the steamer, 200 feet. Both could change their direction, therefore, much quicker than larger vessels; and, unless the bark was much more out of line with the tug than her witnesses admit, the wheelsman's judgment must be correct. If she was so much out of line as the steamer's witnesses estimate, perhaps that is doubtful. The bark, however, by putting her helm hard a-port after starboarding, destroyed what chance there was of avoiding collision by going starboard to starboard; and in that situation, I have no doubt the steamer did right in porting, so as to go between the tug and bark; at the same time hailing them to cast off the hawser. This ought to have been done. *The Galileo*, 28 Fed. Rep. 469, 473, 474. It was not the steamer's fault that it was not done. Nor can I find that she did not reverse as soon as the presence and situation of the bark could be discerned. I am not called on to determine whether the bark was in fault in making these numerous changes of helm. Accepting, in the main, the steamer's testimony as to the fog, these changes would seem to be the result of the discovery of the steamer nearly upon her, and to have been made *in extremis*. The true immediate cause of the collision, in my judgment, was the failure to sound the proper fog-signals to indicate the presence of a tow, or to cast off the hawser. The libels must be dismissed, with costs.

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### THE LYKUS.<sup>1</sup>

### SALMON v. THE LYKUS.

(District Court, S. D. New York. November 27, 1888.)

#### 1. SHIPPING—BOTTOMRY—MASTER'S DRAFTS—CHARTER-PARTY—CONSTRUCTION—DIFFERENCE IN FREIGHT—ADVANCES ON CARGO.

The charter of a steamer provided that difference of freight should be settled at port of loading. At a port of loading the charterer induced the master to sign an obligation many times in excess of the freight, ostensibly for "last disbursements and difference of freight," but actually for advances on the cargo

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

made by charterer; in other words, the purchase price of the cargo, in whole or in part. The obligation pledged the vessel for its payment, and was payable only on condition of arrival at port of destination. On arrival, no consignee appearing to claim the cargo, it was sold by the collector. *Held*, on a libel by an alleged *bona fide* indorsee of the obligation, that the master had no right under the charter, or the maritime law, in settling difference of freight, to take into account such advances; that out of the money for which the cargo was sold the vessel was entitled to her full freight, and the libellant was entitled only to the residue.

2. SAME—NECESSITY FOR BOTTOMRY—LIEN.

Though a master's obligation be in the form of bottomry, if the ship is under no such necessity as would authorize bottomry, and the charter does not authorize it, no lien is thereby created on the vessel.

3. SAME—MASTER'S DRAFT—NEGOTIABILITY.

A master's bottomry obligation, payable to order on arrival at port of destination, is not such a negotiable instrument as to give the indorsee any better rights than those of the payee.

In Admiralty. Action on master's obligation, given in settlement of freight.

The above libellant brings suit to recover as indorsee of a bill for £1,140.13.2, (\$5,543.56,) drawn by the master of the steamer *Lykus*, at Catania, Sicily, in the following words:

“£1140.13.2

CATANIA, 15th January, 1888.

“On arrival at port of destination of the steamer called ‘The *Lykus*,’ of which I am the master, now lying at Catania, loaded with sulphur and fruit, and ready to sail for New York, I promise and bind myself to pay to the order of Pietro Tassi, Esq., one thousand one hundred and forty pounds and thirteen shillings and two pence sterling, in cash or approved banker's demand bills on London, value received, for necessary last disbursements and difference in freight of the above vessel at this port, for the payment of which I hereby pledge my vessel. This is my obligation, which settles definitely every accounts with the charterer, and I have signed this in settlement and fulfillment of the obligations contracted by my owners, Messrs. Parson & Linton, Sunderland, with the charter-party dated London, 10th December, 1887, and I give this bill on their name, account, and order, and acting as their empowered representative. Any other obligation or draft by me drawn to be secondary to this.

GEO. H. SMITH, Master of S. S. *Lykus*.”

The payee, Pietro Tassi, held a freight charter of the steamer, dated December 10, 1887, containing the following provisions:

“What cash the master may require for steamer's ordinary disbursements to be advanced [*i. e.*, on account of the stipulated *hire* of the ship] by the charterer's agents at ports of loading; \* \* \* the balance to be paid in cash on the true delivery of the cargo; \* \* \* the master to sign bills of lading, as tendered, without prejudice to this charter-party; difference of freight between bills of lading and chartered freight to be settled at last port of loading; if in captain's favor, by cash, less insurance; if in charterer's favor, by captain's bill, payable on steamer's arrival at port of discharge; and all claims on charterer to cease after such settlement.”

The cargo shipped by the charterer included, among other things, two shipments of fruit, for which bills of lading were tendered to the master, and signed by him,—the one for 1,889 boxes of oranges, at the “freight” of £887, British sterling; the other for 1,765 boxes of oranges and lemons at the “freight” of £870, British sterling. The “freight” named in these

bills of lading was not in fact the mere freight for the goods, but was many times in excess of the freight proper. The sums called "freight" in the bills of lading included, as was stated to the master by the agent of the charterer, advances made by the charterer upon the fruit; that is to say, the purchase price of the fruit at Catania, wholly or in part. The cargo arrived in New York in good condition, but the "freight" so called, was much in excess of the whole value of the fruit; and, no one appearing to claim it, it was taken possession of by the collector, and sold by him at auction, bringing fair prices, but netting less than half the price of the so-called "freight." The answer alleges that the master's draft was procured by fraud, and was made by the master without authority; that upon crediting the libelant with the freight collected upon the other parts of the cargo, and with the net amount realized from the fruit, there is a balance due the charterer of \$462.96, which was tendered and paid into court with the answer, on account of the draft of \$5,543.56.

*Wing, Shoudy & Putnam*, for libelant.

*Butler, Stillman & Hubbard*, (*Wilhelmus Mynderse*), for claimant.

BROWN, J. This suit being *in rem*, the libel cannot be sustained, unless a lien upon the ship is established. The case differs in some important respects from that of *The Woodland*, 104 U. S. 180, 7 Ben. 110, and 14 Blatchf. 499. In that case the drafts were drawn, "payable ten days after sight," and contained the words, "recoverable against the vessel, freight, and cargo." There was no express pledge of the vessel. The drafts were not bottomry drafts, but were designedly given in lieu of bottomry. 7 Ben. 113, 115. In the present case the bill expressly pledges the vessel for payment, and is made payable only on condition of arrival at the port of destination. Such drafts constitute, in form, valid bottomry. *Force v. Pride of the Ocean*, 3 Fed. Rep. 162; *Force v. Insurance Co.*, 35 Fed. Rep. 767. But the master had no authority in this case, under the general maritime law alone, to execute bottomry; for the vessel was under no such necessity as would authorize bottomry. The consideration of the draft was in part for "necessary last disbursements;" but these advances by the charterer were not made as a loan to the ship, but in part payment of the hire, pursuant to the stipulations of the charter. No bottomry could be lawfully executed for such advances; nor does the maritime law authorize bottomry in order to settle in advance differences of freight. The draft, on its face, moreover, purports to be given merely in fulfillment of the obligations of the charter-party. The master's authority, either to make this draft or to bind the ship for its payment, must therefore be sought in the charter-party alone.

Two questions are presented. *First*, as to the right of Tassi, the payee and charterer, to enforce the draft; *second*, the rights of the libelant, as an alleged *bona fide* indorsee.

1. The libelant is, in this case, in no better position than the payee. Though this bill, being drawn to order, is doubtless transferable by in-

dorsement, it has not those qualities of negotiable paper under the law-merchant, that give superior rights to a *bona fide* indorsee before maturity. This bill lacks the essential conditions of such paper, since the obligation to pay is conditioned on the arrival of the vessel at her destination, and is not payable absolutely in money, but may be paid in demand bills on London. *Coolidge v. Ruggles*, 15 Mass. 387; *Nunez v. Dautel*, 19 Wall. 560; 2 Daniel, Neg. Inst. 43. In the case of *The Woodland*, *supra*, the instrument was a bill of exchange proper, payable "10 days after sight." As the bill, moreover, on its face purports to be made under the charter alone, the indorsee had constructive notice of the contents of the charter, and of its limitations on the master's authority. Again, there is not a word in this charter that authorizes the master to pledge the ship, or to create any express lien on her, for the payment of the bill that he was thereby authorized to execute. If any lien, therefore, attaches to the ship for the payment of such a draft, it cannot stand upon the master's express contract alone, for the charter gave him no such authority; it can stand only upon the implication of the general maritime law, which might possibly attach a lien to the ship as an implied security to the charterer for the fulfillment of the ship's obligations under the charter-party. See *The Scotia*, 35 Fed. Rep. 909, 917; *Freeman v. Buckingham*, 18 How. 182, 189. It is unnecessary to inquire here whether such an implied lien would arise for the payment of obligations like the present, properly given, because no such lien could in any event be upheld beyond what the ship actually owed on a fair settlement under the charter; and the indorsee of the draft would therefore take no greater lien than Tassi, the payee. In this respect the decision of the supreme court in the case of *The Woodland*, *supra*, upon this precise point, is strictly applicable. If it be said that the master's representation on the face of the bill was that its amount was due "for advances and difference of freight, pursuant to the charter-party," and that the indorsee was misled by that statement, this would not aid the libellant in any claim of a lien upon the ship. The situation is no better for a *bona fide* indorsee than that of a *bona fide* holder of a bill of lading, signed by the master, stating the shipment of goods not in fact put on board. It is well settled that no obligation on the ship or her owners in such a case arises, since the master has no authority to bind either in that way. *Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7; *The Querini Stampalia*, 19 Fed. Rep. 123, 125; *Sears v. Wingate*, 3 Allen, 103. In every point of view, therefore, I must hold the rights of the indorsees of such drafts no better than those of the payee. The Italian authorities, cited by counsel, have reference, as I understand, solely to transactions within the scope of the master's authority. This was in clear excess of authority.

2. As respects Tassi, the case seems clear. The advances made by him upon the fruit were plainly not "freight." The master had no right to include such advances under the word "freight" in the bill of lading, nor to take them into account in settling "difference of freight" under the charter. If such advances might be included under the term

"freight" in the bill of lading, for the purposes of collection from the consignees on delivery, this did not give the charterer the slightest claim to have such advances included in the bill to be drawn in the settlement of differences. The charter expressly provides that the bills of lading, signed as presented, should be "without prejudice to the charter." It is unnecessary to consider here whether any such settlement under clauses of this character should be deemed other than provisional, as treated by the parties in the cases of *Eisenhauer v. De Belauanzaran*, 26 Fed. Rep. 784, 790; *Naval Reserve*, 5 Fed. Rep. 209; for no fraudulent settlement can be upheld; and this whole transaction was plainly fraudulent as against the ship and her owners. Under the guise of a settlement of differences of freight, pursuant to the charter, the master was induced by Tassi to include under the name of "freight" alleged advances on the goods, exceeding their value; and the ship and owners, instead of being mere carriers, were thus sought to be turned into purchasers of the cargo. On arrival, no consignees appeared to claim the goods under the bills of lading. The unavoidable inference is that Tassi did not expect that anybody would appear. No such "settlement" can stand. The goods having been entered and sold by the collector in default of anyone appearing to claim them, the vessel is entitled to be paid out of the net proceeds her full freight, according to the usual market rate. The libellant, as indorsee of the draft, is entitled only to the residue, and as this amount, \$462.96, has been tendered and paid into court without objection, judgment may be entered for that sum less the defendant's costs.

### THE BRUCKLAY CASTLE.

#### LUTTKE v. THE BRUCKLAY CASTLE.

(District Court, S. D. California. November 5, 1888.)

##### 1. ADMIRALTY—OBJECTION TO JURISDICTION—WAIVER.

On a libel for wages, after the claimant has pleaded to the merits, and testimony has been taken on the issues made by the pleadings, it is too late to object to the jurisdiction of the court, on the ground that the wages were earned by a foreign seaman on board a foreign vessel.

##### 2. SEAMEN—THE CONTRACT—EVIDENCE.

Where the allegations of the libel and the testimony of libellant as to the length of the voyage are contradictory, and libellant's explanations of his reasons for not leaving the vessel at the end of his alleged voyage also contradictory, the court is not justified in disregarding the written articles.

In Admiralty. Libel by August Luttke against the British bark Brucklay Castle for wages as seaman.

*W. J. Hunsaker*, for libellant.

*Anderson & Story*, for claimant.

Ross, J. The libellant, an ordinary seaman, signed articles for a voyage from "Penarth (Cardiff) to Montevideo, <sup>and</sup> or any ports or places within

the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be three years, trading in any rotation, and to end in the United Kingdom or on the continent of Europe, between the Elbe and Brest, at master's option, calling for orders if required." On the part of the claimant it is objected that, the suit being for wages earned by a foreign seaman on board a foreign vessel, the court should decline to take jurisdiction, and remit the libelant to the tribunals of his own country. But this objection was not raised until after claimant had pleaded to the merits, and until after testimony had been taken on the issues made by the pleadings. Under such circumstances the objection will not be regarded. Apart from this objection, the only defense set up is that the libelant deserted the vessel at the port of San Diego, without cause, and in violation of the shipping articles. The case has been submitted upon these articles and the testimony of the libelant. The libel, which is sworn to by the libelant, charges that libelant shipped on or about December 21, 1887, at the port of Montevideo, South America, for a voyage to the port of New Castle, New Zealand, and thence to San Diego, in the state of California, United States of America, at the agreed wages of three pounds per month, or its equivalent in lawful money of the United States, and that for the due performance of said voyage libelant signed the articles already referred to; that the bark arrived at the port of San Diego on the 27th of July, 1888, and was there safely moored; and that, the term of libelant having expired, the master discharged him from the service of the said vessel without payment, after demand made, of the wages due him for the voyage.

In his testimony libelant states that he shipped for a voyage from Montevideo to New Castle only, and that the understanding between himself and the captain was that the voyage was to end at that port; that he signed the articles, but that they were not read or explained to him; and that the consul at Montevideo simply asked him his age, and where he was born, and told him to sign, which he did. Although the shipping articles are by no means conclusive as to the contract between the parties, it will not do to disregard them upon such testimony as that of the libelant in this case. When he verified the libel he swore that he shipped from Montevideo to New Castle, and thence to San Diego. In his testimony he swears that the contract was that the voyage should end at New Castle. In his direct examination he states that the reason he did not leave the vessel at New Castle, he was sick; and added: "The captain called me aft when we were two days out at sea, and said he made a mistake in taking me out of the harbor." On cross-examination, when asked why he did not go ashore at New Castle, he answered: "The captain would [not] discharge me. He said I signed three years' shipping articles." Such contradictory statements as these show that but little reliance can be placed upon the testimony of the libelant in his own favor. And that it was not his understanding that the voyage was to end at New Castle is very clearly shown by the fact, admitted by him, that, after reaching the port of San Diego, he sought to be discharged upon the ground that the condition of his health was such as not to permit him to

continue further on the voyage. The testimony is clearly insufficient to justify the court in disregarding the written articles. That libellant deserted the bark at San Diego without any valid excuse, and was not discharged as sworn in the libel, abundantly appears from his own testimony. There should be a decree dismissing the libel at libellant's cost; and it is so ordered.

## NESBIT *et al.* *v.* THE AMBOY AND THE TRANSFER No. 2.<sup>1</sup>

(*District Court. S. D. New York. November 27, 1888.*)

### 1. LIMITATION OF ACTIONS—COMMON-LAW PERIOD—ADMIRALTY—DISCRETION OF COURT.

The period of limitation fixed by statute in common-law actions should not be extended by discretion in admiralty cases, except for some cause of practical inability to sue, or for some peculiarity of a maritime nature that demands recognition in a court of admiralty, and makes it plainly a matter of justice that this discretion should be applied.

### 2. SAME—VOLUNTARY DELAY—SIX AND A HALF YEARS.

Libellant, owner of cargo on a vessel lost by collision, did not bring suit for six and a half years after his loss, waiting, by advice of counsel, until the litigation as to the fault of the vessels had been decided in a suit by the owner of the lost vessel; but nothing prevented him or his assigns from suing at any time during that period. *Held*, that the claim was barred.

In Admiralty. Action for damages through loss of cargo in collision.  
*Hyland & Zabriskie*, for libellants.  
*Biddle & Ward*, for the Amboy.  
*Page & Taft*, for the Transfer No. 2.

BROWN, J. The above libellants were the owners of a cargo of brick on board the canal-boat *Idle Hope*, which was sunk on the 23d November, 1881, while in tow of the *Amboy*, by a collision with the *Transfer No. 2*, in going up the East river, to the westward of Blackwell's island. Upon a previous action against the defendant vessels, brought by the owner of the *Idle Hope*, both tugs were found in fault, and a decree entered against both in December, 1884, which, upon appeal, was affirmed in the circuit on July 14, 1886. *The Amboy*, 22 Fed. Rep. 555. The libel in the present case was filed July 6, 1888. The claimants plead the statute of limitations; and, under the recent decision in the case of *Southard v. Brady*, *ante*, 560, I feel bound to sustain the plea. There has been no time since the collision during six and a half years when an action could not have been brought by the libellants or their representatives or assigns to recover their damages. It appears, however, that the claim was early placed in the hands of competent counsel, who advised waiting until the previous case was decided, in the expectation that, if the tugs were held liable, payment would be made without further legal

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.



expenses. The previous case was fully tried on the merits; the testimony printed in full in the apostles on appeal; and, both tugs being held liable, the libelants in the present case offer the former record as an adjudication determining the liability of both tugs, and available in the present suit. By the reception of this record the respondents would obtain all the benefit of the former hearing, and of all the witnesses, some of whom have since either died or disappeared. There is no question, therefore, in this case, about the loss of evidence, which is doubtless one of the grounds of the statute of limitations; and the wish to avoid unnecessary litigation was so far meritorious. As the statute is not strictly applicable to suits in admiralty, there is no doubt of the discretionary right of the court to give relief in a proper case after the expiration of the statutory period of limitation upon common-law suits of a similar nature. But the general course of the admiralty is to shorten, not to lengthen, the statutory period as respects the enforcement of secret liens. This is done in the interest of subsequent purchasers, mortgagees, or lienors who are prejudiced by prior secret incumbrances. The general rule, therefore, is that, as respects such subsequent *bona fide* incumbrancers, liens must be prosecuted with reasonable promptness, or they will be lost. But when no subsequent *bona fide* liens have arisen, there is no good reason why a suitor should not be permitted to proceed *in rem* in courts of admiralty, so long as he may sue *in personam*, or maintain a suit at law for the same debt. *The Lillie Mills*, 1 Spr. 307; *The Bristol*, 11 Fed. Rep. 162; *Martino Cilento*, 22 Fed. Rep. 859. But the policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libelant no case is cited where any suit has been sustained after the lapse of the statutory period. In *Willard v. Dorr*, 3 Mason, 91, though the services were rendered 12 years previous, the cause of action did not accrue, in consequence of the capture of the ship, until within the statutory period. In my judgment, the court is not warranted in extending the statutory period in the exercise of its discretionary power in admiralty suits, except for some cause of practical disability to sue, or for some peculiarities of a maritime nature that demand recognition in a maritime court, and make it plainly a matter of justice that this discretion should be applied. In the present case nothing of this kind exists. The defendants did not in any degree induce the delay, or encourage the expectation of settlement. The libelant's delay was wholly voluntary; and, much as the loss of an apparently just demand may be regretted, I feel constrained to hold the claim barred. Judgment for defendants, without costs.

SMITH v. HAVEMEYER *et al.*

(Circuit Court, S. D. New York. December 1, 1888.)

## WHARVES—LIABILITY OF OCCUPANT—DAMAGE TO VESSEL—REASONABLE CARE.

The occupants of a pier, the foundation of which extends outward like stairs, and which has a spike projecting below the water, may, by the exercise of reasonable care, discover the danger, and are liable for injury caused thereby, though the pier has been used for many years with safety.

In Admiralty. On appeal from district court. 32 Fed. Rep. 844.

Libel by Smith against Havemeyer and others for damages occasioned by an unsafe pier. Decree for libellant, and respondents appeal.

*John E. Parsons*, for appellants.

*Goodrich, Deedy & Goodrich*, for appellee.

WALLACE, J. This is an appeal from a decree of the district court in favor of the libellant in a cause *in personam* for damages suffered by the barkentine *Formosa* while lying at a pier in Brooklyn, of which the appellants were the occupants, and to which the vessel had proceeded at their invitation to discharge her cargo and deliver it to them. The *Formosa* was moored to the pier at flood tide, with her starboard side next the pier. After the tide began to fall she listed to port, away from the pier; and the starboard chocks, through which her two mooring hawsers passed, were torn out by the strain upon them, and the hawsers themselves were broken. With the next flood tide the vessel righted. An examination by a diver the next day disclosed that the stone foundation of the pier below the water extended outward, so that "he could go up the pier like a pair of stairs," and that at a point some eight feet below the surface of the water at low tide there was a spike projecting two or three inches from one of the spiles of which the crib-work of the pier was built. Besides the injury to the vessel by the breaking of her chocks and hawsers, some of her copper was torn off on her starboard side by the spike while she was falling with the tide. It is in evidence that vessels like the *Formosa* had used the pier for the past 10 years without receiving any injuries. The appellants were not aware of the peculiar shape of the foundation of the pier, or of the existence of the spike. There is no evidence to indicate that the vessel was not moored to the pier in the customary way, and none from which it can be properly inferred that there was any negligence on the part of those in charge of her which contributed to the accident. The excessive strain upon her hawsers was caused by her list to port as the tide went down, owing to her contact with the projecting foundation of the pier below the water. Upon the case made by the libellant it was for the appellants, if they relied upon the defense of contributory negligence of the libellant, to establish it affirmatively. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291. It was not necessary for the libellant to show that the appellants were aware of the vices and defects in the structure which

occasioned the injury to the vessel. It suffices to charge the appellants with negligence that they could have discovered them if they had exercised proper care to inform themselves of the condition of the structure. The occupant who is in control of a pier or wharf is not an insurer of the safety of the structure towards those whom he invites to use it, but he owes them the duty to exercise reasonable care that its condition shall be such that they will not be exposed to unnecessary and unusual hazard of property or person in consequence of imperfections which they are not required to anticipate; and if there is such a vice or defect which is known to him, or which, by the use of ordinary care and diligence, should be known to him, his obligation is not fulfilled. The breach of this obligation is negligence, which makes him responsible to the injured party.

The precise question has been considered in some of the adjudged cases. In *Docks v. Gibbs*, 11 H. L. Cas. 512, the action was for negligence against the corporation having the management of the Liverpool docks, to recover damages to a vessel and cargo, sustained because the vessel while endeavoring to enter into the dock struck upon and became imbedded in a bank of mud at the entrance. Upon the trial in the court of exchequer the jury were instructed that it was not necessary for the plaintiff to prove knowledge on the part of the defendant of the unfit state of the docks, but that proof that the defendants by their servants had the means of knowledge, and were negligently ignorant of it, was sufficient. This instruction was approved in the house of lords. In *Wendell v. Baxter*, 12 Gray, 494, the court approved an instruction to the jury that the owners of a wharf were bound to keep it safe for the uses for which it was employed, and that the plaintiff was entitled to recover for injuries sustained through a defect, "unless the defect was latent, and so hidden and concealed that it could not be discovered by such examination and inspection as the condition, use, and exposures of the wharf reasonably required." In *Nickerson v. Tirrell*, 127 Mass. 236, the court, in defining the obligations of a dock-owner towards those invited to use the dock, said:

"If there is a defect which is known to him, or which, by the use of ordinary care and diligence, should be known to him, he is guilty of negligence, and liable to the person who, using due care, is injured thereby."

The evidence that vessels had used the pier for many years with safety, was valuable as tending to show that there was no defect or unfitness in its construction likely to occasion injury to vessels using it, but became quite unimportant when it appeared beyond doubt that there were defects capable of producing mischief which could have been readily discovered by proper examination of the structure. The decree of the district court is affirmed, with costs of this appeal.